**David and Goliath:**

**Due Weight, the State and Determining Unaccompanied Children’s Fate**

Helen Stalford[[1]](#footnote-1)\*

*European Children’s Rights Unit, School of Law and Social Justice, University of Liverpool, UK.*

**Abstract**

This article provides the first detailed, critical attempt to consider children’s status and experiences of immigration proceedings from the perspective of the right to participation, as enshrined in Article 12 of the UN Convention on the Rights of the Child 1989. The analysis adopts unaccompanied asylum-seeking children as a case study for interrogating how children’s right to be heard – a key feature of the legal and policy framework at international, European and domestic level – plays out in asylum proceedings. Specifically, it explores how easily participatory opportunities are distorted and exploited by adult decision-makers who are operating under a rather more hostile agenda of exclusion and expulsion.  Ultimately, the analysis points to the need for a reappraisal of what compliance with Article 12 UNCRC actually means in practice and a more steadfast resistance to so-called participatory practices that potentially undermine children’s welfare and sabotage their claims for asylum.

**Introduction**

This article considers what it means to adopt a children’s rights-based approach to immigration and asylum law in a UK context. It focuses, in particular, on children’s right to be heard as expressed in Article 12(1) of the UN Convention on the Rights of the Child (UNCRC). In doing so, it responds to the need to achieve a more ‘creative alignment’ (Pobjoy, 2017, p.5) between immigration law and the now extensive body of international law, guidance, theoretical and empirical research on children’s participatory rights.

Notwithstanding the vast literature on children’s participation on the one hand, and on child migration on the other, there has been virtually no attempt to bring these fields of inquiry together to interrogate the currency of participation for immigrant children.[[2]](#footnote-2) This is perhaps not surprising: one might query the relevance of participation, conceptually or practically, in proceedings that appear inimical to individual autonomy (there is no specific human right to choose the country in which you want to live) and that permit only narrow, welfare-related concessions to an otherwise rigid regime primarily designed to protect state borders and public resources. And yet it is argued that participation and, specifically, the weight to be attached to children’s views, is a crucial dimension of migration proceedings in the UK. It is becoming increasingly apparent that decision-makers need to engage with children’s accounts of their experiences in order to conduct a rigorous assessment of the child’s or other family members’ (typically their parents’) immigration application. This is already implicit in section 55 of the Borders, Citizenship and Immigration Act 2009 which requires that immigration authorities take into account the welfare of any children affected by an immigration claim, even if the child is not the claimant.[[3]](#footnote-3) In what is still the leading authority in this area, Lady Hale asserted in *ZH Tanzania* (*ZH* [*(Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*](https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf) [2011] UKSC 4) that children’s welfare must be determined by reference to the best interests principle enshrined in Article 3 UNCRC. Determining what is in the child’s best interests, in turn, depends to a large degree on the readiness of the authorities to hear directly from the child:

*Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child’s own views……the … authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents’ this should not be taken for granted in every case.…Children can sometimes surprise one.* [paras 34-37]

Yet despite the explicit correlation between children’s welfare and direct participation, there is little evidence that children are heard directly in immigration proceedings generally, let alone that their views, wishes and feelings inform decision-making in any constructive way. The ‘systemic devaluation’ (Pobjoy, 2017, p.4) of children’s interests and, indeed, perspectives in immigration decision-making has been attributed to the fact that children are generally not the main legal protagonists in such cases. Rather, their entitlement is largely parasitic on and conflated with those of their parents and commonly mediated through adults’ claims (Ottosson, 2013). Consequently, children are typically portrayed, in legal and public discourse, as mobility facilitators (Ackers and Stalford 2004), passive invisible appendages ‘united by an assumption of common dependency on the adult migrants they accompany’ (Bhabba, 2003, p.301) or as ‘silent accomplices’ to legally suspect forms of migration (Connolly 2014, p.343; Ottosson and Lanberg, 2013, p.284). As such, it remains the case that children’s rights and interests are, at best, social and political ‘afterthoughts’ in migration decision-making (Shamseldin, 2012; Thronson, 2006).

Even where children’s rights are foregrounded in a migration context, particularly in claims for asylum, such issues have been framed within a strong child protection narrative, located within thin, paternalistic and often decidedly opaque interpretations of the best interests principle (Bhabba, 2003, p.274; Crawley, 2010). It comes as little surprise, then, that thinking around child participation in an immigration context is underdeveloped – and perhaps deliberately so; participation, as conceptualised in children’s rights law and discourse, sits uneasily with the notoriously adversarial nature of immigration proceedings (Lidén and Rusten, 2014, p.281).

The conceptual and evidential gap around participation in immigration decision-making is perhaps most pertinent and alarming where a child migrant is forced to pursue a claim in his or her own right, in isolation from other family members. The participatory experiences of unaccompanied children present particular concerns insofar as they are placed centre stage of a process that is accustomed to dealing with migrant children on a largely residual, incidental basis. This is compounded by the fact that the asylum process is underpinned by an international treaty - the 1951 Refugee Convention - that makes no explicit reference to children, and by a jurisprudence that has struggled to depart from largely adult-focused interpretations of its asylum criteria. (Pobjoy, 2017, p.3; Crock, 2006, 244; Crock, 2005, 157; UNHCR, 2009, [1]). And yet, participation is all the more important for this group of child migrants, not least because, in the absence of any other documentation or supporting evidence, the outcome of the case rests heavily on the child’s own testimony. As UNICEF and the UNHCR observe (2014, p.31):

*The child is the main source of information about her/his situation. The degree to which the child is heard and indeed listened to will not only ensure a more well-rounded and sustainable decision with respect to the child, but will also potentially empower the child in taking ownership of her/his future development into adulthood.*

With this in mind, this article adopts unaccompanied asylum-seeking children as a case study for interrogating the actual and potential currency of children’s participation in immigration proceedings.[[4]](#footnote-4) Drawing on the legal and policy framework, recent UK case law and empirical evidence, the discussion explores the feasibility of applying children’s rights-based conceptualisations of participation to this area. The analysis begins by mapping out briefly the nature and scope of children’s participatory rights under immigration law and policy (section 1) before considering, in section 2, the reality of unaccompanied children’s participatory experiences. Section 3 highlights the legal, practical and ethical barriers to giving effect to such rights. Specifically, it explores how questions of credibility and ‘due weight’ (Article 12(1) UNCRC) turn on the coherence and persuasiveness of children’s direct accounts as perceived by adult decision-makers – particularly Home Office officials - who are operating under a rather more hostile agenda of removal. Ultimately, the analysis points to the need for a reappraisal of what compliance with Article 12 UNCRC actually means in asylum proceedings and, indeed, of whether this provision is fit for purpose at all.

1. **The Legal and Policy Context Underpinning Unaccompanied Asylum-Seeking Children’s Participatory Rights**

It could be argued that the recent surge in refugee migration has elevated children, insofar as they are unaccompanied and intensely vulnerable, to a special status in public and political consciousness, generating a heightened level of concern and, arguably, greater legal and policy accommodation. As Pobjoy notes, ‘*The arrival of unaccompanied and separated refugee children has compelled decision-makers to shift away from a parent-centred paradigm, resulting in the enhanced visibility of children in the refugee status determination process*’ (2017, pp.47-48). Certainly, it has been impossible to ignore the devastating, destabilising effects of the refugee crisis on children, which has uprooted them from their communities, cultures, schools and friends, and significantly disrupted, if not totally severed close family ties and rendered hundreds of thousands of children stateless (European Network on Statelessness, 2015). According to the most recent EU-wide statistics, in 2016, over 63,000 unaccompanied and separated children claimed asylum in the EU (Eurostat, 2017).[[5]](#footnote-5) Over the same period, 3,175 unaccompanied children claimed asylum in the UK, accounting for approximately 4% of the total claims in the EU (Refugee Council, 2017).[[6]](#footnote-6) The last quarter of 2016 saw a sudden rise in the number of unaccompanied children entering the UK, triggered largely by the closure of the camps in Calais and the launch of an operation to transfer some of the estimated 1,200 unaccompanied children residing there to the UK. As a result, between 1st October 2016 and 15th July 2017 a total of 769 children were transferred to the UK from Calais (Home Office, 2017, p.6).

