



The best interests of the child in deportation cases

November 2020

Bail for Immigration Detainees (BID) is a national charity that provides legal advice and representation to individuals held under immigration powers to secure their release from detention. We also provide legal advice and representation to detainees facing deportation. BID works with detainees in all removal centres in the UK, and with immigration detainees held in prison at the end of their sentence.

- We provide free legal advice, information and support to immigration detainees to help them exercise their right to liberty and access to justice, and to help them challenge their deportation.
- We prepare and present (free of charge) applications for release on bail or temporary admission.
- We carry out research and use evidence from our legal casework to influence decision-makers, including civil servants, parliamentarians, and regulatory bodies through policy advocacy.

The Article 8 Deportation Advice project (ADAP) is a project that provides free legal advice and representation to individuals challenging deportation on the grounds of their long residence in the UK and/or their family life in the UK.

The right to respect for family and private life is protected by Article 8 of the European Convention on Human Rights.

Disclaimer

Although every effort is made to ensure the information in this factsheet is accurate and up to date, it should not be treated as a complete and authoritative statement of the law. BID cannot be held liable for any inaccuracies and their consequences. The information in this factsheet is not legal advice. If you have a legal problem you should talk to a lawyer or legal adviser before making a decision about what to do.

Please check that this factsheet is up to date before using it. Please also check whether BID has written other factsheets or leaflets that might be relevant to you. All BID factsheets and leaflets can be found at www.biduk.org

Q. Who is this leaflet for?

A. This leaflet is for people challenging deportation from the UK based on their family life with a child in the UK.

Q. What is the purpose of the leaflet?

A. This leaflet explains the meaning of 'the best interests' of children in deportation appeals.

Q. What is the 'best interests of the children duty'?

A. The Home Office and the Immigration and Asylum Chamber have a legal duty to *safeguard and promote the welfare of children in the UK*. This means that when deciding whether to make a deportation decision or whether to allow an appeal against deportation, they must treat the best interests of the child as a **primary consideration**. This is called the 'Section 55 Duty' because the law is set down in Section 55 of the Borders, Citizenship and Immigration Act 2009.

Q. What is meant by 'best interests'?

A. In general, the 'best interests' covers all aspects of the wellbeing of children. The government guidance (*'Every Child Matters'**) states that the duty to safeguard and promote the wellbeing of children covers:

- protection from maltreatment
- preventing impairment of physical and mental health
- preventing impairment of development, including 'physical, intellectual, emotional, social or behavioural development

**Every Child Matters – Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children issued under section 55 of the Borders, Citizenship and Immigration Act 2009 - November 2009.*

Q. What is meant by the best interests of a child being a 'primary consideration'?

A. This means that the best interests of a child who will be affected by the decision must be identified and carefully considered and treated as a very important factor. However, it does not mean that it is *the* most important consideration. *It must be balanced against other considerations and can be outweighed by them*. In a deportation case, the best interests can be outweighed by other factors such as the public interest in deporting 'foreign national offenders.' Each case will be assessed on its own facts.

Q. In a deportation case, what is the legal test for assessing the best interests of the child?

A. The law states that it is in the public interest to deport 'foreign criminals'. There is an exception to this based on family life with a 'qualifying child'. However, only those sentenced to less than 4 years in prison will have their case considered under this exception. Those sentenced to 4 years or more must show there are 'very compelling circumstances' over and above the exception to outweigh the public interest in deportation to be allowed to stay in the UK.

Q. Who counts as a 'qualifying child'?

A. A 'qualifying child' is a child who is

- A British citizen; or
- Has lived in the UK continuously for at least 7 years immediately before the date of the immigration decision.

Q. What is the test for the exception to deportation based on family life with a child?

A. The person facing deportation has to show

- They have a 'subsisting parental relationship' with a qualifying child; and
- It would be '**unduly harsh**' for the child to either stay in the UK if their parent is deported; and
- It would be 'unduly harsh' for the child to have to leave the UK to continue to enjoy family life with the parent if deported;

If this test is met, it will be in breach of their right to family life to deport them. This right is protected by Article 8 of the European Convention on Human Rights, so it is often called an Article 8 challenge to deportation.

