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# Definitions

**Asylum seeker** - A person who has applied to the government of a country other than their own for protection or refuge ('asylum') because they are unable or unwilling to seek the protection of their own government. An individual is referred to as an 'asylum seeker' in the UK if he/she has lodged a claim for asylum with the Home Office and is still waiting to see if that claim will be granted, or has an appeal outstanding.

**Asylum Support** - Destitute adult asylum seekers and their families are not eligible to receive mainstream welfare benefits, but can apply to the Home Office for accommodation and/or support with subsistence. This support was previously overseen by the National Asylum Support Service and referred to as NASS, but it is now 'Asylum Support'.

**British citizenship** - British citizenship provides the right to live in the UK and leave and re-enter at any time. Today, British citizenship can be acquired by birth (if at the time of birth either parent is a British citizen settled in the UK), descent (for a person born abroad, if either parent is a British citizen at the time of birth) or naturalisation.

**Child** - A child is defined by the 1989 United Nations Convention on the Rights of the Child and the United Kingdom's Children Act 1989 as a person below the age of 18 years.

**Deportation** - When a person is removed on the grounds of public policy, health or safety. An individual may be deported if convicted of a criminal offence and receives a custodial sentence of 12 months or more. Deportation is not the same as the 'administrative removal' of those who are simply 'unlawfully present in the UK'.

**Destitution** - The government defines an individual as destitute if they do not have adequate accommodation or any means of obtaining it, or if they cannot meet their 'other essential living needs'.

**First-tier Tribunal (Immigration and Asylum Chamber)** - Established in 2010, alongside the Upper Tribunal (Immigration and Asylum Chamber), the First-tier Tribunal (Immigration and Asylum Chamber) is an independent Tribunal dealing with appeals against decisions made by the Home Secretary and his/her officials in immigration, asylum and nationality matters.

**Home Office** - The Home Office is a ministerial government department that leads on immigration and passports, drugs policy, crime policy and counter-terrorism. In March 2013, the Secretary of State had announced that the UK Border Agency would be disbanded, therefore the term 'Home Office' is used throughout this report to refer to immigration services.

**Immigration Rules** - The Immigration Rules are detailed statements of policy with which the Secretary of State for the Home Department must comply. They do not have the force of an Act of Parliament or Statutory Instrument.

**Leave to remain** - The permission given by the Home Office to someone allowing them to stay in the UK. Indefinite leave to remain can be granted, or leave can be limited as to time and may contain various prohibitions (on working or claiming 'public funds').

**National Referral Mechanism (NRM)** - The National Referral Mechanism (NRM) is a framework for identifying victims of human trafficking and ensuring that they receive the appropriate care. Authorised agencies, such as the police, Home Office, social services and certain NGOs, who encounter a potential victim of human trafficking, can refer them to the NRM.

**No recourse to public funds** - No recourse to public funds (NRPF) is a term used for people who are subject to immigration control and have no entitlement to welfare benefits or to public housing.

**Ordinarily resident** - A person is found to be 'ordinarily resident' if they are living voluntarily in a country for settled purposes 'as a part of the regular order of his life for the time being.' The residence has to be lawful and not in breach of the immigration laws.

**Overstay** - A person who was lawfully in the UK but whose leave to remain has now expired and who did not apply for an extension of that leave while it was still current (or who applied for an extension but whose application was refused)

**Primary healthcare** - Healthcare in the UK is divided into 'primary' and 'secondary' services. Primary care is the first point of professional contact for patients in the community and includes, among others, general practitioners (GPs), dentists and opticians.

**Refugee** - A refugee is a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...' as set out in the United Nations Refugee Convention 1951.

**Secondary healthcare** - Healthcare in the UK is divided into 'primary' and 'secondary' services. Secondary care is specialised treatment, which is normally carried out in a hospital.

**Separated/unaccompanied child** - A separated child is a child who has been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. The Home Office definition of an unaccompanied asylum seeking child is 'a person under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age' who 'is applying for asylum in their own right; and is separated from both parents and not being cared for by an adult who by law or custom has responsibility to do so'.

**UK Border Agency (UKBA)** - The UK Border Agency was an executive agency of the Home Office and the government body responsible for managing immigration control in the UK, including the processing of applications for permission to stay, citizenship and asylum. In March 2013, the Secretary of State had announced that the UKBA was to be disbanded. The term 'Home Office' is used throughout this report.

**Undocumented migrant** - An individual who does not have a regular immigration status, in that they do not have permission (leave) to enter or remain in the UK. Undocumented migrants may also be referred to as 'irregular' or 'illegal' migrants.

**Upper Tribunal (Immigration and Asylum Chamber)** - The purpose of the Upper Tribunal is to hear and decide appeals against decisions made by the First-tier Tribunal in matters of immigration, asylum and nationality.

**Young person** - In this report, a young person is defined as anyone aged between 15 and 24 years of age, in keeping with the United Nations definition of 'youth'.