There has been a corresponding upsurge in legal and policy initiatives at international, European and at UK domestic level to respond to the plight of unaccompanied children, overwhelmingly concerned with achieving minimum standards of care and protection and facilitating much-needed cross-national co-operation and burden sharing between receiving states.[[7]](#footnote-7) The best interests principle is a leitmotif running through all of these instruments and is a concept with which practitioners and decision-makers are familiar and comfortable, albeit not always clear and rigorous in its application.[[8]](#footnote-8) Children’s right to be heard is a less explicit but nonetheless visible aspect of this legal architecture. At international and European level, this is primarily expressed as children’s right to legal information, advice and representation, and to the support of a guardian or other representative to assist them in navigating the complex web of legal, social and economic twists and turns of the asylum system.[[9]](#footnote-9) It is also manifested in procedural measures to minimise any trauma for children, such as the avoidance of repeat interviews or delay,[[10]](#footnote-10) ‘child friendly’ adaptations to the physical environment,[[11]](#footnote-11) and tailored training and capacity building among practitioners to ensure that they are equipped to respond to the distinct vulnerabilities of unaccompanied children.[[12]](#footnote-12)

UK domestic law and policy relating to child asylum seekers drills down even further to the scope and nature of children’s participatory rights, asserting that children’s wishes and feelings should not only be heard, but also acted upon at all stages of the asylum and child protection process. Specifically, the UK Government declares in its most recent Strategy on Unaccompanied Minors, ‘*that all children need to be protected from harm, their views heard and acted upon, and to have consistent support provided for their individual needs*.’ (Department for Education and Home Office, 2017, p.8). Guidelines for Home Office officials similarly state that children over the age of 12 will be expected to take part in an interview ‘*as it is an opportunity for the child’s voice to be heard directly*’ (Home Office, Oct 2017, p.39). Moreover, interviewing officers are obliged to ascertain the wishes and feelings of the child in discussions relating to their return to their country of origin (Home Office, Oct 2017, p.76). The same obligations are mirrored in Statutory Guidance for Local Authorities on the Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery which acknowledges that the wishes and feelings of the child are an important guiding principle informing decisions concerning their treatment and placement (Department for Education, Nov 2017). These messages, in turn, reinforce more general statutory child protection guidance which covers unaccompanied children in the same way as any other child under local authority care. The key policy, *‘Working Together to Safeguard children’* states as follows:

*Children want to be respected, their views to be heard, to have stable relationships with professionals built on trust and to have consistent support provided for their individual needs. This should guide the behaviour of professionals. Anyone working with children should see and speak to the child; listen to what they say; take their views seriously; and work with them collaboratively when deciding how to support their needs.* (*(HM Government, 2015,* para 22)

Significantly, all of this guidance is explicitly framed within the UNCRC, endorsing a distinctly children’s rights-based, participatory framework for the development of services for unaccompanied children *(*Giner, 2007, pp.251-252). Certainly the UNCRC and its accompanying General Comments add much needed clarity as to how the participatory obligations should play out in immigration practice. Specifically, General Comment No 12. on the Right to be Heard asserts that ‘*In the case of an asylum claim, the child must…have the opportunity to present her or his reasons leading to the asylum claim.’* This, the Committee emphasizes, demands that ‘*these children are provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings.*’(UN Committee on the Rights of the Child, 2012, paras 123-124).

General Comment No 6 on the treatment of unaccompanied and separated children outside their country of origin develops this further stating that the child’s views and wishes should be elicited and taken into account in relation to family tracing, reunification (UN Committee on the Rights of the Child, 2005, para 81) and return to their country of origin (para 84). More detailed guidance is offered in respect of the appointment and role of a guardian and legal representation (paras 33-38), and the implementation of legal procedural safeguards to accommodate the unaccompanied child’s vulnerabilities (paras 68-73), including the opportunity for a ‘personal interview’ with the official tasked with assessing the child’s claim (para 71).

These provisions are, of course, welcome, necessary and well-intentioned, but they operate on the fundamental presumption that it is in the interests of the child to be heard, that the views of the child hold some currency in determining whether they meet the criteria for international protection, and that the primary motivation of those with decision-making authority is to uphold the child’s interests (and, indeed, wishes). Yet empirical and jurisprudential evidence pertaining to children’s experiences of participating in asylum proceedings reveals that such obligations are heavily compromised by a political and economic agenda that appears ill-disposed to children’s rights.

1. **The Reality of Unaccompanied Children’s Participation in Asylum Proceedings**

A review of the most recent research on unaccompanied children’s experiences of the asylum process reveal that even the most extensive participation provision on paper offers nothing in the way of a guarantee of its quality or, indeed, of its compliance with Article 12 in practice. Indeed, it is fair to say that children’s right to be heard is more poorly implemented in asylum proceedings than in almost any other legal sub-context. There is an abundance of evidence pointing to participatory deficiencies at virtually every stage of the asylum process, from initial reception and screening (House of Lords, 2016; EU Fundamental Rights Agency, 2010; Dorling, 2013; Connolly, 2015), social work assessment and family tracing (Law Centres Network, 2015), through to care placement (Wilding, 2017; Rosen, Crafter and Meetoo, 2017; McGovern and Devine, 2015), access to schools and appropriate accommodation (Wilding and Dembour, 2015).

This is echoed in other jurisdictions too, including those with a strong record of supporting both children’s participatory rights and unaccompanied minors. Ottosson and Lundberg, speaking in a Swedish context, note that:

*‘The right to a customised asylum process, in which children’s needs and perspectives are taken into consideration, tends to be overlooked…migrant children are less likely to be heard than [national] children and this means that asylum-seeking children may be doubly muted.’* (2013, pp.266 and 269)

Similarly, Liden and Rusten note that, in Norway, efforts to engage directly with children as social actors are largely tokenistic and even discouraged, with the emphasis primarily being on paternalistic assessments of their vulnerability (2007, p.281).

This confirms what Jacqueline Bhabha describes as the ‘dual jeopardy’ of children in the asylum process: legally disenfranchised by virtue of their fragile nationality, entry and residence status *and* by virtue of their age (Bhabba, 2003, p.258). One could add to this at least two further ‘jeopardies’ confronting unaccompanied children specifically: one by virtue of the emotional, psychological and physical trauma typically resulting from their migration experiences, which so often manifests itself in a purposeful mode of ‘silence and secrets’ when it comes to direct encounters with officials (Kohli, 2006; Chase, 2010 discussed below); and another by virtue of the fact that such children are left marooned and unaccompanied in a hostile, appeals-dependent process, fraught with inconsistency, unpredictability and patchy legal support (Kralj and Goldberg, 2005; Law Centres Network, 2015, Chapter 4). Language and cultural barriers, as well as mental and physical ill-health (which may alter the child’s capacity to participate from one day to the next) pose additional barriers. Such factors collide with the imperative to act expediently, to minimise the chance of claimants going missing and to meet legal and funding deadlines in a system that is beset by legal and bureaucratic complexity (Wilding and Dembour, 2015; Law Centres Network, 2015; House of Lords, 2016), crippling resource contractions and ruthless performance targets (Page, 2017; Humphris and Sigona, 2017).

All of these failings highlight that, whilst participation-rich provision may well have improved in principle, it remains subject to the vagaries and complexities of an unforgiving regulatory and procedural canvas with diminishing resources available to front-line staff charged with supporting the children who are subject to it. But to say that children are not heard or are ‘muted’ in immigration proceedings only reveals part of the picture. The problem is rather more nuanced than that: it is not so much that children are not being heard, but that the conditions under which they are being heard, and the agendas and methods driving those encounters are often heavily compromised by political and populist priorities. Perhaps more worrying than not being heard at all is the sinister turn that ‘hearing’ children – and particularly the notion of attaching ‘due weight’ - has taken in asylum proceedings, serving ultimately to undermine rather than reinforce children’s rights. This brings us onto a more critical and detailed consideration of the particular ‘brand’ of participation that is currently being levied in an asylum context, and of who its beneficiaries really are. Article 12 UNCRC provides a useful lens through which to conduct this evaluation.

**Testing the compatibility of asylum proceedings with Article 12(1) UNCRC**

According to Article 12(1) UNCRC the child who is capable of forming his or her own views has the right to express those views *freely* in all matters affecting the child, at *all* stages of the asylum process. The purposive tone of this provision – to provide a space in which children can convey their wishes and needs to decision-makers – contrasts markedly with unaccompanied children’s experiences. But such encounters need to be evaluated within the procedural context of the various stages of the asylum process. At present, the literature around children’s experiences of the asylum process fails to tease out the distinct nature and objectives of each of these stages, and particularly the fact that each stage brings with it specific participatory expectations and opportunities. With that in mind, establishing a clear understanding of what is required of each stage is a crucial starting point not only in assessing potential breaches of Article 12(1) but also in identifying how children’s participatory rights might be advanced.