Q. What does 'unduly harsh' mean?

A. The Home Office defines this as meaning '**excessively cruel**'.

The Court of Appeal has recently given guidance on the meaning of the 'unduly harsh' test in **HA (Iraq) v SSHD [2020] EWCA Civ 1176**. It stated that, although 'unduly harsh' is more than 'difficult' or 'uncomfortable, every case must be carefully considered on its individual facts and it is wrong to require the impact to be beyond an ordinary level of harshness that would be experienced by 'any child' experiencing separation from a parent.

This means that it is very important that as much information and evidence as possible is provided to show the likely impact on each particular child of long term and possibly permanent separation from their parent.

Q. How does the Home Office carry out the ‘best interests test’ before making a decision to deport?

A. It is the responsibility of the person facing deportation to provide information about how their child would be affected if they were deported. *It is very important not to rely on the Home Office to take steps to find out information on this.*

When the Home Office is considering deportation, it will write to the person and ask them for reasons why they should be allowed to stay in the UK. This is called the Notice of Liability to Deportation or ‘One Stop Notice’.

It is very important to reply to this Notice and to give as much information as possible about how your child would be affected if you were deported. You should attach as much supporting evidence as you can. The Home Office must consider that information when deciding whether to go ahead with deportation.

You may find it helpful to look at our leaflet ‘*The One Stop Notice of Decision to Deport – What it is and how to reply*’: <https://bit.ly/BIDONESTOP>

Q. Is there any research that shows the negative impact on a child’s wellbeing of forced separation from a parent who is in prison?

A. Yes, there is research that provides objective evidence to show that separation of a child from a parent in prison can have many negative consequences for the wellbeing of the child. Bail for Immigration Detainees has produced a review of recent studies on the impact on children of separation from a parent through imprisonment, (**Literature Review: The Impact of Forced Family Separation on a Child** (BID, 2020) <https://bit.ly/BIDLITREV>

The research found that, compared to children in the general population, children with a parent in prison are

- At significantly higher risk of mental health problems than children in the general population (see page 7 of the research)
- More likely to experience ‘*sadness, including feelings of guilt of disappointment, low self-esteem, anger or aggression, hysteria, separation, anxiety, disturbed sleep patterns, nightmares and symptoms of post-traumatic stress*’ (page 7).
- At higher risk of becoming involved in anti-social behaviour (page 8)
- At higher risk of engaging in behaviour harmful to their health, such as substance abuse (page 10).

Q. Is there any research that shows the negative impact on a child's well-being of forced separation from a parent through deportation?

A. Yes, there is research that shows that children suffer many of the same negative effects on their wellbeing as those with a parent in prison. However, when a parent is deported, the situation can be even worse because the child cannot visit the parent as often or maybe not at all. Deportation will almost always involve separation of a parent from a child for more than 10 years, which is effectively almost permanent separation of a child from a parent.

Studies show that children whose parent has been deported are at risk of

- Depression and anxiety
- Negative changes in behaviour, such as becoming withdrawn or becoming more aggressive
- Financial hardship, especially if the deported parent had been the main breadwinner
- Having to take on caring responsibilities for younger brothers and sisters

All these things can have a negative impact on children's well-being and on their educational performance.

You can obtain a full copy of the Literature Review at <https://bit.ly/BIDLITREV>

You can use this literature as objective evidence to support your case.

Q. What type of evidence should a person gather to show that it is in the best interests of their child that they are not deported?

A. It is important to gather evidence about how your child has been affected while you have been in prison. This is because the negative impact on the wellbeing of the children often starts when they are separated from the parent by prison. The problems experienced by a child during this period of separation can help to provide a picture of the ways a child may suffer if the parent is deported, and that separation continues for a much longer period or permanently.

For example, often, if a child's well-being suffers

- They may need counselling organised by their GP
- The child's school may notice changes in their behaviour. For example, the child may:
 - become withdrawn
 - become aggressive or misbehave
 - do noticeably less well in their school work

It will be important to ask the GP and/or the school to write a letter to explain what has happened. This can be important evidence about how the child's wellbeing might be affected if you are deported.

Q. Is evidence that the primary carer is having difficulties as a single parent important?

A. Yes. If the primary carer of the child has suffered stress or depression and has had to receive professional help, for example from a GP or counsellor, they should get evidence of this. This is important because it helps to show the pressure the parent is under in struggling to meet the practical and emotional needs of the children as a single parent.