# Part 1: Undocumented migrant children

## 1.1 Introduction

*'Undocumented children are triply vulnerable, as migrants, as persons in an irregular situation and as children. The laws applicable tend to tackle their situation from a migration and status standpoint, and not from a child viewpoint. Even when there are laws providing rights and protection to undocumented migrant children, there are often huge barriers in practice, preventing them from enjoying their rights and protection. These barriers, include, inter alia, administrative obstacles, linguistic hurdles, the complexity of the administrative, judicial and other systems, discrimination, lack of information, fear of being reported, etc. To these barriers one can add that the enjoyment of most rights are interlinked with other rights, so whilst one might provide for the right of education, the absence of housing or health care will seriously prejudice the enjoyment of that right.'*<sup>1</sup>

Public concern about immigration is currently at the highest level seen for a number of years. In May 2013, one poll found that 57% of those surveyed ranked 'immigration' among the top three most important issues currently facing Britain, a rise of 11% compared to when the question was asked 12 months previously.<sup>2</sup> In another poll, conducted in December 2012, 80% showed support for the current policy to reduce net migration and 67% perceived immigration as 'having been a bad thing' for Britain.<sup>3</sup> Even allowing for the uncertainties inherent in measuring public opinion, the evidence available clearly shows high levels of opposition to immigration in the UK,<sup>4</sup> with the widely held belief that there are too many migrants in the UK, that fewer migrants should be let in, and that legal restrictions on immigration should be tighter.<sup>5</sup> A number of concerns stem from the perception that

migrants claim benefits or use public services without having contributed in return, and are adding pressure on schools and hospitals.<sup>6</sup>

Past and current government policy has reacted to this public concern in a number of ways, and a large amount of legislation has been passed in the area of immigration and asylum law over the past two decades.<sup>7</sup> The current government is committed to reducing net migration to 'tens of thousands',<sup>8</sup> having introduced stricter border controls and tighter criteria for permitting non-European Economic Area (EEA) migrants to enter and remain in the UK. In particular, current policy is focussed on 'illegal immigration', where individuals enter or are living in the UK unlawfully (this group are referred to in this report as 'undocumented migrants').

1 Council of Europe, *Undocumented migrant children in an irregular situation: A real cause for concern*, 2011, p 5, quoted in S. Lengard and M. LeVoy, *Children First and Foremost: A guide to realising the rights of children and families in an irregular migration situation*, Platform for International Cooperation on Undocumented Migrants (PICUM), 2013 at <http://picum.org/picum.org/uploads/publication/Children%20First%20and%20Foremost.pdf>

2 W. Jordan, 'Immigration concern hits three year high', *yougov.co.uk*, 8 May 2013, at <http://yougov.co.uk/news/2013/05/08/immigration-concern-hits-three-year-high/>

3 P. Kellner, 'The perilous politics of immigration', *yougov.co.uk*, 17 December 2012 at <http://yougov.co.uk/news/2012/12/17/perilous-politics-immigration/>

4 The Migration Observatory, *UK public opinion towards immigration: overall attitudes and level of concern*, 23rd February 2012, at <http://www.migrationobservatory.ox.ac.uk/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-concern>

5 *ibid.* Other recent polls are available at Ipsos Mori, at <http://www.ipsos-mori.com/researchpublications/researcharchive/2833/Too-Many-Immigrants.aspx> and at <http://www.ipsos-mori.com/researchpublications/researcharchive/2972/Global-dvisor-Survey-reveals-negative-attitudes-to-immigration.aspx>

6 Lord Ashcroft, *Small island: Public opinion and the politics of immigration*, 2013, at <http://lordashcrofthpolls.com/wp-content/uploads/2013/08/LORD-ASHCROFT-Public-opinion-and-the-politics-of-immigration2.pdf>

7 There have been six major pieces of asylum and immigration legislation since 1999, the most recent being the *Borders, Citizenship and Immigration Act 2009*. At the time of writing, a new Immigration Bill had just been published.

8 See the Conservative Party website at [http://www.conservatives.com/Policy/Where\\_we\\_stand/Immigration.aspx](http://www.conservatives.com/Policy/Where_we_stand/Immigration.aspx). Also House of Commons Library, *Immigration and Asylum Policy: Government plans and progress made*, 29 July 2013 at <http://www.parliament.uk/briefing-papers/SN05829>

## GROWING UP IN A HOSTILE ENVIRONMENT

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'Illegal immigration' is thought to be particularly unpopular with the public and both the coalition government and the opposition stress the need to tackle this issue.<sup>9</sup> The approach, taken by previous governments, of introducing increasingly restrictive measures for those already in the UK has continued, with further commitment to making 'the housing system, the welfare system, the legal aid system, ... the health system – fit in with our immigration policy'.<sup>10</sup>

This policy response appears to be based on the belief that creating a 'hostile environment' for migrants in the UK is an effective means of encouraging them to leave<sup>11</sup> and that it is Britain's 'generosity' to migrants that attracts them to the UK.<sup>12</sup> Despite the lack of empirical evidence demonstrating that access to services plays a determinant role in attracting migrants to the UK,<sup>13</sup> or that 'we can encourage people to leave by being nasty',<sup>14</sup> much policy is predicated on the belief that migrants' access to public services must be restricted to reduce so-called 'pull' factors. As a result, the past year has already seen the refusal to increase asylum support levels in line with inflation,<sup>15</sup> the removal of free legal advice and representation for almost all immigration cases and the tightening of the Immigration Rules on long residence,<sup>16</sup> as well as proposals to severely restrict access to healthcare and private housing for certain groups of migrants.