In brief, the UK asylum process begins with a claim for asylum being lodged with the Home Office. A short welfare (previously referred to as ‘screening’) interview is normally conducted at the same time or shortly after the asylum claim is made, the purpose of which is three-fold: to ascertain that the child wishes to claim asylum; to collect basic information such as identity, country of origin, when and how the person arrived in the UK, and what documents they have, such as a passport or other identity papers; and to identify and attend to any of the child’s immediate welfare needs. The Home Office subsequently conducts a more detailed asylum interview with the child with a view to assessing the child’s claim (as noted earlier, the default position is that all claimants aged 12 or over will be interviewed). There are various possible outcomes of such assessments: those granted the optimum outcome, refugee status, receive five years’ leave to remain in the UK (accounting for 30% of UASC claims made in 2016 – Refugee Council, 2017). Just before their five-year leave runs out, people with refugee status can apply to stay permanently in the UK, officially referred to as indefinite leave to remain (ILR) or settlement. The majority of claimants receive a rather more temporary status, though: that of Unaccompanied Asylum Seeking Child leave to remain (UASC – this accounts for approximately 50% of all claims in 2016 – Refugee Council, 2017).[[13]](#footnote-13) In such cases, the child is granted leave to remain for a period of 30 months or until the child turns 17½ years old, whichever is shorter, at which point the child will have to make another application to request leave to remain for a further period. A small percentage are granted Humanitarian Protection (3%)[[14]](#footnote-14) or Discretionary Leave (0.8%).[[15]](#footnote-15) Those that are refused (in 2016, initial refusals accounted for 16% of claims from children aged 17 and under: Refugee Council, 2017) can appeal to the Asylum and Immigration Chamber of the Tribunal of which between 25 and 28% are overturned (Refugee Council, 2015).

Insofar as many children seeking asylum never set foot inside a court or tribunal, a key testing bed for compliance with Article 12(1) lies in children’s experiences of the Home Office. Indeed, many of the concerns raised about procedural failings are within the context of Home Office interviews. Evidence gleaned from the case law, empirical studies and anecdotal accounts of lawyers and clients alike raise serious concerns that children’s participation at this stage of the process is used for rather more reductive purposes (to undermine claims for asylum) rather than as a means of actively determining the wishes, feelings and best interests of the child.

* 1. ***The reductive (ab)use of unaccompanied children’s right to participation in asylum proceedings***

The extent to which unaccompanied children can express themselves ‘freely’, as required by Article 12(1) UNCRC, is heavily undermined by the adversarial nature of asylum proceedings, the nature of the evidence requested of children and the purpose for which it is elicited. In spite of the obligation to ascertain and act in the best interests of all children subject to immigration proceedings, there is nothing particularly ‘free’ about this process. Empirical evidence, coupled with an analysis of the case law, points to basic procedural failings that not only undermine but also abuse children’s participation in asylum proceedings. Consider, for instance, children’s encounters with Home Office officials during initial welfare interviews. Home Office guidance on the purpose and scope of such interviews is unequivocally limited to ensuring a child *“understands what is happening and why, and to ensure necessary information about the child’s welfare is obtained”,* reflecting the Court of Appeal ruling in *AN and FA v SSHD* ([2012] EWCA Civ 1636). However, evidence continues to emerge of persistent abuses in this regard, with reports of Home Office staff engaging children in discussions around their substantive claim, often in the absence of appropriate adults and legal representation, and then using their responses to support rejected claims (Crawley, 2010; Warren and York, 2014, pp.14-15; Matthews, 2014, pp.51-53; the Law Clinics Network, 2015, pp.73-74; the Parliamentary Joint Committee on Human Rights 2013). Such practice immediately places children on the defensive at the most fragile of stages in their migration journey, and potentially hampers more positive efforts to ascertain their basic welfare needs.[[16]](#footnote-16)

The remainder of the asylum determination process is rather more concerned with whether the child fulfils the conditions for international protection which, for a significant minority of cases, turns on the question of credibility and the persuasiveness of other, more objectively quantifiable and verifiable evidence (for an illustration, see *The Queen on the Application of ZM v London Borough of Croydon* and *The Queen on the Application of SK v The London Borough of Croydon*, [2016] UKUT 0055p (IAC)). Concerns have been expressed, in particular, over the extent to which substantive Home Office interviews – the very stage at which children’s testimony becomes so crucial to their claim - support children’s Article 12(1) right to express their views freely. Research suggests that such encounters perform a rather different function than that envisaged by Article 12(1) which is less about giving the child the opportunity to have a say in how different aspects of their claim might be disposed of, and more about defending their right to make such a claim in the first place. Evidence gathered by the Law Centres Network in 2015, following their analysis of 60 unaccompanied children’s cases, revealed much about the techniques of immigration officials, in particular. These are reported to include: the use of vague, confusing and closed questions militating against any meaningful elaboration by the child; a failure to explore significant aspects of the child’s migration trajectory that might support their claim in favour of more ‘peripheral’ details; and inappropriately timed, intrusive and insensitive questions probing, for instance, the child’s sexuality, intimate relationships and experiences of abuse.[[17]](#footnote-17) This, their report claims, has perpetuated a system whereby ‘things are being done to these children… with little or no seeking of their opinions, thoughts, feelings or desires.’ (Warren and York, 2014, p.149; Law Centres Network, 2015, chapter 6).

Overwhelming evidence of ‘hostile, interrogatory’ procedures and ineffective safeguards during Home Office interviewing was also a feature of the UK field work undertaken by Wilding and Dembour (2015). Child respondents in their sample spoke of feeling ‘attacked and intimidated’, being asked multiple questions repeatedly, seemingly in an attempt to expose inconsistencies in their accounts and having limited or no opportunity to draw on the support of their accompanying adult. Accounts of tribunal proceedings (where children’s participation is much less common) also cast doubt over judges’ adherence to Article 12, with some children asserting that they felt neither respected nor heard (2015: p.14). This, their report concludes, is symptomatic of a widespread ‘culture of disbelief’ amongst the authorities, particularly in relation to older boys from parts of Africa and Afghanistan, and a corresponding ‘lack of trust’ in officialdom on the part of the claimants (House of Lords, 2016: Chapter 3).

Child participation in asylum proceedings, therefore, is fraught with risks. The potential of direct encounters with immigration decision-makers to compound children’s vulnerabilities, ignore and perhaps even distort their claims is heightened by the trauma and complexity of the child’s migration history. The sheer horror and psychological impact of unaccompanied children’s experiences are now well-documented (Bhabha and Finch, 2006; Mougne, 2009; Crawley et al, 2017) and it is widely acknowledged that such experiences militate against a comprehensive, chronologically coherent testimony. Because of past trauma or ongoing fear, children may be simply incapable or unwilling to express their views freely. Ravi Kohli’s interviews with 29 social workers in relation to 34 unaccompanied children in their care reveals much about how the “silence, secrets and the types of ‘truths’ they tell about themselves both help and hinder their search for resettlement” (2006, p.708). Whilst much of the withdrawal exhibited by these young people is attributed to their inability or unwillingness to recall painful and traumatic events, there is also some evidence that it is part of their healing strategy, and a quest to become autonomous in much the same way that many adolescents in ‘normal’ circumstances (and certainly those in care) maintain secrets and silence. Kohli also points to evidence of children relaying well-rehearsed versions of the truth, usually under the instruction of parents, agents or other ‘successful’ refugees, in an attempt to *‘*squeeze their stories into the narrow channels acceptable to asylum givers in their chosen country of refuge.’(2006, p.710). Such stories, Kohli explains, favour ‘thin’ narratives of victimhood that fit well within legal constructions of the refugee child in preference to their ‘thick, ambiguous, multi-layered and complex’ realities that encompass both ordinary desires, relationships and experiences alongside extraordinary suffering (2006, p.710).

Elaine Chase’s subsequent study into the emotional well-being of 54 unaccompanied children seeking asylum in the UK similarly points to a widespread reticence to share crucial aspects of their personal histories, not just with the professionals charged with assessing their cases, but with other significant people in their lives including friends, foster-carers and medical staff. For them, what to disclose, to whom and when is the only aspect of their immigration journey over which they felt they had any control. Their wishes (to resist the pressures placed upon them by ‘multiple and insistent systems of surveillance’: Chase, 2010, p.2052) are expressed not through words, as Article 12 implies, but through their silence:

*‘…the predominant impetus for this selective disclosure was a desire to retain a degree of agency as they navigated their way through a complex web of immigration, asylum, social care, health and education systems, and simultaneously sought to establish themselves in the social world.’*

As a consequence, the worlds of unaccompanied migrant children are ‘half hidden’ and knowledge about them remains ‘inchoate’ (Connolly, 2014, 331). This does not bode well in a process that is defined by legal categorisations contingent on the availability and persuasiveness of detailed factual accounts.

