



HA (Iraq) and Deportation Appeals: Reasons to be Cheerful

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KO (Nigeria) v SSHD [2018] UKSC 53: Deportation and Best Interests

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Statutory public interests considerations

Section 117C

1. The deportation of foreign criminals is in the public interest.
2. The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
3. In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.



Section 117C(5) Exception 2

Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.



KO (Nigeria):Section 117B(6)

s117B(6):

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.



Immigration Act 2014: section 71

“For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children)”



‘Unduly Harsh’: Lord Carnwath: [23]

“unduly harsh” seems clearly intended to introduce a higher hurdle than that of “reasonableness” [of removal] under section 117B(6), **taking account of the public interest in the deportation of foreign criminals.**

“unduly” implies an **element of comparison.**

assumes that there is a “due” level of “harshness”, **that is a level which may be acceptable or justifiable in the relevant context**

“Unduly” implies something going beyond that level.

One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.



KO (Nigeria): the Court's reasoning

- The provisions of section 117 are intended to be consistent with the general principles relating to the “best interests” of children,
- including the principle that “a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent” (per *Zoumbas*)



KO (Nigeria): best interests

- Children are human but are quite different human beings from adults.
- They have developmental needs which someone must meet if they are to grow up into healthy functioning adults, fit to play a proper role in society.
- Children must be recognised as rights holders and not just as adjuncts to other people’s rights: and “their best interests must be treated as a primary consideration, and considered separately from those of the adults involved and from the public interest” [§46]. Baroness Hale in *Makhlouf v SSHD (NI)* [2016] UKSC 59



HH v Deputy Prosecutor of the Italian Republic, Genoa (§33):

- *Children need a family life in a way that adults do not. They have to be fed, clothed, washed, supervised, taught and above all loved if they are to grow up to be the properly functioning members of society which we all need them to be...their emotional needs can only be fully met within a functioning family.*
- *Depriving a child of her family life is altogether more serious than depriving an adult of his. ...Although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up”*



Best Interests principles

- Section 55 of BCIA Act 2009 reflects the UK’s treaty obligations under the UNCRC:
- the SSHD is required to make arrangements to ensure that his immigration functions are discharged “having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom”
- Section 55 and *Every Child Matters* require the duty of provision to be discharged in a manner that take into account the need and (unless there is a good reason why not) satisfies the need to assess and promote the best interests of children, to treat them as being of equal value and to ensure they have an equal opportunity of realising their full potential:
- For this purpose, immigration functions include “*any function of the Secretary of State in relation to immigration, asylum or nationality*” (section 55(2)(a))



Interpretative principles: UNCRC: Article 3.1

Article 3(1) of the UNCRC:

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



UNCRC: Article 3.1

General Comment No 14”:

“best interests” in this context is a “three-fold concept”:

- (a) a substantive right,
- (b) a fundamental, interpretative legal principle, and
- (c) a rule of procedure.



UNCRC: Article 8 ECHR

Where Convention Rights under the Human Rights Act 1998 are engaged, it is well established that they have to be interpreted and applied consistently with international human right standards, including the UNCRC



Article 12: UNCRC

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."



ZH(Tanzania) [33]

- In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her.”



Where next?

- ZH (Tanzania) and Makhlouf are still good law
- Supreme Court in a 7 or 9 judge Court... ?
- HA (Iraq) successful appeal from the Upper Tribunal
- SSHD is seeking permission to appeal



HA (Iraq), AA (Nigeria)
and KB (Jamaica):
Themes and take-away points

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8 February 2021



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A new line of authority

- ***HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020)**
- **Two subsequent cases applying *HA (Iraq)*:**
 - *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 (9 October 2020)
 - *KB (Jamaica) v SSHD* [2020] EWCA Civ 1385 (28 October 2020)

HA (Iraq) v SSHD

- Considers in detail SC’s approach to “unduly harsh” test in *KO (Nigeria) v SSHD* [2018] UKSC 53
- Restores a flexible, child-centred approach to the test
- Remedies courts’ preoccupation with the “height” of the “unduly harsh” threshold which precluded “ordinary” levels of hardship from meeting the threshold



HA (Iraq): facts and procedural context

- Previously *RA* (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 00123 (IAC)
- Iraqi citizens with British children, sentences of 16 months (*HA*, for immigration offences) and 12 months (*RA*, ID document offence)
- Both won in FTT, SSHD appealed successfully and UT dismissed appeals
- Underhill LJ, Popplewell LJ and Peter Jackson LJ
- Underhill LJ granted permission so CoA could consider UT’s guidance