Our research and experience show that this tougher stance is having a significant and damaging impact on children in the UK. Undocumented migrant children, who live in the UK but without regular immigration status, are often unable to access appropriate education, healthcare and support as a result of their immigration status, leaving them cut off from society and in many cases facing extreme poverty. At the same

time, they are often unable to either return to their (or their parent/s') country of origin, or to take the necessary steps to regularise their status, even when they have strong claims for remaining in the UK. The former may be due to ongoing fear and protection needs; the latter due to lack of awareness of their legal options, inadequate or unavailable legal advice, and prohibitive Home Office application fees. This circular problem, where immigration status leaves 'unreturnable' children and young people in 'precarious situations with no access to basic social rights'<sup>17</sup> but the current asylum and immigration system does not sufficiently allow for individuals to resolve their immigration issues, is one that must be addressed with great urgency if the UK is to fulfil its legal obligations towards children.

At a time of widespread cuts and hardship across the country, undocumented children, an already marginalised group, are bearing the brunt of many government measures, either through direct targeting or because of failure to assess the impact that changes have on children.<sup>18</sup> The reduction of resources and funding available to service providers has led to a redefining of priorities and produced 'a new hierarchy of deserving and undeserving beneficiaries',<sup>19</sup> with young undocumented migrants seen as not entitled to the same treatment as other children and young people in the UK. While undocumented migrants have historically been invisible because many are too scared of detection and removal to engage with statutory services, they are now becoming more visible 'within the context of more general and ongoing austerity measures' as friends, family or organisations in the voluntary sector find that they are no longer able to support them.<sup>20</sup> And as central government makes further and deeper spending cuts, the burden of responsibility and cost is falling more and more on local authorities as destitute

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- 9 The Migration Observatory, *Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain*, 2011 <http://migrationobservatory.ox.ac.uk/sites/files/migobs/Report%20-%20Public%20Opinion.pdf>
  - 10 David Cameron's immigration speech, 25 March 2013 at <https://www.gov.uk/government/speeches/david-camersons-immigration-speech>
  - 11 The inter-ministerial group on migration set up in 2013 was, according to one ex-minister, initially called the 'hostile environment working group' – D. Aitkenhead, 'Sarah Teather: "I'm angry there are no alternative voices on immigration"', *The Guardian*, 12 July 2013, at <http://www.guardian.co.uk/theguardian/2013/jul/12/sarah-teather-angry-voices-immigration>
  - 12 The government has vowed to 'make sure that ours is the toughest country instead of the softest' – see David Cameron's immigration speech, 25th March 2013 at <https://www.gov.uk/government/speeches/david-camersons-immigration-speech>
  - 13 The Migration Observatory, *Determinants of migration to the UK*, 2011, at <http://migrationobservatory.ox.ac.uk/briefings/determinants-migration-uk>
  - 14 In 2008, Ian Duncan Smith MP stated that 'it appears that a British government is using forced destitution as a means of encouraging people to leave voluntarily. It is a failed policy... UK policy is still driven by the thesis, clearly falsified, that we can encourage people to leave by being nasty'. Centre of Social Justice, 'Scrap policy that drives asylum seekers underground and into prostitution, says new report', 15 December 2008, <http://www.centreforsocialjustice.org.uk/media-centre/press-releases-2012-13/press-release-85>
  - 15 The Children's Society, 'Freezing asylum support will hurt vulnerable children – Sarah Teather MP and The Children's Society', 6 June 2013 at <http://www.childrenssociety.org.uk/news-views/press-release/freezing-asylum-support-will-hurt-vulnerable-children-%E2%80%93-sarah-teather-mp-an>
  - 16 Immigration Rules are detailed statements of policy with which the Secretary of State for the Home Department must comply. They do not have the force of an Act of Parliament or Statutory Instrument.
  - 17 Platform for International Cooperation on Undocumented Migrants (PICUM), *Country brief: United Kingdom*, at [http://picum.org/picum.org/uploads/publication/UK%20Workshop%20Brief\\_updated.pdf](http://picum.org/picum.org/uploads/publication/UK%20Workshop%20Brief_updated.pdf)
  - 18 See, for example, Coram Children's Legal Centre 2013 responses to government consultations on legal aid and healthcare, raising the lack of child impact assessments, at [http://www.childrenslegalcentre.com/index.php?page=policy\\_documents](http://www.childrenslegalcentre.com/index.php?page=policy_documents)
  - 19 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 37 at [http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO\\_WAY\\_OUT\\_NO\\_WAY\\_IN\\_FINAL.pdf](http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf)
  - 20 N. Finch, *Routes to regularisation for people without legal status in the UK*, Paul Hamlyn Foundation, 2013, p 2 at <http://www.phf.org.uk/news.asp?id=1921>

undocumented children and families find themselves with nowhere else to turn.

Regularisation, the process by which undocumented migrants can either temporarily or permanently gain legal permission to remain in the UK allows states to better account for, and integrate, undocumented migrant populations, as well as providing a way of correcting past administrative failures and backlogs. There are strong moral and practical arguments in favour of regularisation, 'given the UK's history of immigration mismanagement'.<sup>21</sup> At present, even if the government were able to locate all undocumented migrants in the UK, nearly 2/3 of whom will have been in the UK for at least five years,<sup>22</sup> not only would the removal of many be unlawful, but the cost of doing so, at £15,000 per individual, would be disproportionately high.<sup>23</sup> The Home Office has long been criticised for its inadequacies and inability to provide a robust and effective immigration system.<sup>24</sup> Yet, rather than accept some of the historic failings of the system of managing immigration, those who have been here for years as a result of that system are among those being significantly disadvantaged and the options available to them for regularising their status have been narrowed. This includes children who have grown up in the UK, gone to school in the UK, and consider themselves to be British.