These seemingly widespread failures to attend to children’s basic needs in the asylum process persist in spite of detailed guidance reminding Home Office decision-makers of their obligation to safeguard and promote the welfare of the child in the course of their participation in proceedings (Home Office, 2017; and *AN and FA v SSHD* [2012] EWCA Civ 1636). This guidance prescribes a number of measures to inform interviews with children including the requirement that: all staff who conduct substantive interviews with children must have received appropriate training in interviewing children, and that all interviews should be “scheduled for a time and location that is suitable for the child” (Home Office, 2017, p.43). The rules also insist that: a responsible adult should be present for the interview to go ahead; that any specific health and emotional needs of the child should be acknowledged and addressed; that, where an interpreter is used, his or her manner is appropriate; that the child is informed of the names and role of all of those present at the interview and of the process that the interview will follow; that the child is aware that they can speak to their legal representative and responsible adult at any time in the interview, to request clarification of any of the questions; that the child has regular breaks and has had sufficient food and drink; that questions are put to the child in an accessible and sensitive way; and that the interview should be postponed if the child becomes too distressed.

Isolated examples of good practice have been reported in this regard (Law Centres Network 2015, pp.77-78), including the provision of child friendly interview suites and compliance with lawyers’ requests to postpone interviews in the light of the child’s mental and physical ill-health. However, the same evidence indicates that such practice is the exception rather than the norm, and largely the result of individual, conscientious legal representatives putting forward robust cases for child friendly concessions; there is rather less indication that such precautions are proactively engaged as a matter of course.

* 1. ***The distortion of the ‘due weight’ requirement in asylum proceedings***

The true currency of child participation in any legal proceedings, including asylum, is contingent not just on the procedural safeguards that are in place, but on the weight likely to be attached to such testimony. In that sense, the process and outcome-related strands of participation are inextricably interlinked and mutually reinforcing. Quite simply, poor participatory process tends to lead to poor outcomes for children.

Article 12(1) UNCRC expresses this obligation as follows: *“…the views of the child* [should be] *given due weight in accordance with the age and maturity of the child.”*. As such, it is now widely accepted, in children’s rights circles at least, that it is insufficient just to “hear” children; children’s views must have some level of influence - a genuine purpose (Daly, 2018, p.5; Lundy, 2007; UN Committee on the Rights of the Child, 2003, para 12; Cairns, 2006). Adherence to this compels decision-makers to be more transparent and rigorous in ensuring that children’s expressed views inform their decisions. But applying the concept of ‘due weight’ to asylum claims requires more serious reflection as to whether Article 12(1) offers a satisfactory formula.

The first point of reflection probes precisely what wishes and feelings we expect children to express that can be realistically acted upon in the face of the stringent legal and evidential requirements associated with asylum claims. The second point relates to the way in which children’s evidence, age and maturity might be weighed counterintuitively– to justify a refusal of their claim rather than to inform an assessment of what is best for them. Specifically, rather than supporting credibility and persuasiveness (as envisaged by Article 12 and other types of proceedings), the older and more mature unaccompanied minor runs the risk of not actually being believed to be a child at all. Each of these points are now considered further.

***Giving due weight to unaccompanied children’s views: a question of evidence rather than expressed wishes***

The legal and policy references to ascertaining and acting upon children’s wishes and feelings are somewhat over-stated. What children want is relatively easy to fathom in asylum proceedings, but rather less easy to achieve: the safety and security of long term residence in the UK. This was confirmed by the findings of an EU-funded research project (TALE, 2017) conducted by the author in 2015-17 which explored how children’s rights principles and methods can be brought to bear more meaningfully on legal practice. The project, which culminated in the development of an online training tool for lawyers, involved in-depth observation of 15 ‘live’ cases involving children, one-to-one interviews with their legal representatives, and focus groups and individual interviews with ten other children who had prior experience of different justice proceedings. Six of the cases observed involved unaccompanied children, the ultimate wishes of whom were reasonably predictable and universal, as the following lawyer explains:

*In asylum claims, children generally know exactly what they want…which is to win their case and get asylum, so the lawyer’s job is to help them with that, based on their instructions. Now helping a child to win their claim involves taking their instructions, understanding what has happened to them, applying the law, and presenting their evidence, but their evidence needs to be focused…and put in a way that is the most persuasive and which applies the law to their situation. So, if the lawyer is just a post box between the child and the Home Office or between the child and the court, and the child is entirely given their voice, then really the lawyer is not adding any value…So what the lawyer needs to do is to try and focus the child’s evidence on the points needed to win the case.* (Lawyer, TALE, 2017)

Achieving this, of course, depends on the extent to which the child’s claim fulfils the carefully prescribed criteria of the 1951 UN Convention Relating to the Status of Refugees.[[18]](#footnote-18) Quite apart from the difficulties that decision-makers have in interpreting legal criteria that were never really designed with children in mind (Pobjoy, 2015; Arnold, 2017), the process hangs not on subjective expressions of desire or aspiration, but on verifiable testimony. If the ultimate wish of the child is to remain in the UK, it matters not whether this is an expression of his or her desire; what matters is whether he or she meets the legal and evidential threshold.[[19]](#footnote-19) The child’s views, wishes and feelings are only relevant insofar as they are supported by persuasive, objective evidence of (past and, more importantly, potential) persecution in their home country. Even the latest Home Office Guidance says as much:

*More weight may need to be given to objective evidence of risk than to the child’s state of mind or the oral or written evidence they are able to provide* (HO, October 2017, p.48).

Indeed, a review of first tier and appellate case law since the Supreme Court decision in *ZH Tanzania* reveals virtually no judicial engagement with children’s expressed wishes and feelings at all (other than that supported by objective evidence), let alone explicitly with Article 12 UNCRC.[[20]](#footnote-20) Even in cases concerning the family reunification prospects of the ‘Calais’ unaccompanied children seeking to join their families in the UK, there is no discussion whatsoever of children’s views, even though the relevant EU law (the Dublin III Regulation, Article 6(3)(d) – above note 8) explicitly lists children’s views as relevant to a determination of their best interests (see for instance, *ZAT* [2016] EWCA Civ 810; *R (on the application of RSM) v SSHD*, [2018] EWCA Civ 18). Due weight, in asylum terms, therefore, turns on whether decision-makers believe the child’s account.

* 1. ***‘Due weight’ as a test of credibility***

The discussion has already referred to the difficulties of many unaccompanied children in presenting sufficiently detailed accounts to satisfy an asylum decision-maker, and of their strategic preference to remain silent. Perhaps more problematic, however, are those who operate at the other end of the spectrum, revealing rather too much, perhaps inaccurate or partially evidenced information in a misguided bid to please authority figures (including those who have illicitly organised their migration) or to secure a swift resolution to their claim. The process of attaching ‘due weight’ to the child’s views takes on a rather different, more negative, perhaps even sinister construction in this context. In contrast with other legal contexts, in asylum ‘due weight’ is attached, not so much to the humanely ascertained wishes and feelings of the child, but to inconsistencies and inaccuracies teased out through what the previous discussion has highlighted are often highly adversarial and confusing cross-examination. Put simply, due weight, in asylum proceedings, is synonymous with credibility. Credibility permeates the entire refugee status determination process insofar as adverse credibility findings provide the basis for a significant proportion of failed asylum claims (Pobjoy, 2017, p. 93; Sweeney, 2009; UNHCR, 2014).

In such cases, the participatory opportunities afforded by the asylum process may not actually serve to enhance children’s agency or enable them to influence outcomes in their favour at all. Rather, they risk reinforcing abuses of power and subverting children’s voices, turning them in on themselves in a way that serves only to create the conditions in which they can adulterate their own claims, not to mention significantly compound their trauma. The potential for those in power to abuse participation for such ends entrenches the denial of real voice to children because there is everything to lose and not much to win in expressing their wishes, feelings and experiences. Indeed, participation, in the wrong hands and driven by the wrong objectives engages children in a perverse act of self-sabotage rather than an exercise of their autonomy rights.

But there is a more positive side to the credibility coin that at least partially offsets the defensive positioning of children in this context: the fact that credibility questions have to adhere to specific guidance, including a liberal application of the benefit of the doubt principle. This guidance reflects a compelling jurisprudence[[21]](#footnote-21) and international guidance (UNHCR, 2014; UNCRC, 2005) which acknowledges that it is neither possible nor fair to expect claimants, least of all children, to ‘prove’ all aspects of their asylum claim. As such, decision-makers are precluded from drawing undue inferences from inaccurate or missing information provided by vulnerable children, even if there is evidence that they have embroidered their story (Home Office, 2017, p.50).

