

Disrupting the Rules: child rights in the UK Supreme Court by Ben Amunwa

1. This paper gives a short overview of the international and domestic legal framework governing child rights in the immigration context and discusses two recent UK Supreme Court cases on the UK's obligations to children in immigration matters and considers potential future developments in child rights litigation.
2. Two questions animate the discussion:
 - a. Does UK immigration law provide effective protection for children's rights and interests?
 - b. Does "*Every child matter*", as the Labour government's green paper of 2003 suggested?

The legal framework

International law

3. The UN Convention on the Rights of the Child 1989 ('UN CRC') reads as follows:

Article 3

*1. 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.***

...

Article 12.

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.

(bold added)

4. Accompanying the UN CRC and its three optional protocols (On the involvement of children in armed conflict (OPAC), On the sale of children,

child prostitution and child pornography (OPSC) and On a communications procedure to the UN), plus 20 General Comments produced by a panel of monitors.

Regional law

5. The European Convention on Human Rights 1950 enshrines the protected right to family and private life in Article 8. Where that right is engaged, any interference must be lawful and justified by reference to the proportionality principle implied in Article 8(2) of the Convention.
6. The Charter of Fundamental Rights of the European Union ('the Charter') provides at Article 24 that:

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

7. This provision in the Charter may be most relevant in cases that concern the application of EU law, such as:
 - a. In the context of freedom of movement in the EU, the rights contained, retained or derived from the Treaty of the Functioning of the European Union ('TFEU') and/or the Directive 2004/38/EC ('the Citizens Directive');
 - b. In the context of asylum seekers, Council Directive 2003/9/EC of 27 January 2003 ('the Reception Conditions Directive') – see for example the obligation on member states to take into account the position of vulnerable individuals, including minors (Article 17) and Directive 2004/83/EC of 29 April 2004 ('the Qualification Directive'), at Recitals 12, 20 and Articles 9(2)(f), 20, 23 and 30.

Domestic law

8. When the UK first ratified the UN CRC in 1991, it entered a reservation regarding its immigration functions. By 2008, the UK had dropped its

reservation, leading to the passage of section 55 of the Borders, Citizenship and Immigration Act 2009 ('BCIA 2009'), which states:

55 Duty regarding the welfare of children

*(1) The Secretary of State must make arrangements for ensuring that—
(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom...*

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

...

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

9. Under section 10 of the Children Act 2004 local government bodies owe a similar duty to children, cast in substantially the same terms as section 55 of the 2009 Act.

UK Supreme Court cases

Hesham Ali

10. This appeal concerned the correct approach to the proportionality test where a "foreign criminal" sought to resist a deportation order on the basis of their right to family and/or private life under Article 8 of the 1950 Convention.
11. Much of this judgment may seem rather abstracted from children's rights, however, in Lord Kerr's dissenting judgment the seeds were sown for later reasoning.
12. The Court was concerned with the law pre-Immigration Act 2014 (see § 2). It examined in detail the framework of the UK Borders Act 2007 and its background. Old paragraph 398 of the Immigration Rules required "exceptional circumstances" if the family and private life exceptions in old 399 and 399A did not apply.
13. The Appellant argued that the Rules did not determine the weight that should be attached to the public interest in deportation. The Secretary of State contended that the proportionality assessment is governed entirely by the

Immigration Rules, which were a “complete code” (applying *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192).

14. The Court agreed with Appellant.
15. In the judgment of Lord Reed, the essential question is whether a fair balance has been struck between the individual’s right to respect for private / family life and the interests of the community, while giving substantial weight to the public interest in deporting “foreign criminals” (§ 32 and 50).
16. The weight to be attached to competing public interests is a matter for the decision-maker / Judge, giving due weight to the policy concerns that are emphasised in the Rules (§ 53).
17. The Upper Tribunal had failed to take the Rules into account and therefore the appeal was remitted (§§ 60 and 64).
18. Lord Wilson gave some points of practical advice to the First-tier Tribunal at § 84. Tribunal judgments should follow this structure:
 - a. Factual findings;
 - b. Clear, succinct reasons for conclusions, balancing necessary considerations set out at §§ 37 to 38, 46 and 50;
 - c. It should not generally be necessary to refer to other authorities.
19. A balance sheet approach setting out the ‘pros’, ‘cons’ with reasoned conclusions on whether the public interest in deportation is outweighed by the individual’s circumstances has operated successfully in other jurisdictions, such as extradition.
20. In a minority, dissenting judgment spanning 30 pages, Lord Kerr took the opportunity to make some politically unpopular though entirely sustainable points of legal principle, where he challenges the lack of protection for child rights in the Immigration Rules:

