



INTRODUCTION

Refugee children are vulnerable due to their status as children and refugees. In some that do not parties to the 1951 Convention Relating to the Status of Refugees (CRSR). It is difficult for refugee children to claim protection and enjoy their rights. As the principle of the best interests of the child (BIC) is a fundamental rule in children protection, its application should extend to refugee children. This study aims to show that the principle has become a customary international law and consequently a basis of state obligation to protect refugee children present in its territory when no express legal protection is available. It first show the condition of refugee children in states where express protection is absent and followed by why the BIC rule is a practical tool of protecting refugee children by looking at the parameter of protection under the rule. Next it presents evidence of formation of the BIC rule as international custom. The study argues that the BIC rule conforms to the requirement of international custom and challenges are expected. Utilization of the BIC principle in state response would promote refugee protection and the enjoyment of children's rights.

RESEARCH QUESTION

How can states which are not parties to the CSRH be compelled to provide protection to refugee children?

CONDITION OF REFUGEE CHILDREN IN NON CONTRACTING STATES

Treated as illegal migrant and not as children first.	Without express legal protection.	Temporary refuge in host states.
Prolonged stay in refugee camp.	Such extra armed detention deprivation.	Subject to harassment, abuse and exploitation.
Quality and quantity being uncertain.	Consciousness of armed forces.	No access to education & healthcare.

No access to justice system. Xenophobic.

BEST INTERESTS OF THE CHILD

Means considering the child's best interests in every decision affecting a child's life is made. Also known as the welfare of a child and "best interests" doctrine.

United Nations Convention on the Rights of the Child, 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."

BIC as substantive right: every child has right to have his/her best interests assessed and given primary consideration in the decision-making. The BIC must be held as a primary consideration along with other compelling interests.

BIC to be used as a fundamental and interpretative legal principle to allow interpretation of legal provisions that serve the BIC effectively.

As a rule of procedure, a decision that children must make evaluation of its impact on children as part of the decision-making process.

Duty to consider the child's best interests on the administrative and legislative. Integrate the general principles of the BIC rule into legislative measures, budgets, judicial and administrative decisions so that the BIC are not compromised by state actions and decisions that might contradict each other.

APPLICATION OF BIC AT ALL LEVELS OF REFUGEE CYCLE- EXAMPLE OF BENEFIT TO REFUGEE CHILDREN

During flight: protection of separated and unaccompanied children, assistance for distressed women, prohibition against human trafficking.

At the border of host state: allowed to cross border, allowed to disembark, vessel and state treatment, treated as children first, protection against deportation and deportation.

Refugee status determination: consideration of child's best interests, persecution, consideration of child's individual persecution, instead of a business decision based on family or community rights to participate and express their views.

During settlement: enjoyment of basic rights including health care, education and protection of family unity, prohibition on forced deportation, and non-refoulement and adoption.

PROOF OF CUSTOM- STATE PRACTICE AND OPINIO JURIS

Best interests: Provisions in State National Legislation Indicates (Nideseemed and Representative Practice)

States from all over the world have incorporated the principle in their national legislation and 182 state parties to the UNCHR have incorporated the provisions of BIC in their local legislation with 33 countries explicitly give a constitutional guarantee to the rule.

I. The Requirement to Give the BIC Primary Consideration in International Treaties Has Not Been Objected to

No objection or opposition has been published, aired, recorded or written on the rule where it requires the principle of the BIC as primary consideration.

II. Judicial Decisions Relating to BIC

Australia- *Alm v Minister for Immigration & Multicultural Affairs* [2001] 107 FCR 133; *Minister for Immigration & Ethnic Affairs v Teoh* [1995] 125 CLR 473.

UK- *ZH (Iranian) v Secretary of State for the Home Department* [2011] UKSC 4; *N (Iran) (Application of AG and Others) v Secretary of State for the Home Department* [2015] UKSC 10.

New Zealand - *Re O. and D. (Stateless Persons) v R (Chamberlain) & others* [2011] NZFLR 573; *Re v Minister of Immigration* [2008] 2 NZLR 565.

Singapore- *Aze v Aze* [2012] SGHC 128; *Re Aze* [2007] SGCA 12.

Canada- *Re Doe* [1990] 2 SCR 350; *Sewer v Canada (Minister of Citizenship and Immigration)* [1992] 2 SCR 317; *Almeida v Canada (Citizenship and Immigration)* [2012] FC 1407.

India- *Ashtive (Rajeev) Mahila (Tina) and Ashtive (Sai) v Attorney-General* [2014] 1 KR 70 49.

Sri Lanka- *Udayaraj v Udayaraj* (1989) 1 SLR 113.

ECHR- *McMahon v Finland*, 23 September 1994, Series A no 296-A.

HCGR- *AbuNajeh and Shawk v Switzerland* [GC] No. 415/07, ECHR 2010.

V. State Legislation as Recognition of the Rule

State practice in creating statutes containing the rule or principle of the BIC is solely an opinio juris. States consider themselves bound by the principle of the BIC (whether or not it flows the obligation of the UNCR) thus, its inclusion in some law displays the state's sense of obligation because the state makes laws for everyone to follow, including its agencies.

CONCLUSIONS

- Refugee children are at risk of abuse, mistreatment, and denial of rights in non-contracting states.
- The BIC is a realistic tool to provide protection for refugee children.
- The BIC has become customary international law. There are clear and strong support for the assertion that the principle of BIC has reached customary status.
- All states are compelled to consider the BIC of refugee children.
- BIC consideration at all level of refugee cycle is required to protect refugee children.



REFERENCES

Christie, A. 'The Best Interests of the Child in the UK Immigration Law' (2018) 22 *Human Rights L.J.* 15.
 Dausab, Y. 'The Best interests of the Child in Omani O.R. (pp4) (Ed). *Children's Rights in Muscat* (Muscat: Al-Nahda 2007) 147.
 Cohen, L. 'Mining the Foundations of the BIC Standard in American Jurisprudence' (2014) 10 *J.L. Form. Stud.* 357.
 Suppak, D. J. (2012). *Refugee Children in Malaysia and the Customary International Law*. Ph.D. Thesis, University of Birmingham UK.
 Thomson, D. B. 'Kids Will Be Kids - Reconciling Conceptions of Children's Rights Underlying Immigration Law' (2021) 63 *Orin St. L.J.* 979-986.
 Walker, R. M. N. & Imortola, F. A. (2014). *The Best Interests of The Child in Immigration And Asylum Process: The Case of ZH (Iranian) v Secretary of State for the Home Department* (2011) 31 *Child Legal Stud. J.* 46-48.
 Wu, J. 'The Concept of the "Best Interests" in Terms of the United Nations Convention on the Rights of the Child' in Michael Freeman and T. Weirman (eds), *The Ideologies of Children's Rights* (Martinez-Niehoff, Publishers Dordrecht 1992) 129.
 Zermatten, J. 'The Best interests of the Child: Principles, Legal Analysis and Practice' (2016) 15 *Int'l J. Child. Res.* 453.

POSTER PRESENTATION:
REFUGEE LAW INITIATIVE 2nd ANNUAL CONFERENCE,
5-7 JUNE 2017, UNIVERSITY OF LONDON, UK