HA (Iraq): Lord Carnwath on “unduly harsh”

- Lord Carnwath in *KO (Nigeria)* at §23
- “... Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. **One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.** What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence....”
- Underhill LJ at §42: **what is exactly is Lord Carnwath saying, and what is he not saying?**



HA (Iraq): no “ordinary” test

- Carnwath’s words in bold above should NOT be taken literally. Underhill LJ at §44:
- *“it is hard to see how one would define the level of harshness that would “necessarily” be suffered by “any” child (indeed one can imagine unusual cases where the deportation of a parent would not be “harsh” for the child at all, even where there was a genuine and subsisting relationship). **The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category.**”*



HA (Iraq): no “ordinary” test

- Also Underhill LJ at §56:
- *First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. **There is no reason in principle why cases of "undue" harshness may not occur quite commonly.** Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. **How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness" ..."***



HA (Iraq): no “ordinary” test

- Underhill LJ at §56 contd.
- *“Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.”*



HA (Iraq): no “ordinary” test

- In other words, Carnwath IS saying:
- there is an underlying concept of an enhanced degree of harshness (which must be sufficient to outweigh the public interest in deportation)
- but he is NOT saying that this necessarily happens rarely, or that there is a baseline of “common” or “ordinary” effects of deportation which is not enough to meet the threshold



MK (Sierra Leone)

- Unduly harsh threshold comes from *MK (Sierra Leone) v SSHD* [2015] UKUT 223 (IAC) at §46
 - “...“unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. **“Harsh” in this context denotes something severe, or bleak. It is the antitheses of pleasant or comfortable.** Furthermore, the addition of the verb “unduly” raises an already elevated standard still higher.”
- Test found to be met in the “go” scenario in *MK (Sierra Leone)* - “struggling, impoverished and plague-stricken African state” - see Underhill LJ at §46



MK (Sierra Leone)

- **BUT** the test was also found to be met in the “stay scenario” – a fact that went unnoticed in *KO*...
- Perhaps, in combination with the fixation with “ordinary” or “necessary” effects of deportation (i.e. separation between parents and children), this proved to be a distraction for the courts, post-*KO* but pre-*HA*?
- Had the courts been too reluctant to consider whether “commonplace” separation was capable of meeting the “unduly harsh” threshold?



Peter Jackson LJ in *HA (Iraq)*

- If you're going to read anything, read this! *HA (Iraq)* at §§151-163
- Summarises s55 principles
- Peter Jackson LJ at §156:
- *“There are two broad ways in which it seems to me that a decision-maker may inadvertently be deflected from giving primary consideration to the best interests of the child of a foreign criminal. One is by focusing on the position of children generally rather than on the best interests of the individual child. **The other is by treating physical harm as intrinsically more significant than emotional harm.**”*



Peter Jackson LJ in HA (Iraq)

Peter Jackson LJ at §159:

- *“...Reflecting our contemporary understanding of the importance of emotional development and mental health, there is no hierarchy as between physical and non-physical harm. It must therefore always be recognised that for the child the consequences of going with both parents may be experienced as far less harsh than staying with one parent. **Despite this, it may be easier for decision-makers to envisage the harm that may be done by expecting a family to experience precarious or even dangerous physical conditions than to factor in at full worth the lifelong emotional harm of terminating the relationship between a child and a close parent during the child's minority and possibly forever....”***



Peter Jackson LJ in *HA (Iraq)*

Peter Jackson LJ at §159:

- *“... Both situations are grim but for the child neither is intrinsically grimmer than the other. Provided the decision-maker faces up to the reality of the child's situation and gives it primary consideration, the public interest in deportation may prevail, but **it will not do to minimise the emotional impact on the child of the severing of ties by reference to the doubtful prospect of maintaining relationships over many years by indirect means only, or by reciting the fact that this is what deportation does**”*



AA (Nigeria) v SSHD; KB (Jamaica) v SSHD

- Court applied *HA (Iraq)* and allowed the appeals
- Both appeals won in FTT pre-KO, UT found an error of law, re-made and dismissed
- Both Popplewell LJ, leading judgment
- AA: 4 1/2 years for conspiracy to supply cocaine and heroine, 2 British children, FTT found unduly harsh/very compelling circumstances applying *NA (Pakistan) v SSHD* [2017] 1 WLR 207
- KB: ABH (domestic violence), act intended to pervert the course of justice (12 months and 6 months to run concurrently), 4 British children, FTT found unduly harsh test met on pre-KO