“Family life is not to be defined by the application of a series of rules. Disturbance of that precious aspect of existence is not avoided by a limited set of exemptions... one should recognise that family life and the requirement to respect it are not susceptible to verification solely by a system of checks against a set of prescriptive rules.”
(§ 147)

*“The rules **do not permit consideration of the best interests of the children concerned**. Indeed, insofar as they envisage that where an alternative family member can care for a child deportation will be proportionate, **the rules positively disregard the child’s interests**.”*

(§ 148, bold added)

21. Further relevant remarks are made in a similar vein at §§ 156, 158, 162 and 169.
22. For now, not much has been made of this line of reasoning, given that the views of the majority prevailed and the politicised character of deportation cases, of which *Hesham Ali* was one.
23. While Lord Kerr was heavily outnumbered in *Hesham Ali*, the major themes of his path-breaking dissent gained unanimous backing in the non-criminal case of *MM (Lebanon) & Ors v Secretary of State and another* [2017] UKSC 10.
24. Key to understanding this dynamic is the fact that the context in which the proportionality assessment takes place seems crucial.

MM (Lebanon)

25. The Claimants challenged the legality of amendments to the Immigration Rules made on 9 July 2012, introducing the Minimum Income Requirements (MIRs) of £18,600 gross annual income (plus a number of other income requirements for additional children and exclusions) for persons residing in the UK wishing to bring over their non-EEA partners and children.
26. While the Court found that the MIRs were lawful, it was clearly troubled by the harsh effects of the threshold. It noted that a report from the Office of the Children's Commissioner for England estimated that around 15,000 children were affected.¹
27. At § 80 the Court noted:

There are several types of family... upon whom the MIR will have a particularly harsh effect... Of particular concern is the impact upon the children of these couples, many or even most of whom will be British citizens themselves.

¹ Family Friendly? The impact on children of the Family Migration Rules: A review of the financial requirements, Children's Commissioner for England from Middlesex University and the Joint Council

28. The Court also examined the Defendant's related policy guidance to caseworkers in the Immigration Directorate Instructions.²
29. In doing so, the Court took into consideration the approach to the assessment of children's best interests taken by the Grand Chamber of the European Court of Human Rights in the *Jeunesse v The Netherlands* (2015) 60 EHRR 17. In focus were the comments of the ECtHR at § 109, (a paragraph whose importance is difficult to overstate):

"Where children are involved, their best interests must be taken into account. ... On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."
(bold added)

30. Despite the Rules at GEN.1.1 referring briefly to the best interests of children, the Court concluded that the position of children was insufficiently reflected within Appendix FM of the Rules.
31. Under the policy guidance which supplements the Rules, if the MIRs were not met, a spouse could be granted a visa exceptionally if a child was undergoing a major operation or to prevent abandonment but only if the spouse's presence was necessary to alleviate matters.
32. The Court found the criteria in the guidance too stringent. It failed to treat the best interests of children as a primary consideration, by reference to the factors of proportionality, practicality and feasibility as outlined in *Jeunesse* (see § 91 of *MM*). The SSHD's policy was therefore defective and required amendment. The Court commented:

The duty imposed by section 55 of the 2009 Act stands on its own feet as a statutory requirement apart from the HRA or the Convention. It applies to the performance of any of Secretary of State's functions including the making of the rules. While the detailed guidance may be given by instructions, it should be clear from the rules themselves that

² Immigration Directorate Instruction: Family Migration: Appendix FM Section 1.0a: Family Life (as a Partner or Parent): 5-year Routes and Appendix FM Section 1.0b: Family Life (as a Partner or Parent) 10-Year Routes (August 2015).

the statutory duty has been properly taken into account. We would grant a declaration that in this respect both the rules and the instructions are unlawful.
(§ 92, bold added)

33. In addition, the Court concluded that alternative sources of income could be considered outside the Rules under Article 8. The Secretary of State's guidance should be amended accordingly (§ 100).
34. The Court did not offer any suggested wording as to how any given part of the Rules should show it has taken proper account of the children duty. The Court adjourned the question of remedy on which the parties are to make submissions. Further developments are expected.