This report examines the ways in which lack of immigration status is an obstacle to children and young people accessing their basic rights and entitlements and the further difficulties this group face in obtaining essential legal advice and regularising their status. Undocumented migrant children are amongst the most vulnerable in the UK and the most at risk of exceptional poverty and destitution. While the importance of developing a more effective immigration system cannot be denied, such a system must go hand in hand with the UK's human rights obligations to children.

All children in the UK have the same rights, irrespective of status, and the UK's international and domestic legal obligations continue to apply regardless of a child's circumstances or those of their parents. Lines of distinction should not be drawn between children based on their immigration status, nor on the reasons why they find themselves in or seeking to enter the UK. Whether seen in terms of protection and promotion of the rights of a vulnerable group or in terms of the social and economic benefits of ensuring children are able to develop, flourish and ultimately contribute to society, an immigration system that is effective but also treats the welfare of children as the primary concern should be viewed as a practical necessity.

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- 21 T. Finch & M. Cherti, *No easy options: irregular immigration in the UK*, IPPR, 2011, p 7 at <http://www.ippr.org/publication/55/1837/no-easy-options-irregular-immigration-in-the-uk>
- 22 I. Gordon, K. Scanlon, T. Travers & C. Whitehead, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London School of Economics, 2009, at [http://www.london.gov.uk/mayor/economic\\_unit/docs/irregular-migrants-report.pdf](http://www.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf) - this estimate was based on 2007 figures
- 23 Council 'horrified' over scheme for immigrants to go', 23rd July 2013, *BBC News*, at <http://www.bbc.co.uk/news/uk-england-london-23419848>
- 24 See, for example, the numerous and wide-ranging reports from the Independent Chief Inspector of Borders and Immigration at <http://icinspector.independent.gov.uk/>, as well as inquiry reports from the Home Affairs Select Committee at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/>

## 1.2 Methodology

Information for this report was gathered in the following ways:

- A review of the current international and UK legislative and policy framework<sup>25</sup> relevant to undocumented migrants and their access to services and support, and a literature review of existing academic research and NGO reports on this area.
- A review of the cases and queries undertaken by the Migrant Children’s Project including its advice line and outreach services in Greater London, and the legal casework taken on by Coram Children’s Legal Centre (CCLC) under its Legal Aid Agency family and asylum contracts.
- Freedom of Information Act requests to 31 local authorities in Greater London.

### Migrant Children’s Project advice line

This report draws on the legal problems callers to the Migrant Children’s Project faced between April 2012 and September 2013, a period of 18 months which witnessed drastic changes to the legal landscape and to the law and policy affecting undocumented migrants.

The quantitative and qualitative information collected from our advice provision illustrates the experiences of migrant children and families in the UK and the barriers faced by those with irregular immigration status when seeking support in the UK. While the advice line covers all issues facing refugee and migrant children, including those with leave to remain, we estimate that at least 50% of queries received related to an individual or family without regular immigration status.

Between April 2012 and September 2013 legal advice was provided to 1087 callers, 43% of whom were individuals seeking advice for themselves and their families. 57% of callers were supporting migrant children and families in some way – 21% from the voluntary sector or other professionals, 36% from local authorities. The table below illustrates the top ten issues raised by callers from April 2012 to March 2013:

Issues raised by enquiry*	Percentage of callers
Immigration rules	15%
Nationality	14%
Support from a local authority under Children Act 1989	11%
Access to education (including further & higher education)	10%
Access to legal advice/legal aid funding	9%
Access to leaving care support from a local authority	8%
Article 8 right to private and family life	7%
Age disputes	5%
Support for families with No Recourse to Public Funds	5%
Home Office enforcement	4%

\*Figures include where one call covered more than one issue

Almost all callers were advised in more than one of the areas of law identified, for example a family calling because they are destitute and have been denied support from a local authority will often have an unresolved immigration issue on which they need advice. Or a young person enquiring about access to further education may have support to which they are entitled under leaving care legislation of which they were unaware.

The Migrant Children’s Project saw an upsurge in the number of queries received in the summer of 2012 and demand has remained at a higher level ever since, prompting CCLC to open the MCP advice line for five days a week from April 2013. Statistics from April to June 2013 show a rise in the percentage of queries related to immigration (24%), legal advice and representation (20%) and local authority support for families (20%). While it is not possible to determine exactly the links between the wider legal and political context and the types of calls to the MCP, looking at both the rise and demand and the types of

25 As immigration and asylum policy are non-devolved, the law and policy outlined in this report is also applicable in Scotland, Wales and Northern Ireland. However, the provision of services to migrant children (including social services, health, education and housing) are devolved, and therefore different in Scotland, Wales and Northern Ireland. This report focuses on the situation in England.

queries we have received it would seem that the changes to the Immigration Rules introduced in 2012 and also the recent changes to legal aid provision have fuelled an increase need for advice and assistance.