AA (Nigeria) and *KB (Jamaica)*: takeaway points

- **Court critical of over-enthusiastic use of UT's error-of-law jurisdiction**, restored FTT decision and appellant's won outright
- Popplewell LJ quotes *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 per Floyd LJ at §19 (see e.g. *KB* at §16):



AA (Nigeria) and KB (Jamaica): takeaway points

- ***“...although “error of law” is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:***

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."



AA (Nigeria) and KB (Jamaica): takeaway points

- Court recognised in *KB (Jamaica)* that **rehabilitation, and other characteristics of the parent, can be relevant, directly or indirectly, to the unduly harsh test**
- Popplewell LJ at §33:
- *“the loss of loss of benefit to the children from KB acting as a role model was one of the factors relied on by the Judge in the earlier section of the decision, and is a legitimate consideration which may contribute to the deportation having unduly harsh consequences for the children”*



AA (Nigeria) and *KB (Jamaica)*: takeaway points

- Court rejected SSHD's submission that KB's role in caring for children's grandmother, and his efforts to establish a business, were necessarily irrelevant to the unduly harsh test
- both factors had knock-on positive effects on KB's children (Popplewell LJ at §§31, 33)



HA (Iraq) and Deportation Appeals: Reasons to be Cheerful Deport appeals in the FtT

Zehrah Hasan, Garden Court Chambers

8 February 2021



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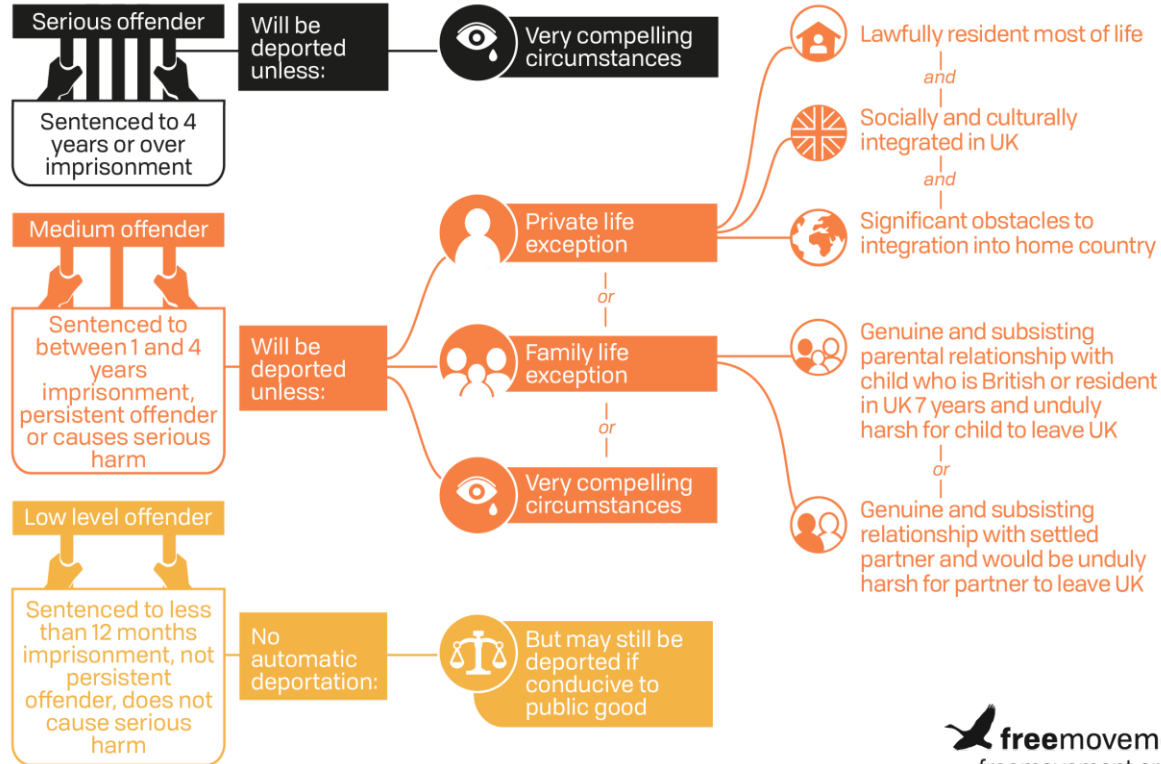
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“People are making decisions about my dad. When they grew up, they probably had a dad. The decisions they make mean I won’t have a dad with me.