The case law has developed its own set of participatory principles in this context, none of which are immediately consonant with the wording of Article 12. Perhaps the clearest example of judicial discussion of children’s testimony relates to what aspects of a child’s evidence can legitimately be weighed, particularly with a view to repairing the mischief of it having been elicited inappropriately in the first place, typically during initial welfare (screening) interviews. The case law suggests two approaches: the first is to limit the admissibility of the evidence so that it can have no negative bearing on the decision; the second (seemingly favoured option) is to adjust the weight to be attributed to such evidence by giving the child an opportunity to correct it in later proceedings, and to offer a wide discretion to the decision-maker to discount that evidence. Notwithstanding the difficulty in practice of ‘unhearing’ persuasive evidence that casts doubt on a particular claim (see on this point *Regina (Refugee Legal Centre) v Secretary of State for the Home Department* [[2004] EWCA Civ 1481](http://www.bailii.org/ew/cases/EWCA/Civ/2004/1481.html) per Sedley LJ), the courts have stated clearly, that where there has been a clear breach of the procedures and principles governing questioning*, “…it ought at the very least to be exceedingly difficult to persuade the court to admit material that has been thereby obtained”* (*AN & FA (Children), R (On the Application Of) v Secretary of State for the Home Department* [2012] EWCA Civ 1636, per Black, LJ, at para 126. See also *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, para 21)

One might even go as far as to say that judicial and Home Office guidance on how to weigh children’s evidence represents a refreshing departure from the decidedly amorphous application of iterations of the due weight principle in other legal contexts.[[22]](#footnote-22) Indeed, there is limited guidance or any specific onus on decision-makers in other justice proceedings relating to care arrangements, education, or medical decision-making, in exercising what may be enormous discretion, to account for the extent to which they have taken the child’s expressed testimony into consideration (Daly, 2018, p.57). But other features of credibility assessments in asylum proceedings fit less easily with the due weight obligation under Article 12. Specifically, age and maturity as factors lending weight to children’s views under Article 12(1) operate in a distinctly counterintuitive way when it comes to unaccompanied children.

* 1. ***The counterintuitive operation of age and maturity***

Manifestations of maturity and age undermine credibility rather than promote the reliability of the child’s testimony and fly in the face of Article 12(1) which holds so much store by the expressed wishes of older, more mature children. This is reinforced by the proportion of unaccompanied children whose age is called into question. For example, Home Office data indicates that in 2017, a third of unaccompanied children seeking asylum in the UK were subject to some form of age assessment to satisfy concerns that they were over 18 (Refugee Council, 2017).[[23]](#footnote-23) As such, in contrast with other legal proceedings where the opinions of older, more mature children hold greater sway in decision-making, the unaccompanied asylum seeking child has a vested interest in pronouncing his or her vulnerability and immaturity to optimise their chances of obtaining full legal protection. This is significantly compounded by fickle and highly stereotypical representations of unaccompanied children, with which the media has been particularly complicit. Such representations, McLaughlin notes (2017, p.2), ‘hinge on the problematic notion of the universal child’:

…[the media’s] *foregrounding of child victims, has produced a humanitarian narrative of crisis which is built on a politics of innocence and vulnerability. At the centre of this ‘media spectacle’ is the iconic figure of the child, the embodiment of the very quality of innocent vulnerability that is seen to define a universal childhood.*

By contrast, McLaughlin asserts(2017, p.2)*,* the‘unchildlike’ images of unaccompanied minors who arrived, particularly in the wake of the so-called ‘Dubs amendment’[[24]](#footnote-24) illustrate:

*‘...how discursive and representational practices around asylum-seeking children rely on codes that preclude demonstrations of resilience, maturity and agency in these children, and suppress bodily markers of gender and race that would detract from their perceived childness.’*

The modelling of the authentic unaccompanied child on constructions of vulnerability and immaturity is reinforced by Home Office policy, which, in turn, is legitimised by guidance issued by UNICEF in its seminal handbook, *‘The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union’* (2014). Aspects of this policy are encouraging insofar as it recognises that children may simply not have the same capacity or knowledge to express themselves in a manner that will satisfy the grounds for asylum set out in the 1951 Refugee Convention. Thus, the 2017 guidance acknowledges that children may find it difficult ‘...to *identify all the material facts and ascertain the potential risks on return... The expression of fear of return may not be as elaborate as in an adult’s case and a very young child may not even have a fear of persecution on return. A child may be less able to produce objective evidence to corroborate their claim, and may in fact have very limited life experience. Decision makers must also be aware that a child may find it difficult to describe details beyond their direct experience, such as names of places, people, or organisations.’* (Home Office, 2017, p.49)*.*

In the same vein, there have been numerous critical and empirically-grounded attempts to rebuff judicial stereotypes of children as unreliable witnesses, prone to lying, fantasy or undue influence (Cashmore and Bussey, 1996; Bala et al, 2005; Makin, 2002; Bottoms and Goodman, 1994; Hamblen and Levine, 1997). Judges have taken this advice on board and brought it to bear on their judgments and approaches to hearing and assessing children’s testimony. This body of knowledge adopts as its starting point that direct participation is positive if only judges would shift their perceptions of and approaches to children (*KS (benefit of the doubt)* [2014] UKUT 00552 (IAC)). But there is an argument that much of this jurisprudence and guidance is informed by a selective and somewhat superficial synthesis of what is, in fact, an expansive, sometimes inconsistent and by no means conclusive body of clinical and empirical evidence. This, in turn, risks perpetuating new stereotypes, exposing children who do not exhibit the typical traits ascribed to unaccompanied children to suspicion. The Home Office guidance, in particular, responds to an incapacitated and infantilised image of unaccompanied children and does little to reflect the complex idiosyncrasies and capacities of older unaccompanied claimants. Moreover, international guidance from which such information is gleaned does not even hint at the contradictions, nuances and complexities of the research. We are left, instead, with a rather crude pocket-book of child developmental psychology which, on the one hand, licenses decision-makers to be more concessionary in their credibility assessments but, on the other, attributes decision-makers (somewhat recklessly, I would argue) with the authority of a seasoned developmental psychologist. In reality, there are contradictory schools of thought in child developmental psychology regarding the testimonial reliability of younger children as compared to older children, and regarding the age thresholds for specific types of behaviour and capacities.[[25]](#footnote-25) A number of psychological studies have shown that professionals (including judges, lawyers, social workers and police officers) are no better than laypeople at predicting veracity through observing a person’s demeanour. Behavioural cues are commonly misinterpreted. As one commentator notes:

*Psychological research shows that demeanour of either an adult or a child*

*witness is a doubtful indicator of reliability. In fact, there are few specific behaviours or mannerisms that are reliable indicators of deception. Children, like adults, may be reacting to the stress of the courtroom, or their family situation, or any number of factors totally unrelated to truthfulness. Additionally, it is important to note that appearance, behaviour and body language are all heavily culturally-determined* (Driver, 2017, p.4)

The limited reach of such representations is brought into sharp focus when we consider the sheer number of unaccompanied children who are likely to fall short of its vulnerability narrative. 2017 data, for instance, reveals that 57% of unaccompanied children are 16 and 17 years old, whilst only 13% are aged less than 14 (Refugee Council, 2017). Many will have spent months if not years reaching their asylum destination, having experienced unspeakable abuse and trauma in the process. Such trajectories inevitably have an ageing effect on children, with the result that claimants commonly exhibit significantly more mature behaviour and may offer accounts that belie the child’s youth and acute vulnerabilities.

An alternative approach might be simply to acknowledge that unaccompanied children who seek asylum display an enormous range of emotions and reactions to a vast range of characteristics, circumstances and experiences. Asylum decision-makers simply do not have the clinical expertise to assess these claims in a reliable, informed way; they just have their instinct and a rather rudimentary list of child developmental factors to enable them to exercise their benefit of the doubt in a more liberal way. What this basic level of knowledge does not acknowledge, however, is that the repeated recounts of profoundly personal and traumatic experiences to virtual strangers in the full glare of the Home Office or tribunal process is, of itself, potentially harmful and, more often than not, adds nothing of particular value to other evidence.

