Determining the Best Interests of the Child

Conference on Protection of Unaccompanied and Separated Children
George Mason University, Fairfax (VA)
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Children of concern to UNHCR

• Asylum-seeking and refugee children
• Internally displaced or returnees assisted and protected by UNHCR
• Stateless children
International legal framework

  – Article 3: “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.”
Purpose of the BID Guidelines

It will guide UNHCR and partners in:

• When to conduct a BID
• Who should participate in the BID and what procedural safeguards should be followed
• How criteria should be applied to take a decision in a particular case
BID as a tool for child protection

‘States should promote the establishment and implementation of child protection systems, in accordance with international obligations of States concerned, and to which children under their jurisdiction should have non-discriminatory access’

‘The support provided by UNHCR and other relevant agencies and partners in helping States fulfil their obligations should supplement and strengthen the national child protection system in areas where gaps exist, and be delivered in a spirit of partnership by building on each actor's comparative advantages to reinforce the beneficial impact on the protection of children’

‘Within the framework of the respective child protection systems of States, utilize appropriate procedures for the determination of the child's best interests …’

‘In the case of UNHCR, conduct best interests determinations respecting child protection systems of States in cooperation with other relevant agencies and partners’
Best interests of the child: Principle, assessment, determination

- **Best Interests Principle**: As the CRC is a normative frame of reference for UNHCR the best interests of the child should be a primary consideration in all actions concerning the child.

- **Best Interests Assessment**: An assessment made by staff taking action with regards to individual children, except when a BID procedure is required, designed to ensure that such action gives a primary consideration to the child’s best interests. Such assessment can be done alone or in consultation with others by staff with the required expertise and with the child’s participation.

- **Best Interests Determination**: describes the formal process with strict procedural safeguards designed to determine the child’s best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise are involved and balance all relevant factors in order to assess the best option.
Higher procedural safeguards

Best interests determination – higher procedural safeguards are necessary if:
- the parents are absent, do not or are unwilling to meet the best interests of the child;
- the action has a fundamental impact on the future of the child; and
- there are conflicting factors and rights, which complicate the determination of the child’s best interests.
Situations in which a BID is required

- **identification of durable solutions** for unaccompanied and separated refugee children;
- **temporary care arrangements** for unaccompanied or separated children in exceptional situations; and
- **possible separation** of a child from his or her parents against their will.
Best interests principle

Best Interests Principle

- Action affecting all or groups of children
- Actions affecting individual children

Best Interests Assessment

- Best Interests Determination
  - Durable solutions for UASC
  - Temporary care for UASCs in exceptional situations
  - Separation of child from parents against their will
Who should undertake the BID

Responsibility primarily with the State with UNHCR as subsidiary actor (e.g. in separation from parents). A BID conducted by UNHCR, based on the Guidelines, may help complement national child protection systems in two distinct circumstances:

- as an exceptional procedure in substitution of State responsibilities, when national systems to determine the best interests of the child cannot reasonably be made available or accessible to children of concern; and
- for actions that UNHCR undertakes independently, such as, for example, the decision whether or not to submit an unaccompanied refugee child for resettlement, or support his or her voluntary repatriation.

Whenever possible, UNHCR should make all reasonable efforts to involve the competent State authorities in its own BID procedures.
Who should undertake the BID – cont’d

Structure:

- BID supervisor
to set up and supervise the BID process
- Child welfare officer
to collect all information needed for the BID process, analyse the information collected and draft recommendations for decisions
- **Multi-disciplinary** BID panel
to consider the recommendations of the child welfare officer, as reviewed by the BID supervisor, in order to assess available options and decide which is in the child’s best interests
Gathering information

• Child welfare officer:
  – Verification of existing documents providing information on the child
  – Interviews with the child and if appropriate observations
  – Interviews with persons within the child’s network including caregivers, family (extended and siblings), friends, neighbours, guardian, teachers, etc
  – Background information on the conditions in the locations considered for the decision
  – Views of experts, as appropriate or necessary
Making a decision

The result of the BID must take account of the full range of the child's rights, and hence consider a variety of factors. The best interests of the child is rarely determined by a single, overriding factor.

The primary consideration for decision-makers is to determine which of the available options is best suited to securing the attainment of the child's rights, and is thus in his or her best interests. Both the short and long-term impact of each option needs to be weighed before deciding which is best suited to the individual circumstances.

Determining the best interests of a child thus requires taking account of all relevant circumstances, while keeping in mind the indivisible nature of the CRC and the inter-dependency of its articles. Giving weight to these various factors can be a challenge. UNHCR has identified the following factors that need to be taken into account:

- Views of the child
- Views of family members and others close to the child
- Safety as a priority
- Importance of the family and of close relationships
- Nurturing the development needs of the child
- Balancing best interests of the child with rights of others
Factors that determine a child’s “best interests” Checklist

• VIEWS OF THE CHILD
  – Child’s wishes and feelings and were these obtained from the child directly?
  – The weight to be given to them, in light of the child’s age and maturity;
  – Child’s ability to comprehend and assess the implications of the various options.

