Children – Overstayers New Law

BY **LIRA SIMON CABATBAT**

HOME OFFICE data show that in the last 5 years **7134** children (under 18s) were removed (including deportation) from the UK. If you break this down as an average, this means:

- 1427 children per year
- 119 children per month
- 4 children per day

The above is of course a very simplified way of using the data as the number of removals will inevitably vary daily depending on cases, flights, and recently the pandemic. Nevertheless, it is worrying statistics as the vast majority of the children removed will not have committed immigration offences themselves but are in the UK with their parents who do not have leave to remain.

Given the above data, do **not** assume that having a child in the UK means a presumption in favour of the family remaining in the UK. Immigration rules, policies and caselaw have changed over the years and dramatically so in the last decade.

Past provisions

Some may still remember the old Home Office concession called DP5/96, which provided that if a child has lived in the UK for a continuous seven-year period, he / she should not be removed from the UK in the absence of "countervailing factors". Simply put, there was a presumption that children (and their parents) who have lived in the UK for 7 years or more should not be removed from the UK. This concession in fact ended in **December 2008** to the concern of many as it was unclear how the Home Office would deal with applications concerning children.

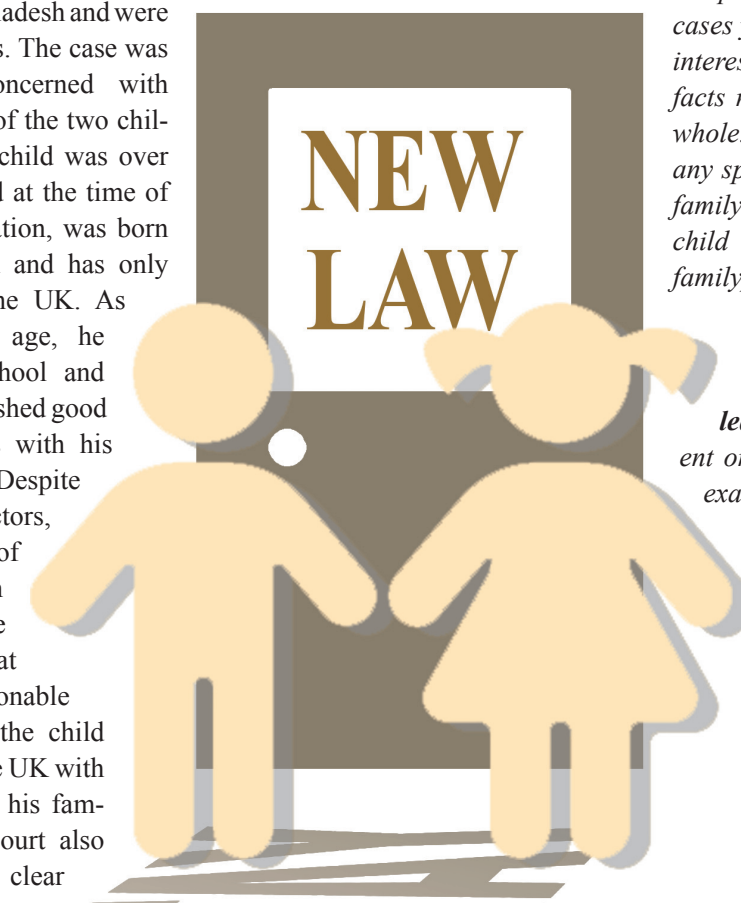
The introduction of the Borders, Citizenship and Immigration Act 2009 on 2 November 2009 provided some comfort in that Section 55 of the Act states that there is an obligation on the Home Office to **safeguard and promote the welfare of children who are in the United Kingdom**…

Recent changes

Section 55 remains effective today and until recently this was helped by caselaw. The most helpful to child applicants, and their family, was the Court of Appeal case of *MA (Pakistan)* [2016] EWCA Civ 70, which said it would **not** be "reasonable" for such children (7 years plus in the UK) to leave the UK unless there were "powerful reasons to the contrary".

Unfortunately, *MA (Pakistan)* has effectively been superseded by the recent case of *NA (Bangladesh) v Secretary of State for the Home Department* [2021] EWCA Civ 953. That case involved two children both born in the UK to parents who were from Bangladesh and were overstayers. The case was mainly concerned with the eldest of the two children. The child was over 7 years old at the time of the application, was born in the UK and has only lived in the UK. As many his age, he was at school and had established good friendships with his peers. Despite these factors, the Court of Appeal in this case decided that it was reasonable to expect the child to leave the UK with the rest of his family. The Court also made it clear that there is **no** presumption in favour of a child remaining in the UK, contra to MA (Pakistan).

The Home Office have often been accused of being slow to react and implement changes in the law but not on this occasion.



On the same date the judgement was handed down, on the 24th of June 2021, updated guidance was provided to Home Office staff, under the Family Policy Family Life Version 14.0. It is a crucial provision and is worth noting in detail. It states:

"There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s). In deciding such cases you must consider the best interests of the child and the facts relating to the family as a whole. You should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK *with the parent or primary carer where for example:*

- *the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country*
- *there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable*
- *the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:*

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- *you must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of their life and how a transition to similar support overseas would affect them*

- *a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate the parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country*

- *you must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country*

- *for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country*

- *the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period Page 54 of 96 Published for Home Office staff on 24 June 2021*

- *fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice*

- *removal would not give rise to a significant risk to the child's health*
- *there are no other specific factors raised by or on behalf of the child*

The parents' situation is a relevant fact to consider in deciding whether they themselves and therefore, their child is expected to leave the UK. Where both parents are expected to leave the UK, the natural expectation is that the child would go with them and leave the UK, and that expectation would be reasonable unless there are factors or evidence that means it would not be reasonable"

The explanation of the above policy could be clearer. What is clear is that the Home Office in their haste to make use of the NA (Bangladesh) judgement is, I believe, also showing their keenness to make full use of what many considers to be a widening of what would be regarded as factors to support the conclusion that it is "***reasonable for a qualifying child to leave the UK*** ".

What does NA (Bangladesh) and the Family Policy V14.0 mean for applications?

If you have a pending application, or about to make one, and your case involves a child who is 7 years old (or above) it is crucial that you consider and address the above Family Policy Family Life Version 14.0. From this you will see the various factors the Home Office will look at. It would be folly not to deal with each point and apply them to your case. You should state why you consider your circumstances to be different. You should provide evidence in support of your claim including expert reports from a psychiatrist or psychologist where there are likely to be emotional or psychological consequences on the child if s/he is required to leave the UK. If the country you will be removed to have economic or social issues you should submit country reports supporting your claim, to simply say that the country is "poor" will not cut it. In a nutshell, **good preparation** is key. ■