Please let my dad stay with me.”



Deportation rules in non EU cases



1. Application of *HA (Iraq)* principles in FtT deport appeals:

I. Approach to relevant authorities;

II. Approach to ‘unduly harsh’ test given child-focused approach.

2. Best use of evidence relating to children



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1. Application of *HA (Iraq)* principles in FtT deport appeals:
 - I. Approach to relevant authorities



Application of *HA (Iraq)* principles: (1) approach to relevant authorities

- Importance of succeeding in FtT given that on occasion, UT can be too quick to find errors of law
- *KB (Jamaica)* – the UT should be reluctant to find an error of law “*simply because it does not agree with [the decision], or because it thinks it could make a better one*” (*UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA)
- Remember whilst this principle was expressed in favour of *KB*, the principle cuts both ways – which is why it is so important to put forward the strongest case possible in the FtT appeal



Application of *HA (Iraq)* principles: (1) approach to relevant authorities

Advance the approach expressed at §42 in *AA (Nigeria)*:

- Tribunal judges should not seek to express their decisions by categorisations of degrees of harshness, which is to complicate what is a single and straightforward statutory test
- Judges should identify the factors which are relied on as making the consequences of deportation unduly harsh and evaluate whether cumulatively they do so
- Following *HA (Iraq)*: almost all cases are different, involving a multitude of individual factors, and it is impossible to measure objectively a norm or baseline as the comparator against which the individual case is to be judged



Application of *HA (Iraq)* principles: (1) approach to relevant authorities

In advancing legal arguments, consider §9 *AA (Nigeria)*:

THERE IS NO NEED TO REFER EXTENSIVELY TO AUTHORITY FOR THE MEANING OR APPLICATION OF THE TWO STATUTORY TESTS

- Four authorities considered salient and sufficient in *AA (Nigeria)*:
 - ‘*Unduly harsh*’ = *KO (Nigeria)* and *HA (Iraq)*
 - ‘*Very compelling circumstances*’ = *R (oao Byndloss)* and *NA (Pakistan)*
- You may also want to cite *AA (Nigeria)* and *KB (Jamaica)* in respect of the application/restatements of *HA (Iraq)* if helpful or appropriate



Application of *HA (Iraq)* principles: (1) approach to relevant authorities

§9 *AA (Nigeria)* explains the rationale for this:

*“It will usually be unhelpful to refer first instance judges to other examples of their application to the particular facts of other cases and seek to draw factual comparisons by way of similarities or differences. Decisions in this area will involve an examination of the many circumstances making up private or family life, which are **infinitely variable**, and will require a close focus on the particular individual private and family lives in question, judged cumulatively on their own terms.”*

Therefore, it strengthens the argument to rely on the relevant principles and focus on their application to the factual circumstances of your particular case

Keep your analysis of the law focused and head off any attempts by HO to detract from overarching principles



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1. Application of *HA (Iraq)* principles in FtT deport appeals:
 - II. Approach to ‘unduly harsh’ test given child-focused approach.



Application of *HA (Iraq)* principles: (2) child-focused approach

- Trite law that the best interests of the child(ren) are a primary consideration
- Usually appropriate, therefore, to argue these points / plead them at the outset of your submissions
- The authorities have reinforced a properly child-focused approach – so this should be placed front and centre of the Tribunal’s mind
- Further, remember the focus should only be on the child(ren) – no requirement to ‘balance’ parental misconduct
- Further *HA (Iraq)* §156 Peter Jackson LJ: focus should be on best interests of individual child, rather than position of the children generally
- There should be a flexible child-centred approach to the ‘unduly harsh’ test



Application of *HA (Iraq)* principles: (2) child-focused approach

Remember UNCRC Article 3.1 – General Comment No.14 – “best interests” is a three-fold concept:

1. A substantive right
2. A fundamental, interpretative legal principle
3. A rule of procedure

In considering the ‘child-focused’ approach cemented by *HA (Iraq)* in the assessment of ‘undue harshness’, can follow this three-fold concept to guide legal argument and/or analysis