The top ten countries of origin for callers (or individuals on whose behalf practitioners are calling) for this period were:

1. Nigeria
2. Afghanistan
3. Pakistan
4. Zimbabwe
5. Jamaica
6. Ghana
7. India
8. Iran
9. Democratic Republic of the Congo
10. Poland

## Outreach work and legal representation

The Migrant Children's Project has been working to provide holistic, quality legal advice to undocumented migrants living in Greater London, operating within, and building the capacity of, established projects, which already work with large numbers of children, young people and families. The MCP's clients are hard-to-reach families, children and young people experiencing immigration-related problems, who may not otherwise have access to legal advice and who may be mistrustful of mainstream services. Since Autumn 2012, the MCP has been providing an advice service on all areas of immigration, asylum and nationality law in addition to advice on how immigration status affects access to services and support including welfare, housing, healthcare and education.

The MCP has established in Greater London relationships with the heads of the local children's centres and with the parent support workers based at the centres. It has also built relationships with other organisations and agencies operating within the children's centres, such as health visitors, speech therapists and midwives. We have worked with primary schools, secondary schools and charities, including community support groups, domestic violence organisations and family support services.

The MCP outreach advice programme reaches approximately 40 individuals each month, including family members. Frequently, cases involve families with a range of legal issues and specific legal advice will be given to different family members, with a range of follow-up work carried out outside of a single advice session, such as discussing the issues with other professionals, holding follow-up appointments and making referrals. Such follow-up work is of particular importance to this vulnerable client group, particularly victims of domestic violence, those with mental health problems and those who do not speak English.

Where appropriate, cases are referred to Coram Children's Legal Centre's Legal Practice Unit which provides legal representation under its family and asylum contracts. Many cases taken on by CCLC involve judicial review of unlawful decisions made by the Home Office, in relation to immigration cases, and decisions made by local authorities regarding the provision of support to vulnerable children and families.

All case studies in this report are based on real CCLC cases, although names and some details have been changed to ensure anonymity. Consent was sought from all clients that CCLC represents whose cases were used as part of this research, who were informed that none of their personal details would be shared and that any case study would be anonymous so that it would not be possible to identify the individual or their family.

## 1.3 Undocumented migrant children and young people in the UK

Children, young people and families who do not have a regular immigration status may be referred to as ‘undocumented’, ‘irregular’ or ‘illegal’ migrants.<sup>26</sup> This report uses the term ‘undocumented’, and broadly defines an individual who is undocumented as someone without permission (leave) to enter or remain in the UK. It looks at the issues faced by *all* undocumented children and young people, including unaccompanied children in care, those leaving care, and undocumented children who are with their families.

There are many routes to becoming ‘undocumented’, which might be summarised by the following:

1. Entering the UK unlawfully and never acquiring any form of regular immigration status (some in this situation may have never come to the attention of the authorities, others may have made an application to regularise their status but had this refused);
2. Coming to the UK on a form of visa (for example, as a visitor or student) and remaining in the UK beyond the date at which that leave expires (individuals in this situation are often referred to as ‘overstayers’);<sup>27</sup>
3. Making an asylum claim which is unsuccessful and exhausting all possible appeals (often known as ‘appeal rights exhausted’);<sup>28</sup> and
4. Being born in the UK to parents with irregular immigration status (a child born in the UK does not automatically acquire British citizenship so there are a significant number of undocumented children who were born in the UK).

There is no single category of undocumented migrant and being undocumented can be seen as more of a process rather than a fixed state of being.<sup>29</sup> It has been argued that the term ‘precarious status’ more accurately reflects the ‘gradations of precarity that exist between status and lack thereof’.<sup>30</sup> As this group is so broad, the legal and

### Case study 1 - Being born undocumented

X, an undocumented young person aged 21, was born in the UK and she has never left the UK. Her family was originally from Nigeria. She attended school and college, where she studied health and social care. X always just assumed that she was British, as did her friends and those she interacted with – if she needed ID she would use her birth certificate. As a result, no applications were made to regularise her stay. She did not realise for many years that she needed to register as a British citizen – her immigration status only became an issue when she applied for an NHS bursary, having been accepted at university to study nursing. She was refused a bursary on the basis of her status. When X became aware of the steps she needed to take to register as a British citizen, she found that she was unable to get legal advice on how to make her application because of the absence of legal aid, and struggled to get the money together to pay the fee of £753 for the application.

policy framework determining what services and support can be accessed by those who fall under the category of ‘undocumented’ can vary significantly. For example, the entitlements and treatment of those who have been through the asylum process but whose claims have been rejected may vary considerably with those of a family who have lived in the UK for a number of years but have never formally been part of any immigration or asylum system. However, all undocumented migrants share the common problem of limited access to basic social and economic rights.

Estimating the numbers of separated migrant children in the UK is challenging, especially as ‘there is no single category of irregular migrant but differing modes of irregular status’.<sup>31</sup> Estimates made by the London School of Economics in a

26 The term ‘illegal’ is highly problematic due to its connotations with criminality and its failure to take into account the ‘varying degrees of compliance which may apply to the situation of any one migrant’. The UN, Council of Europe, European Parliament and European Commission all advocate that use of this term be avoided – see PICUM, *UK Country Briefing*, p 3. The Associated Press recently decided to ban the use of this term in its stylebook on the basis that the term ‘illegal’ should not be used to describe a person only an action, such as living in or immigrating to a country illegally. See <http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/>

27 As visitors they cannot remain in the UK for more than six months (see paragraph 42 of the Immigration Rules) – and leave in this capacity cannot generally be extended

28 ESRC Centre on Migration, Policy and Society, Working Paper No. 78: *Being children and undocumented in the UK: A background paper*, University of Oxford, 2010 at [http://www.compas.ox.ac.uk/fileadmin/files/Publications/working\\_papers/WP\\_2010/WP1078%20Nando%20Sigona.pdf](http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1078%20Nando%20Sigona.pdf)