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A high degree of caution is, therefore, needed, in the application of these guidelines, with much more emphasis, instead, on whether it is fair or appropriate to expect the child to give evidence directly at all. Whilst a lowering of the standard of proof goes some way in preventing any unfounded and disproportionately restrictive exercise of judicial discretion, there is, ultimately, no reliable replacement – at least as far as the legal assessment of their asylum claim is concerned - for rigorous, appropriate and transparent consideration of objective evidence, obtained from country reports and suitably qualified experts working in the field.[[26]](#footnote-26) This was reinforced by the Court of Appeal’s ruling in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 which reproved the first tier and upper tribunals’ failure to attach sufficient weight to the highly compelling evidence of an independent psychologist in favour of their own rather less compelling, and certainly less fair, adverse credibility assessment. The Court of Appeal, in contrast, drew on the psychologist’s evidence in concluding that the claimant’s significant learning disability significantly impeded his ability to participate effectively and fairly in the asylum process. Reinforcing its insistence on procedural fairness in the light of the participatory capacities and preferences of the individual child, Sir Ernest Ryder, Senior President of Tribunals notes:

*I recognise that this marks a failure of the system to provide sufficient and adequate protection in the asylum process for the particular requirements, needs and interests arising out of the disadvantages that the appellant has as a highly vulnerable child.  There is a consensus that the critical errors arose from the focus on the credibility of the appellant’s account and the failure to properly have regard to the objective evidence and to give it priority over the ability of the appellant to provide oral testimony…* *Likewise, the tribunals’ procedures could have been designed to ensure that the appellant’s needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.* (paras 22-23)*.*

The ruling is particularly instructive in reiterating existing practice guidance relating to participatory expectations and support for vulnerable witnesses (Tribunals Judiciary, 2008 and 2010, summarised in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, at para 31). These include: early identification of issues of vulnerability, if at all possible, before any substantive hearing; only requiring a person who is incapacitated or vulnerable to attend as a witness to give oral evidence where the tribunal determines that “the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so”; where an incapacitated or vulnerable person does give oral evidence, *detailed* provision is to be made to ensure their welfare is protected before and during the hearing (author’s emphasis); the need to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence.

Whilst the guidance, and indeed, this ruling, refers specifically to tribunal proceedings, the same principles should presumably apply to participation in Home Office interviews. To suggest otherwise would be to apply different standards and presumptions of vulnerability purely on the basis of the stage of the proceedings, which makes no sense at all.

* 1. **Promoting participation ‘at a distance’**

The ruling in *AM (Afghanistan)* clearly suggests that the primary responsibility is on the legal representative to raise concerns around vulnerability or incapacity, based on their client’s medical and personal information and to remind the decision-maker of the participatory concessions that are available under the guidance (per Ryder, para 32). With that in mind, there is much greater scope for lawyers and children to opt for alternative participation strategies and adaptations, notably by way of gathering as much factual evidence as they can to support a child’s claim on paper. The selective silencing of children may well be part of this strategy, particularly in an appeal to the tribunal where the credibility of this evidence will be rigorously contested by the Home Office. The following lawyer, interviewed for the TALE project, commented as follows:

*You really need to make a decision about whether you want the child to give evidence or not and part of that is whether the child wants to give evidence, and part of that is the decision about whether it will help the child to win the case to give evidence. So there is sometimes a danger that if the child gives evidence and then is questioned by the Home Office, they will go off into a lot of detail without necessarily thinking through what they are saying and everything that they say can then be used against them…So it’s very important for the advocate to be in control of the evidence…So you need to think very carefully, and talk to your child client about whether it’s a good idea to give evidence or not.* (Lawyer, TALE, 2017)

The notion of selective silencing jars with proponents of Article 12. But lawyers in the TALE project were not saying that their young clients were not participating in the process; quite the contrary. Rather, their reasons for being heard are resolutely connected to their ultimate desire to obtain the most secure, long-term legal status. Of course, in some cases, putting a child before the judge may be an extremely powerful tool, giving the latter first-hand insights into the acute vulnerabilities of the child (thus reinforcing the need to maximise and sustain protection in the UK) or, conversely, into the extent of the child’s linguistic and cultural integration to support a request to remain. In many cases, though, lawyers and clients alike are extremely apprehensive at the prospect of presenting the testimony directly to the Home Office or tribunal, opting instead to express the child’s views in the form of a written witness statement. This approach to participation ‘at a distance’ is proffered as a much more controlled, predictable and less traumatic means of presenting the child’s case to the decision-maker, but it is certainly not an easy option. Achieving a sufficiently (forensically) detailed written presentation of the child’s cultural, social and migration history is a time-consuming and painful process, necessitating many hours of careful trust-building and often close engagement with other counselling and welfare professionals. The practitioners interviewed for TALE pointed to the need to craft the child’s expressed views and wishes into a compelling and relevant narrative for the decision-maker. This, in their view, is entirely compatible with Article 12; giving expression to what they perceive to be the child’s ultimate wish (to remain in the UK), they feel perfectly justified in diluting or omitting aspects of children’s expressed wishes, feelings or experiences that are tangential to and potentially undermining of that claim. Indeed, all were of the view that their child clients willingly abdicated all decisions to their lawyer regarding the nature and extent of their participation, the content of their witness statement and the overall strategic approach to ‘winning’ their case. Importantly, this is regarded by many practitioners as flowing from rather than undermining the lawyer’s efforts to actively engage the child in decision-making from the outset of the case.

Limiting children’s participation to the more controlled confines of written witness statements may not always be an option, however, particularly during the earlier stages of the process at Home Office interview stage. Current Home Office guidance asserts that *‘in most cases, it will be appropriate for an interview to take place for children over 12 as it is an opportunity for the child’s voice to be heard directly.’* (Home Office, 2017, p.39).This guidance, ostensibly, seems entirely compatible with Article 12, insofar as interviewing the child (with 12 years old identified as an appropriate age threshold) is presented as supporting the child’s right to be heard. But there are two aspects of the guidance that call into question its authenticity as a children’s rights measure. First, the decision as to whether or not the child should be interviewed directly is entirely at the discretion of the Home Office, not the child. It is entirely plausible, then, for the Home Office to compel a child to be interviewed. Indeed, the Home Office guidance asserts that only in the most exceptional cases will a decision-maker assess the case of a child over the age of 12 in the absence of an interview on the information already available (Home Office, 2017, p.45). This flies in the face of the UN Committee’s guidance on the operation of Article 12 which states that: *“The child…has the right not to exercise this right. Expressing views is a choice for the child, not an obligation.”* (GC 12, para 16).

Of course, the counter argument to this is that where the stakes are so high in terms of the costs to the public purse of supporting claims for asylum, particularly by unaccompanied children, and the potential opportunities for abuse of the system are perceived to be so great, it is both reasonable and necessary to test the robustness of a child’s evidence through formal cross-examination. Certainly, parallels might be drawn with the treatment of young offenders in the criminal justice process where the opportunity to subject the child to cross-examination remains an equally strong feature in the interests of upholding public security, achieving justice for alleged victims, and encouraging the child to confront their wrongdoing as an initial step towards their rehabilitation. However, even in criminal justice proceedings specific procedural adaptations can be made to ensure that the participation of children in interviews and hearings does not exacerbate existing vulnerabilities (MoJ, 2011).[[27]](#footnote-27) It is entirely conceivable, therefore, that children can be simultaneously protected as rights-holders and called upon to justify their claims in asylum proceedings as another branch of public law. But such a comparison belies the important differences between criminal justice process and immigration proceedings. Unlike in criminal proceedings, unaccompanied children are subject to asylum proceedings because of alleged persecution, displacement, and often the most acute forms of torture, exploitation and neglect. They are the victims, not the perpetrators; they should be the objects of support and redress, not retribution. Moreover, the two groups might share a common need for recovery and rehabilitation, but for entirely different purposes and from quite different experiences and life trajectories.[[28]](#footnote-28) There is arguably a much greater probability that exposing children to the full glare of asylum questioning, at such a fragile time in their migration journey will significantly compound their vulnerabilities (O’Connell Davidson, 2011), not only by subjecting them to the trauma of recounting what may be difficult and painful experiences, but by placing them on the evidentiary back foot in what is, for all intents and purposes, an interrogation.