Application of *HA (Iraq)* principles: (2) child-focused approach

(1) A SUBSTANTIVE RIGHT

- Analyse the best interests of the child in light of what is said about ‘undue harshness’ in the *HA (Iraq)*
- §56 Underhill LJ: no reason why cases of ‘undue harshness’ may not occur quite commonly
- §56 Underhill LJ: not possible to identify a baseline of “ordinariness”
- So think carefully about how deportation would be adverse to the child’s best interests, in a way that centres the child’s individual needs and circumstances



Application of *HA (Iraq)* principles: (2) child-focused approach

(2) FUNDAMENTAL AND INTERPRETATIVE LEGAL PRINCIPLE

- In terms of best interests s.55 duty – *HA (Iraq)* Peter Jackson LJ §151-163 - interpretation should not create any hierarchy between emotional and physical harm
- Consider each of the ways in which deportation would be unduly harsh on the child – emotionally, physically, psychologically, socially, developmentally, educationally, culturally etc
- Tribunal should consider these factors holistically. None are inherently more important than another



Application of *HA (Iraq)* principles: (2) child-focused approach

(3) RULE OF PROCEDURE

- In line with s.55 duty and HO's own 'Every Child Matters' policy, the SSHD is required to ensure their immigration functions are procedurally discharged accordingly
- However, best interests of the child are often considered in a cursory way - not analysed meaningfully at all
- Think about any failures to materially consider child's best interests in HO decision making



2. Best use of evidence relating to children



Best use of evidence relating to children

- Remember there are '*infinitely variable*' ranges of circumstances, including: age, living situation, degree of the child's emotional dependence on the parent, financial consequences, individual characteristics of the child etc (§56 *HA (Iraq)* Underhill LJ)
- Think creatively and empathetically about the issues, the impact deportation would have on the child, and supporting evidence
- Be critical and mindful about assumptions or platitudes relied upon by HO – e.g. undermining the role of fathers where the mother would remain in the UK with the child(ren), and where mother has been caring for the child(ren) during father's time in prison



Best use of evidence relating to children

Evidencing the relationship between the child and the parent:

- Existence of relationship (birth certificate, attendance at school parents' evenings or drop off/pick up, GP records, listed as next of kin etc)
- Nature of relationship (photos, social media evidence, evidence from the child themselves etc)
- Extent of relationship (family court orders (SEEK PERMISSION), records of visits to prison, evidence of living situation etc)



Best use of evidence relating to children

Evidencing the impact of deportation on the child (parent's role *and* child's situation):

- EDUCATION (nursery, school, college, tutors etc)
- SOCIAL (social worker report, other services engaged with child, youth support etc)
- EMOTIONAL (their own testimony, social worker, GP etc)
- PHYSICAL (GP, medical records, specialist treatment/professionals etc)
- PSYCHOLOGICAL (expert psychiatric/psychological report etc)
- DEVELOPMENTAL (school report (behaviour), social worker, other services etc)
- CULTURAL (religious institution, community group/centre, etc)

Remember to address key factors in detailed witness statements too, from client and family members – focus on impact on the child

Expert evidence usually essential – Independent Social Worker's Report

Where the child has particular vulnerabilities, ensure this is evidenced clearly and comprehensively – e.g. Psychological/Psychiatric Report



Best use of evidence relating to children

Child-focused approach and Article 12(1) UNCRC:

A child who is capable of forming their own views should be afforded the right to express those views freely in all matters affecting the child

The views of the child should be given due weight in accordance with their age and maturity

- Letters from child, if appropriate or possible
- Anything else demonstrating child's own views, whether visual, in school work etc.



Best use of evidence relating to children

Country expert evidence – where considered child could go with parent(s):

- Will the child's rights be protected in that country?
- Will the parent(s) be able to find employment?
- Will the child suffer discrimination / other forms of harm?
- If the child has health needs – will there be adequate medical provision?
- Other vulnerabilities



Bad



Good



How to represent children in Article 8 ECHR appeals

Sonali Naik QC, Garden Court Chambers

8 February 2021



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How to represent children in Article 8 ECHR appeals

- Children have rights and must be recognised as rights holders
- They are section 7 Human Rights Act 1998 ‘victims’
- They need a meaningful remedy
- Their rights must be assessed discretely from their parents
- Do they require separate representation?
- Hear from the children
- Learning from the Family Court
- Revisit *Beoku-Betts* ?



Thank you

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