Q. Is it important to explain the difficulties a child would face in the country of deportation?

A. Yes, very important. There may be lots of reasons why your child would struggle to live outside the UK. For example, there might be:

- Language barriers. The children may not speak the language.
- Lack of familiarity with the culture of the country of deportation. For example, the children may have been brought up with little or no knowledge of the culture of the country.
- A wider family network in the UK that the children are in contact with which will be lost if they move abroad.
- A particular health condition which requires special treatment in the UK which they would not be able to access abroad.
- Special educational needs due to a condition such as dyslexia, ADHD or autism, which means that they need special support that they could not get if they moved abroad.

Q. Is expert evidence important to describe the best interests of the children and the likely impact of separation from a parent by deportation?

A. Yes, the type of expert most often asked to write a report describing the likely impact on the wellbeing of a child if a parent is deported is called an Independent Social Worker (ISW).

If the child has needed professional support such as counselling, a report from their counsellor or a Psychologist will be important.

Independent Social Workers are not connected to a Local Authority Social Services, so instructing one to write a report is not the same as getting Social Services involved with the family.

In order to prepare a report, the Independent Social Worker will usually talk to the parents and possibly the children, depending on age and maturity, about how they have coped with separation while the parent was in prison and how they would cope with separation through deportation.

These reports must be carefully considered by the Home Office when deciding whether to make a decision to deport a parent and by the Immigration and Asylum Chamber in deciding whether to allow an appeal against deportation. However, they are very expensive, costing about £1,500 or more.

Q. What should I do if my case needs an Independent Social Worker report but I cannot pay for it?

A. Legal aid is not normally available to challenge deportation based on family life. However, it is possible to get 'Exceptional Legal Aid Case Funding' if it can be shown that a case cannot be fairly presented without legal aid.

Legal aid can pay for a lawyer. It can also pay for any expert reports that are needed for a case. To get Exceptional Funding, a case must meet two tests, a financial means test and a merits test. The financial means test is to check that a person's income is not too high to qualify. The merits test is about the strength of the case against deportation. If there are children involved, the case is likely to meet the merits test.

You can apply for Exceptional Legal Aid Funding yourself. You do not need a lawyer. You may find our leaflet (ECF leaflet) helpful ([insert link](#)).

Glossary of key terms

Immigration Rules

This is the name given to the set of rules which govern who can enter and remain in the UK. The rules relating to deportation are found at Part 13 of the Immigration Rules.

Immigration Asylum Chamber

This is the court that hears deportation appeals. It has two levels. The lower level, which hears first appeals is the First Tier Tribunal (FTT). The upper level is the Upper Tier Tribunal (UTT). The UTT hears appeals against decisions of the FTT.

'Public interest' in deportation

The law states that it is in the public interest to deport foreign national offenders. The Immigration Rules set down 'exceptions' to deportation being in the public interest if certain conditions are met or if there are 'exceptionally compelling circumstances' in a case.

The Human Rights Convention (ECHR) 1950 This sets down basic human rights in 'Articles' which everyone is entitled to enjoy.

More information

Advice Lines:

BID advice line:

- 020 7456 9750 (Monday-Thursday 10am to 12 midday)

Here For Good:

- 0207 014 2155 (Monday 9.30-11.30, Wednesday 11.30-13.30, Friday 13.30-15.30).0115 964 4112 (Tuesday 9-11, Thursday 15.00-17.00).

AIRE Centre:

- 020 7831 4276 (10.30-6pm Monday-Friday)
- 020 7831 4276

Some organisations that work with specific vulnerable groups include:

- Rights of Women (ROW). Provides an advice line for vulnerable women who are EU citizens or their family members who have experienced violence, (including domestic abuse, sexual violence, trafficking, modern slavery, so-called honour-based violence and FGM). Open Tuesdays & Thursdays 11-1 and 2-4 on 020 7118 0267
- The AIRE Centre Women In Prison Project Advice Line - 020 7831 4276 10.30-6 Monday-Friday.

Help finding a lawyer

The website below allows you to search to find immigration lawyers in your area:

- Civil Legal Advice: 0345 345 4 345 (Monday-Friday 9-5)
- <https://www.gov.uk/civil-legal-advice>

How to contact BID

By post:

Freepost RTSU-ZJCB-XCSX
Bail for Immigration Detainees (BID)
1b Finsbury Park Road
London
N4 2LA

Fax: 020 3745 5226

General enquiries: enquiries@biduk.org

Casework enquiries: casework@biduk.org

Advice Line: 020 7456 9750
(Mon-Thurs, 10am - 12 midday)

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