* 1. **Why compulsory interviews need to be challenged**

In the absence of more rigorous monitoring and sanctioning of poor Home Office interview practice, legal representatives could do more to present a children’s rights-based case for an exemption to being interviewed where the risks outweigh the potential benefits. Certainly, even where procedural safeguards are in place in principle, there are real concerns as to the appropriateness of compelling children with such acute vulnerabilities to be interviewed in formal proceedings at all unless it is resolutely with a view to putting in place welfare provision. Certainly, up until 2002, all unaccompanied children were exempt from being interviewed, and instead completed a written statement (Crawley, 2010). Other than providing an opportunity to cross-examine the child, what can possibly be gained from a face-to-face interview that cannot be gleaned from the information proffered by the child, their legal representatives and other relevant family members and professionals through paper-based evidence and previous (often multiple) interviews? The Upper Tribunal has already acknowledged as much in relation to under 12s (see for example, *ST (Child asylum seekers) Sri Lanka* [2013] UKUT 00292 (23 May 2013) and the Tribunals’ practice guidance on taking evidence from children and other vulnerable witnesses (2008; 2010)). There are equally compelling reasons for protecting over-12s as much as younger claimants from such encounters. In fact, in other legal contexts (such as family proceedings), the default position is to *preclude* children from participating directly in formal decision or judicial processes, precisely because of concerns that it will do more harm than good.[[29]](#footnote-29) Whilst a blanket exclusion on participation is no more of a solution than a compulsion to participate, the disparity between asylum proceedings and other types of legal proceedings illustrates how seemingly intractable judicial attitudes towards children’s vulnerability, accountability and agency can shift depending on the legal sub-context and the wider public policy and political landscape.

Common to all legal proceedings is the imperative to act in children’s best interests, an objective that can only be served if children are heard in a way that is meaningful and not unduly damaging to their welfare. Indeed, the correlation between protecting the procedural, participatory rights and welfare (best interests) of children in asylum proceedings, and actually arriving at the truth, are affirmed by Black, LJ in *AN and FA [2012]EWCA Civ 1636* in her assertion that“…procedural and substantive safeguards are the most effective means of obtaining the child’s full and reliable account of the reasons why he is in the UK and should not be removed” (para 79). Her subsequent comments cast significant doubt on the extent to which the Home Office’s insistence on and approach to interviewing children really do achieve the primary objective of promoting their best interests:

*I have doubts as to the logic of the approach taken in the UKBA's policies in relation to the interviewing of children and I consider that a rigid application of them risks producing an outcome for the individual child which is not compatible with the requirement to have the interests of the child a primary consideration when making decisions about his future whilst, of course, also ensuring effective immigration control.* (para 124)

Of course, the extent to which more routine requests for exemption from presenting oral evidence and a greater reliance on paper-based witness statements offers a better route to presenting the voice of the child depends, not just on the preferences of the child, but on the quality of the child’s legal representation, and their ability to elicit the necessary depth of information for a suitably compelling and robust evidence statement. The current legal advice landscape does not exactly inspire confidence though. Lawyers, in particular, have been censured by academic commentators and activists for their inconsistent, ill-prepared and, in many cases, ill-informed advice and representation on behalf of unaccompanied minors. While some of this may be attributed to the complexities of an ever-changing legal framework,[[30]](#footnote-30) the availability of appropriately qualified, sufficiently experienced legal support has also been impaired by cuts in legal aid by virtue of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 (Valdez, 2012). Even though claims for asylum protection remains within the scope of legal aid funding, the withdrawal of legal aid from most other areas of immigration casework has precipitated a reduction in lawyers prepared to undertake such specialised work.[[31]](#footnote-31) This, in turn has increased reliance on the goodwill of an already overburdened minority of specialists in the not-for-profit sector, or worst of all, consignment to the case loads of underqualified non-specialists (Woodhouse and Meyler, 2013; Wilding and Dembour, 2015, at p.31). Thus, in the absence of any U-turn on the scope of LASPO, more rigorous training and capacity building is urgently needed for those working in the field of immigration and asylum, more stringent monitoring of those who represent children, in particular, coupled, in some cases, with something of a paradigm shift on the part of legal practitioners as to what a children’s rights-based approach to legal practice actually requires of them.[[32]](#footnote-32)

**Conclusion**

This article has sought to expose the persistent gulf between the formal commitment to children’s rights in international, European and domestic law and policy and the lived experiences of migrant children. The evaluation of unaccompanied children’s rights and experiences of participation have exposed the awkward ‘fit’ of current interpretations of Article 12(1) UNCRC with the reality of the UK asylum process, both procedurally and in the factors that inform substantive decision-making. The burgeoning body of empirical research and case law points, time and time again, to a failure of frontline decision-makers to create the conditions under which children can express their wishes and feelings with impunity. Perhaps most worrying is the way in which the children’s participation– the bedrock of children’s rights – can so easily become the rock on which their asylum claims perish, with the due weight obligation operating in an absurdly counterintuitive way. Jurisprudential and policy progress towards sensitising asylum proceedings, manifested notably in guidance on interviewing children and the burden of proof principle, are to be welcomed. The discussion has also pointed to less formal, alternative ‘strategies’, developed by children and their legal representatives, to reclaim their agency and to position children as more positive protagonists in their own asylum claims. The effectiveness of such approaches, however, remain very much at the discretion of individual decision-makers.

The problem surely lies in the fact that there is a fundamental mismatch between the participatory rhetoric underpinning domestic asylum law and policy and the explicitly ‘hostile’ immigration regime in place in the UK. Even the claims of children are at the mercy of heavily circumscribed conditions for entry and residence, coupled with severely contracted resources to address what may be extensive social and welfare needs. Other narratives stack up against child asylum seekers too (most of which are not supported by any persuasive evidence): that borders need to be ever more secure to destabilise the activities of migrant terrorists; that asylum seeking boys are vulnerable to radicalisation either prior to or following entry into and residence in the UK; and that an overly accommodating approach to unaccompanied children is open to strategic abuse by other family members who might later qualify for family reunification (House of Lords, 2016). Such perceptions, taken together, represent something of a Goliath to David’s unaccompanied migrant child, allowing for little flexibility in decision-making in the absence of compelling, credible evidence. Even with the most express procedural and substantive concessions on paper to accommodate the distinct vulnerabilities of unaccompanied asylum-seeking children, front line decision-makers, specifically Home Office staff, are simply unable to reconcile their exclusionary brief with the ethic of empowerment, agency and welfare envisaged by Article 12(1) UNCRC. Consequently, we are left with an asylum process that persists in compounding the very vulnerabilities it should seek to address.