Possible future developments

35. The Defendant's policies (including the Immigration Rules) must take sufficient account of the best interests of children affected by immigration decisions as a 'primary consideration'. Children's rights must be given 'effective protection'. Measures that fail to do this may be liable to be declared unlawful for breaching the statutory obligation contained in section 55 BCIA 2009.
36. Importantly, the Rules themselves ought to reflect that the best interests assessment has been incorporated. This comes back to Lord Kerr's point in *Hesham Ali* (at § 147).
37. Note that the Court in *MM (Lebanon)* drew attention to the fact that there are different types of Immigration Rules. Where the Rules express a clear public policy (such as the deportation provisions) the Defendant's views should be given appropriate weight. Where the Rules are simply practical requirements (such as in Appendix FM), a Judge may make their own assessment of whether rules dealing with the quality of evidence have been met, using their own expertise (see § 76).
38. Challenges to the Rules based on breach of the children duty should gather as much compelling evidence as possible to substantiate breaches of section 55 BCIA 2009. This seems to have served the Claimants well in *MM (Lebanon)* (as with similar structural challenges to unfair systems in the Detained Fast

Track litigations, such as *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) and subsequent cases).

39. The Court in *MM (Lebanon)* was clearly impressed by the independent evidence of very large numbers of children whose welfare was being compromised by the MIRs and small numbers of cases meeting the ‘exceptional circumstances’ criteria in the ECO’s guidance.
40. In terms of potential targets for test case litigation, some indicative examples are listed below:
 - a. Parents applying under the ‘7 year rule’ in **Appendix FM, EX.1.(a)**, cannot benefit from this exception if they have a genuine and subsisting relationships with children who are not British, or who do not have 7 years of qualifying residence in the UK or where it is ‘reasonable’ to expect the child to leave the UK. Guidance and current case law suggests that the ‘reasonableness’ requirement should include consideration of the conduct of the parent, which is arguably inconsistent with the children duty (see the Court of Appeal judgments in *MA (Pakistan) and others v Secretary of State for the Home Department* [2016] EWCA Civ 705 and *AM (Pakistan) v Secretary of State for the Home Department* [2017] EWCA Civ 180;
 - b. Children applying under the ‘7-year rule’ in **paragraph 276ADE(1)(iv)**, if successful, are granted limited leave to remain of 30 months pursuant to paragraph 276BE(1). They are required to re-apply until they reach 120 months of leave when they are eligible for settlement. These chunks of leave are often granted subject to the condition of ‘No Recourse to Public Funds’ (see paragraph 276BE(1)). There is evidence in a recent report that such Rules can have negative implications for the child or young person’s access to education, housing, employment among other things;³
 - c. Applications for Indefinite Leave to Enter as a child based on **paragraph 297(f)** (which requires “*serious and compelling family or other considerations which make exclusion of the child undesirable*”).

³ Skehan A, Sandhu B, Payne L, Wake Smith E. Precarious Citizenship: Unseen, Settled and Alone – The Legal Needs of ‘Undocumented’ Children and Young People in the England and Wales. London: MiCLU (Migrant & Refugee Children’s Legal Unit at Islington Law Centre), 2017 pages 119 to 121.

The related online guidance **Children: SET07** sets out the meaning of this requirement at **section 9.SET7.9**, which imposes a relatively high threshold and arguably fails to integrate the assessment of best interests;

- d. The ‘Good character’ requirements in Chapter 18, Annex D of the nationality instructions (which are applied to most applicants aged over 10 seeking naturalisation or registration as a British citizen). This guidance does not appear to have been appropriately differentiated for the purposes of assessing the applications of minors versus adults;
 - e. The Home Office’s “**deport now, appeal later**” policy⁴ makes reference to the section 55 children duty but in describing circumstances where it is appropriate to exercise the certification power (granting an out-of-country right of appeal) it provides arguably restrictive examples such as parental relationships with a child who has a ‘*serious illness and requires fulltime care by the claimant*’. It should of course be noted that the deportation context is less amenable to challenge given the result in *Hesham Ali*, notwithstanding Lord Kerr’s observations.
41. These examples demonstrate that the outcome of *MM (Lebanon)* may have far-reaching and fundamental consequences for the relationship between child rights and the Immigration Rules.
42. All of these requirements engage the children duty but arguably disregard the interests of children if they fall outside of stringent policies. Whether these Rules (and any other policies that significantly affect children) are section 55 compliant remains to be seen.

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⁴ Certification under section 94B of the Nationality, Immigration and Asylum Act 2002 Version 8.0 (20 January 2017).