29 M. Ruhs and B. Anderson, *Semi-compliance in the labour market*, COMPAS working paper No. 30, 2006

30 H. Bauder, *Why we should use the term illegalized immigrant*, RCIS Research Brief No. 2013/1, 2013

31 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 6



2009 report for the Greater London Authority gave a central figure of 618,000 for the number of undocumented migrants in the UK at the end of 2007 (including children born to undocumented migrant parents).<sup>32</sup> A University of Oxford report in May 2012 put the number of undocumented migrant children in the UK at 120,000, with over half born in the UK.<sup>33</sup> Given that the estimated UK population in mid-2012 was 63.7 million,<sup>34</sup> and taking into account the LSE's 2007 estimate of irregular migrants, it would appear that undocumented migrants make up under 1% of the UK population. There is little comprehensive data available to indicate the countries of origin of undocumented migrant children but one source suggests that the most prevalent are Jamaica, Nigeria, Pakistan, China and Turkey.<sup>35</sup>

Many undocumented children are brought into the UK by a parent or guardian, or through a private fostering arrangement. Some come to the UK lawfully when they are very young with a parent or other relative and grow up here, unwittingly staying beyond the period when their visas or leave were valid. In some cases family relationships may break down, leaving children abandoned and left to be taken into the care system. Other children are born in the UK to parents with irregular status.

These children and young people may be in the UK for many years without realising that immigration is even an issue. This may become evident only years later when they wish to work or access further or higher education. Often the 'visibility' of an individual's immigration status coincides with their transition to adulthood as 'age constitutes one of the main criteria... which defines the position of this group of (undocumented) migrants within the UK legal system'.<sup>36</sup> For families, a crisis situation, for example domestic violence, relationship breakdown, an accident, deterioration of health, or the loss of a job, often precipitates action regarding their immigration status. In the intervening period, children and young people will usually have become fully integrated into society, built up support networks, settled in the education

system, know no other life and speak no other language. It is unlikely to have been their choice to come to the UK and yet they are often expected by the Home Office to leave their lives behind and return to a country 'of origin' of which they may have little or no memory. For most of those born in the UK, their parent/s' 'home' will be a country to which they have never even been.

Some young undocumented migrants will have arrived as children seeking asylum, and may now be 'appeal rights exhausted', their asylum claim having been refused, but are too scared and/or unable to return. The category of 'undocumented children' also includes victims of trafficking, many of whom are not identified and do not make a claim for asylum. The UK Human Trafficking Centre has reported that as over half (54%) of all potential victims of trafficking were not referred to the National Referral Mechanism<sup>37</sup> (the process for identifying victims of trafficking) and the real number of trafficked children in the UK is likely to be far higher than that reported.

Often undocumented migrants will have had previous asylum or immigration applications decided by the Home Office or the Tribunal/courts but these applications may not have been soundly and justly determined due to poor quality legal representation, poor quality Home Office decision-making, a lack of adherence to guidance by Home Office decision-makers,<sup>38</sup> and a 'culture of disbelief'<sup>39</sup> within the Home Office. Single young people over 18 and families with children can find themselves undocumented and liable to be detained and forcibly removed from the UK, without feeling as if they have had a chance to have their case fairly determined. They are seen as 'illegal immigrants' even though they may have strong legal arguments to remain. This is illustrated, for example, by the first report of the Independent Family Returns Panel. The report highlighted that of the 186 families that the Home Office had considered to have no right to be in the UK and should be removed, 77 (41%) were subsequently granted leave to remain in the UK.<sup>40</sup>

32 With a range of 417,000 to 863,000 – see I. Gordon, K. Scanlon, T. Travers & C. Whitehead, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London School of Economics, 2009.

33 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

34 Office for National Statistics, see: <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html>

35 B. Vollmer, *Undocumented Migration: Counting the Uncountable. Data and Trends across Europe*. Country Report UK, 2008, at [http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino\\_report\\_united-kingdom\\_final\\_.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report_united-kingdom_final_.pdf)

36 N. Sigona and V. Hughes, *Being children and undocumented in the UK: A background paper*, University of Oxford, 2010, pp 12 & 28

37 UKHCT: *A Baseline Assessment on the Nature and Scale of Human Trafficking in 2011*, August 2012, at <http://www.soca.gov.uk/news/462-human-trafficking-assessment-published>

38 Research has consistently highlighted problems with the quality of decision-making by the Home Office in asylum claims generally, as well as in family and children's cases specifically. See Amnesty International, *A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK*, April 2013, available at: [http://www.amnesty.org.uk/uploads/documents/doc\\_23149.pdf](http://www.amnesty.org.uk/uploads/documents/doc_23149.pdf); UNHCR, *Untold Stories: Families in the asylum process*, 2013, at [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/aUNHCR\\_Report\\_Untold\\_Stories.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/aUNHCR_Report_Untold_Stories.pdf); and UNHCR, *Sixth Report of the Quality Initiative Project*, 2009, at [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/6\\_QI\\_Key\\_Observations\\_Recommendations6.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/6_QI_Key_Observations_Recommendations6.pdf)

39 The Children's Society, *Into the Unknown: Children's journeys through the asylum process*, 2012 at <http://www.childrenssociety.org.uk/news-views/press-release/children-seeking-safety-uk-face-damaging-culture-doubt>