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1. \* [stalford@liverpool.ac.uk](mailto:stalford@liverpool.ac.uk). I am enormously grateful to a number of colleagues for the valued in-depth discussions and feedback that have helped shape the ideas presented in this article, notably: Aoife Daly; Frances Meyler; Sarah Woodhouse; Laura Lundy; Paula Case; Samantha Currie; and Jo Bezzano. Any remaining errors or omissions are my own. [↑](#footnote-ref-1)
2. Limited exceptions include Liden, H. and Rusten, H. ‘Asylum, Participation and the Best interests of the Child: New Lessons from Norway’ *Children and Society,* Vol 21 (2007) 273-283; Ottosson, L. and Lundberg, A. ‘People out of place’? Advocates’ Negotiations on Children’s Participation in the asylum application process in Sweden’ *International Journal of Law, Policy and the Family,* 27(2) (2013) 266-287; These primarily refer to children’s participation in immigration proceedings when they are accompanied by other family members. Shamseldin, I. ‘Implementation of the UN Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum-Seeking Children: Findings from Empirical Research in England, Ireland and Sweden’, *International Journal of Children’s Rights,* Vol. 20(2012) 90-121, at p.99touches briefly on participation in the context of unaccompanied asylum-seeking children’s claims. [↑](#footnote-ref-2)
3. The UK Border Agency instruction ‘Arrangements to Safeguard and Promote Children’s Welfare in the United Kingdom Border Agency’ sets out the key principles to take into account in all Agency activities which include: fair treatment which meets the same standard a British child would receive; the child’s interests being made a primary, although not the only consideration; no discrimination of any kind; asylum applications are dealt with in a timely fashion; identification of those that might be at risk from harm. [↑](#footnote-ref-3)
4. For these purposes, an unaccompanied asylum-seeking child is defined as someone who is, or appears to be, less than 18 years of age, is submitting an asylum petition on his or her own behalf, has no adult carer with legal responsibility for them, and is in need of the care and protection of the child welfare system of the host country while their petition for international protection is assessed and resolved (UNHCR, 1994; Connolly, 2014, p.333-334.) [↑](#footnote-ref-4)
5. The number of unaccompanied children present in the EU territory in the same period who did not seek any international protection is unknown but expected to be at least equivalent (House of Lords, 2016). [↑](#footnote-ref-5)
6. Compare this with Germany where approximately 35,000 claims for asylum (approximately 57%) were made by unaccompanied children. [↑](#footnote-ref-6)
7. See for instance Communication From The Commission To The European Parliament And The Council: The Protection Of Children In Migration COM (2017) 211 final which details the EU’s priorities and recommendations for protecting and promoting the rights of unaccompanied children; and EU Guidelines for the Promotion and Protection of the Rights of the Child – Leave No Child Behind (2017) [↑](#footnote-ref-7)
8. For a detailed and insightful analysis of how best interests can be used (and, indeed, undermined) in children’s claims for international protection, see Meyler and Morrish, 2017; Pobjoy, 2015; and Smyth, 2015. [↑](#footnote-ref-8)
9. Note, however, Article 6 of the Dublin III Regulation (EU) No 604/2013, OJ L 180/31 regulating unaccompanied children’s reunification with family members in the territory of the EU, which explicitly provides that children’s view should be taken into account in assessing their best interests, in accordance with their age and maturity. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers., Art 19 (the Reception Conditions Directive, OJ) 9 and Directive 2004/83/EU of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted, Art 30 (the EU Qualification Directive), require Member States ‘as soon as possible’ to ‘take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation’. Similarly, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Arts 17(2) and (3).(the EU Procedures Directive) guarantees to unaccompanied minors (at least to those under 16) that Member States shall: (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. This ‘guarantee’ is now incorporated into the Immigration Rules for all children (para 353ZA). The recast versions of these directives reinforce the representation rights of child asylum seekers but, as the UK has not opted into them, are not binding in this jurisdiction. [↑](#footnote-ref-9)
10. EU Trafficking Directive (2011/36/EU) Art 15(3)(a) [↑](#footnote-ref-10)
11. EU Trafficking Directive (2011/36/EU) Art 15(3)(b) [↑](#footnote-ref-11)
12. Reception Conditions Directive (Art 19(4)); EU Procedures Directive (Art 17(4));EU Trafficking Directive (2011/36/EU) Art 15(3)(c); Immigration Rules (Part 11, para 352) [↑](#footnote-ref-12)
13. This reflects the government’s position that lone children should not be returned unless there are adequate conditions for them to be looked after in the country of return. [↑](#footnote-ref-13)
14. Humanitarian protection is granted to a person who does not meet the criteria for refugee status under the 1951 Refugee Convention but to whom return is deemed to pose a serious risk. Persons who are granted humanitarian protection will normally be granted leave for five years. At the end of the five years, the individual can apply for indefinite leave to remain (ILR). [↑](#footnote-ref-14)
15. Discretionary leave is granted to a person who the Home Office has decided does not qualify for refugee status or humanitarian protection but where there are other strong reasons why the person needs to stay in the UK temporarily. This used to be available to unaccompanied children for three years or until they turned 17½, whichever was the shortest, but was replaced by the child-specific UASC status, introduced in April 2013 and incorporated in Rule 352ZC, Part 11 of the Immigration Rules. [↑](#footnote-ref-15)
16. Ascertaining and acting upon the child’s welfare in practice falls to welfare professionals and civil society organisations tasked with facilitating intermediate access to housing, care, education, family reunification and healthcare treatment, for instance. Whilst the participatory nature of these (non-legal) welfare processes is beyond the scope of this paper, serious concerns prevail as to whether they promote participatory practices in a way that adheres to the obligations and spirit of Article 12. See in particular, Chase, 2017 and Abrams, 2018. [↑](#footnote-ref-16)
17. Put yourself in our shoes, pp. 83-84 and 91-94 [↑](#footnote-ref-17)
18. According to Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees, a person who has reason to fear persecution in their country because of their race, religion, nationality, membership of a particular social group, or political opinion, should be recognised as a refugee. [↑](#footnote-ref-18)
19. *Mk (Afghanistan) By His Litigation Friend, Fk v The Secretary of State for the Home Department*, 15 February 2017, [2017] EWCA Civ 72 [↑](#footnote-ref-19)
20. A notable exception is Mr Justice Collins judgment in *JA (child - risk of persecution) Nigeria* [2016] UKUT 560 (IAC) [↑](#footnote-ref-20)
21. See, in particular, *AA (Unattended children) Afghanistan CG* [2012] UKUT 00016; *TN (Afghanistan) [2014] 1WLR 2095; HK (Afghanistan)* [2012] EWCA Civ 315; *DS (Afghanistan)* [2011] EWCA Civ 305 and *ZJ (Afghanistan)* [2008] EWCA Civ 799 [↑](#footnote-ref-21)
22. ### For a detailed consideration of the application of the due weight principle in a range of other contexts see Daly, A (ed) (2018) ‘Special Issue: According due Weight to Children’s Views’, *International Journal of Children’s Rights*, 26(1).

    [↑](#footnote-ref-22)
23. Note that the Home Office statistics on age disputed cases do not include the category of those applicants who claim to be children but who are treated as adult because in the opinion of an Immigration officer “their physical appearance and/or general demeanour very strongly indicates that they are significantly over 18 years and no other credible evidence exists to the contrary” (Refugee Council, 2017). There have been reports of successful compensation claims totalling over £2m by scores of children who were unlawfully detained following erroneous age assessments (Taylor, 2012). [↑](#footnote-ref-23)
24. s.67 of the Immigration Act 2016, introduced following a high profile campaign by Lord Dubs, enabled the Secretary of State to make arrangements to relocate to the UK and support a specified number (480) of unaccompanied refugee children from other countries in Europe (Home Office, 2018). The scheme is restricted to those who were in Europe before 20 March 2016, so as not to incentivise others from making the journey from Africa or the Middle East [↑](#footnote-ref-24)
25. For a very comprehensive review see Driver, 2017. [↑](#footnote-ref-25)
26. For guidance on this point, see *JL* (medical reports – credibility) (China) [2013] UKUT 00145 (IAC), at [26] to [27]). For a good example of how expert testimony is used to inform considerations as to the potential impact of return on the child, see *The Queen on the application of RSM, a child by his litigation friend ZAM and ZAM v Secretary of State for the Home Department, The Queen on the application of RSM, a child by his litigation friend ZAM and ZAM v Secretary of State for the Home Department*, [2017] UKUT 00124 (IAC) [↑](#footnote-ref-26)
27. For a critical analysis of children’s participation and autonomy in the context of criminal justice, see Hollingsworth, 2013; and Arthur, 2016. [↑](#footnote-ref-27)
28. Of course, placing children in neatly defined legal categories on the basis of presumed experiences, culpability and need presents a grossly oversimplified and unhelpful response to the complexities of children’s lives. In reality, a number of cases are characterised by a complex hybridity of issues involving, for instance, asylum seeking children who are implicated in criminal activities, or those in the criminal justice system who have experienced significant abuse – see further Goldson, 2015; and **Goldson and Muncie, 2015** on this point. [↑](#footnote-ref-28)
29. Adducing vulnerable children’s evidence in family proceedings is governed by Family Procedure Rules (FPR) 2010 which seeks to strike a balance between optimising the quality of the child's evidence to assist in determining the truth, whilst minimising any damage that being exposed to such processes might pose to the child’s welfare. See further McFarlane LJ in Re E (A Child) (Evidence) [2016] EWCA Civ 473, [2017] 1 FLR 1675, at [47] and [48]; and per Lady Hale in Re W (Children) (Abuse: Oral Evidence) **[2010] UKSC,**12 (discussed in Stuart, 2016). This paternalistic approach is so endemic that even mature children who *wish* to give direct evidence in child protection proceedings are precluded from doing so. See for example *P-S (Children)* [2013] EWCA Civ 22. In Court of Protection proceedings, in addition to ‘giving evidence’ (subjecting the individual concerned to the rigours of cross examination), there is another option which involves them ‘giving information’ to the court. This option does not involve ‘participation at a distance,’ but enables the individual to be heard by the judge directly without cross examination. See further *A Local Authority v AB* [2016] EWCOP 41. [↑](#footnote-ref-29)
30. The rate of law-making in immigration surpasses any other social policy area, with six different Parliamentary Acts introduced since 1999, accompanied by dense and ever-changing policy guidance [↑](#footnote-ref-30)
31. Worryingly, research published by Coram Children’s Legal Centre estimates that there are several thousand children in local authority care in the UK with potential immigration claims that are outside the scope of legal aid. Its London-based Migrant Children’s Project alone advised 234 separated children and young people with an out-of-scope immigration issue over the past year. (Coram Children’s Legal Centre, 2018, p.18). [↑](#footnote-ref-31)
32. Examples of practitioner training materials on ‘child friendly justice’ are now emerging, including that produced as part of the TALE project referred to above. See further: http://www.project-tale.org/ [↑](#footnote-ref-32)