• SAFE ENVIRONMENT
  – Safety is normally a priority. Exposure or likely exposure to severe harm usually outweighs other factors. Consider:
    • safety in the geographical location/household under consideration
    • availability of life-saving medical treatment for sick children
    • past harm (frequency, patterns, trends)
    • ability to monitor
    • whether root causes of past harm still persist.
Factors that determine a child’s “best interests” Checklist

• FAMILY AND CLOSE RELATIONSHIPS
  a) General factors:
  – Quality and duration of the relationship and degree of attachment of the child to:
    • siblings
    • other family members
    • other adults or children in the cultural community
    • any potential care-giver;

• DEVELOPMENT AND IDENTITY NEEDS
  – The child’s cultural and community network;
  – Continuity in the child’s ethnic, religious, cultural and linguistic background;
  – Specific considerations based on age, sex, ability, and other characteristics of the child;
  – Particular physical or emotional needs;
  – Physical and mental health considerations;
Making the decision – cont’d

The child welfare officer should present to the Panel an individual file, preferably in hardcopy (as this limits the risk of further sharing). It should include:

• the child’s registration form;
• a summary of the child’s history;
• the available options and their impact on the child; and
• the information required to balance the relevant factors.

The file should also reflect all opinions and views recorded, as well as any other relevant background information that has been collected. For decisions relating to separation from parents, the views of each parent should also be presented to the Panel. The BID report form should be used to present the information in a systematic manner.
Making the decision – cont’d

- The BID panel will base their decision on the file presented by the child welfare officer.
- Recorded in the BID form:
  - whether the decision was reached unanimously or by majority
  - the reasoning of the decision
  - any relevant issues raised during the discussion

If any information is rejected (e.g. for lack of credibility), this must be recorded in the BID Report form.
Reopening a BID decision

In general, any BID decision should be reopened for review if:

- there have been changes in circumstances, such as successful tracing or the emergence of new evidence, that could alter the original decision;
- the initial BID decision could not be implemented within a reasonable timeframe, which in the context of durable solutions should not extend beyond one year after the initial BID decision.

A BID decision on the separation of a child from parents against their will can also be reopened at the request of the child’s guardian (or by the child, if there is no guardian) or holders of parental rights. While the final decision on parental rights rests with the competent State authorities, UNHCR must review the measures taken, if requested by the child’s guardian or the parents, on the basis of new facts, evidence, or legal considerations that may affect the initial decision.
Some benefits of a BID

- It ensures that specific protection and care is provided to a child who is or may become deprived of the protection of his or her family;
- It enables UNHCR staff and partners to review the situation of the child in a comprehensive manner, ensuring that decisions are in line with the provisions and spirit of the CRC, and other relevant international instruments;
- It allows the child’s opinion to be heard, and ensures that his or her views are given due weight according to his or her age, maturity and evolving capacities;
- By means of a child-focused approach, it helps to identify protection gaps affecting individuals or groups of children of concern to the Office; to monitor the effectiveness of past measures; to address gaps identified; and to enable follow-up remedial action if needed;
- Through the involvement of persons with varying expertise, it avoids decisions which have a fundamental impact on the child being taken by one individual in isolation.
Implementation findings

- Some 54 UNHCR country offices have reported that best interests determinations were regularly part of their operations last year, and at least 12 operations have established multi-agency BID panels (Standards and Indicators Reports 2007, Annual Protection Reports).

- Currently available resources are far from adequate.

- Focus on resettlement and BID usually only implemented when offices are implementing durable solutions.

- Need for more specific guidance on how much weight to give to the various factors.

- How to do BID when no formal mechanisms to trace the biological parents exist.

- Training: need for training on child-friendly interviewing techniques as well as on weighing the various factors when determining what is in the best interests of the child.
Response

a) Resources
- BID sub-roster with International Catholic Migration Commission which provides resettlement deployments to UNHCR (BID experts, e.g. Ethiopia, Tanzania, Nepal, Thailand)
- Deployment of Child Protection Officers through the Save the Children Emergency Standby Agreement (Ghana, Sierra Leone, Sudan, Tanzania, Ecuador, Mexico)
- Mapping tool on protection and care of unaccompanied and separated children, in partnership with Lutheran Immigration and Refugee Service (LIRS) – turned into training session
- European Commission funded project on child protection systems
- Joint International Rescue Committee (IRC) - UNHCR project to build UNHCR and partner staff capacity in conducting BIDs (1/3 funded by BPRM)

b) Need for more specific guidance
- Analysis of individual BID decisions
- Production of a collection of BID jurisprudence (work in progress)

c) Training
- HQ and regional training
- BID specialists to be deployed to the field will provide on the job training
- Plan to identify more specifically the training needs of the field

d) BID info sheet (English, French, Spanish)
Next steps

• Provisionally released in May 2006 – implementation started. Final version published in May 2008 and to be printed before end 2008
• Translation and printing of BID Guidelines in French (2008), Spanish and Arabic (2009)
• Continued provision by HQ and Regional offices of technical guidance to UNHCR country offices
• Start of joint ICR – UNHCR BID project end 2008 and continued joint fundraising to top up the BPRM contribution
Some recommendations

- To make a concerted effort to have the “pre-conditions” for a BID in place
- To further strengthen UNHCR and partner staff in child protection in general and BID in particular
- To continue to advocate for the implementation of the BID Guidelines beyond resettlement and within two years
- To dedicate and provide adequate resources
Thank you!