40 *Independent Family Returns Panel Annual Report*, 2011/12, p 8, at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/ifrp-report/ifrp-report.pdf?view=Binary>

### Case study 2 - Becoming undocumented

R was brought from the Democratic Republic of the Congo aged 15 on a family reunion visa to join his father, who had been granted asylum in the UK. The leave to remain given to R was concurrent with his father's and expired when R was 18, when his father needed to apply for settlement. Unfortunately, probably due to the long period the parent and child had been separated and the fact they barely knew each other, R's integration into the family was not successful and the relationship broke down. R left the family home aged 17 and lived with friends intermittently. The local authority, rather than offer R accommodation under Section 20 of the Children Act 1989, wanted to mediate with his father so that he could return to his household. R knew this was impossible and that the relationship had broken down on his side, irretrievably.

R turned 18, but shortly afterwards his leave to remain expired, and the Jobcentre ceased his Income Support as he did not have valid leave to remain. R felt sure his father had not included him in the settlement application he should have made for himself and any dependants at the point when the five-year refugee leave expired, so R had become an 'overstay' with no current leave to remain in UK, and not eligible for legal aid. R 'fell through the net' and became homeless, relying on soup kitchens and the charity of friends. Eventually R attended a youth project where an advocate sought advice from the Migrant Children's Project about his situation, and he was referred for pro bono legal advice.

Bureaucratic inefficiencies and backlogs have also exacerbated the number of migrants living in the UK for long periods without final decisions on their immigration or asylum claims. For example, despite the 'asylum legacy' programme, which ran from 2007 to 2011 and aimed to address the outstanding 450,000 asylum claims that had been made before March 2007 but were still unresolved, the asylum system still contains a large number of individuals in limbo, and indeed is still routinely adding to these numbers every year. The 2012 report of the Independent Chief Inspector of Borders and Immigration

found that in March 2011 when the UK Border Agency had said that the review of all the cases had been concluded there were actually 147,000 cases unresolved.<sup>41</sup> A 2012 report from the Home Affairs Select Committee estimated that, as of 31 March 2012, there were 21,000 unresolved asylum cases in their initial stages, 80,000 individuals in the asylum 'controlled archive' and a further 101,500 untraceable individuals.<sup>42</sup>

In addition to having strong legal claims to remain in the UK, many young undocumented migrants are simply unable to return to their country of origin. There are a number of countries that are internationally recognised as unsafe to return to, or where the courts have ruled that it is unsafe to return at that particular time but this is frequently not acknowledged in UK asylum policy and decision-making.<sup>43</sup> These barriers will directly prevent removal or voluntary return but will not be reflected in the immigration status of children and families, who may still have had their claims refused. In addition, many children, young people and families are refused international protection but are unable to obtain documentation to return because there is not effective means of doing so. This applies, for example, to those from Iran, as there is currently no embassy in the UK.<sup>44</sup>

Appendix 1 explains the ways in which an individual can regularise their status. However, for those undocumented migrants who have lived in the UK for many years and are unable to return to their (or their parent/s') country of origin, there may be a number of obstacles to doing this, including:

- Lack of awareness of their legal rights;
- Inability to understand the extremely complex Immigration Rules;
- Misinformation about legal rights and routes to regularisation;
- Lack of access to legal advice and representation, including the absence of legal aid for non-protection immigration cases;
- Reluctance on the part of solicitors and legal representatives to take on certain cases;
- Unaffordable application fees for Home Office applications;
- Lack of co-operation by partners, including in situations of abuse and domestic violence;
- Fear.

41 These cases had been passed to a new unit (the Case Assurance and Audit Unit)

42 Home Affairs Committee, *The Work of the UK Border Agency, December 2011–March 2012* at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/71/7102.htm>

43 For example, the UN Committee Against Torture recently criticised the UK for not amending its asylum policy on Sri Lanka despite the High Court ruling earlier this year suspending removals of Tamil refused asylum seekers to Sri Lanka. 5th periodic report – May 2013: <http://www2.ohchr.org/english/bodies/cat/cats50.htm>. The Refugee Council report *Between a Rock and a Hard Place* from 2012 illustrated other examples of the protection gap for nationals from the Democratic Republic of Congo, Eritrea, Somalia, Sudan, and Zimbabwe who have been refused asylum but may still have a well-founded fear of return – see [http://www.refugeecouncil.org.uk/latest/news/177\\_between\\_a\\_rock\\_and\\_a\\_hard\\_place](http://www.refugeecouncil.org.uk/latest/news/177_between_a_rock_and_a_hard_place)

44 Foreign and Commonwealth Office, *UK for Iranians*, at <https://www.gov.uk/government/world/organisations/uk-for-iranians>

This leaves them in limbo, without regular immigration status or access to services but unable to leave the UK.

Immigration status can impact on a child's life in a variety of ways: directly, for example due to restricted access to secondary healthcare or further and higher education; or indirectly, through discriminatory treatment or insecure housing situations that require moving regularly.<sup>45</sup> Destitution and poverty are prevalent as many undocumented young people and families are expressly excluded from employment and mainstream welfare, and are provided support at reduced levels which may, in certain circumstances, be withdrawn despite the inability of the individual or family to support itself. These day-to-day concerns are compounded by an inability to stand up for one's rights or to seek redress for exploitation, either due to lack of knowledge or empowerment, or because of fear of repercussions.<sup>46</sup>

This is often combined with a powerlessness over one's own immigration status. The length of time taken for an individual or family's immigration status to be regularised can leave children and young people in a constant state of limbo, with 'a sense of hopelessness and lack of anything that they could actively do to change their situation'.<sup>47</sup> Making plans for the future is 'a crucial part of being young'<sup>48</sup> which a number of young undocumented migrants are denied.

### Case study 3 – Becoming undocumented

S, aged 22, came to the UK from Nigeria aged seven with his mother and grandparents on six-month visit visas. They overstayed.

After family relationships broke down, N was taken into care at the age of 16. An application to the Home Office was made on S's behalf when he was 17 but S never received a decision on this application. In 2009 S contacted his MP and was told that he would receive a decision within the year. He is still waiting and continues to live without immigration status, despite having lived in the UK for 14 years.

### Case study 4 – Becoming undocumented

Y came to the UK from Angola as a student, and lived in the UK legally for a number of years, including after she had had a baby. The baby's father was not involved in the child's life and had returned to his own country (not Angola). Y continued to try to pursue her studies despite being a lone parent, but was eventually refused further leave to remain as a student or for post-study work. By this point, it was apparent that the child was deaf. When the child was aged four, Y applied for discretionary leave to remain, but this was refused with no right of appeal. The child has a statement of special educational needs and is in a special school, learning to communicate under a very specific learning environment and she is thriving. Y's great fear is that back in Angola her child would not be able to access the services she needs and would be exposed to discrimination and that both of them would be ostracised by a society which views deafness with suspicion. Y is too frightened to give up work (as it provided the only means of support for herself and her child). She has continued to work for the same employer for whom she had worked since the period when she could legally do this as a student. However, this is only for 20 hours a week so the family lives in one room, very frugally. Y has never claimed any help from social services, nor has she sought to claim legal aid. Y has been left hoping that a removals decision will be granted so that she can appeal and get her case in front of an immigration judge, but in the meantime she feels as if she is 'living on the edge'.

45 N. Sigona and V. Hughes, *No way out, No way in: Irregular migrant children and families in the UK*, University of Oxford, 2012

46 S. Lukes, R. Stanton, M.A. Mackintosh, B. Vollmer, R. Grove-White, D. Flynn, *Irregular Migrants: the urgent need for a new approach*, Migrants' Rights Network, 2009, at <http://www.migrantsrights.org.uk/publications/policy-report/irregular-migration-urgent-need-new-approach>

47 N. Sigona and V. Hughes, *No way out, No way in: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 26

48 N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, p 100 at <http://www.staff.city.ac.uk/yum/documents/Young%20Undocumented%20Migrants%20report.pdf>

## 1.4 Children's rights standards

Migrant children should be viewed as children first and foremost, and must be afforded the same rights and protection as any other children in the UK, an approach outlined in the UK government's own guidance which states that 'every child matters even if they are someone subject to immigration control'.<sup>49</sup> The UN Convention on the Rights of the Child (UNCRC), which the Supreme Court has held imposes binding international legal obligations on the UK,<sup>50</sup> clearly states that the rights within the Convention should be respected for all children within the State Party's jurisdiction, 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.<sup>51</sup> The UNCRC also states that the best interests of the child must be a primary consideration (Article 3) in decision-making processes, including in the government's exercise of its immigration control functions.<sup>52</sup> A State Party must also afford children the right to express their views in all matters affecting them – including in judicial and administrative proceedings (Article 12). The UN Committee on the Rights of the Child has made clear that 'non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations'.<sup>53</sup>

Under much UK domestic law, refugee and migrant children currently have the same entitlements as citizen children, including the right to compulsory education, primary healthcare and the rights enshrined in the Children Act 1989 and the Children Act 2004, although these rights are not always upheld in practice. There has been progress in the

protection of migrant children's rights in the shape of the UK having lifted its reservation to the UN Convention on the Rights of the Child in 2008<sup>54</sup> and in the passing of section 55 of the Borders, Citizenship and Immigration Act 2009, which places a statutory duty on the Home Office to safeguard and promote the welfare of children. The courts in the UK have also made positive findings on issues relating to children's best interests in immigration cases, setting procedural standards and providing guidance in their jurisprudence. The landmark Supreme Court judgment *ZH (Tanzania) v SSHD* held that the best interests of a child who will be affected by an immigration decision is a factor 'that must rank higher than any other' and not be 'merely one consideration that weighs in the balance alongside other competing factors'.<sup>55</sup> The same judgment made clear that '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'.<sup>56</sup>

However, there remains an ongoing tension between children's rights and the prioritisation of immigration control. This is evident in law and policy determined by central government, in the media's portrayal of the 'problem' of immigration,<sup>57</sup> and in the practice of some front-line service providers working with this group. In 2013 the Joint Committee on Human Rights heard a range of evidence on the treatment of separated migrant children in the UK, concluding that 'immigration concerns are too often given priority when dealing with such children; in doing so the UK is falling short of the obligations it owes to such children

49 UK Border Agency, *Every Child Matters, Change for Children: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*, 2009, para 2.7.

50 *ZH (Tanzania) v SSHD* [2011] UKSC 04, para 23

51 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 2

52 *ibid*, Article 3

53 UN Committee on the Rights of the Child, General Comment Number 6 (2005), 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 1 September 2005, CRC/GC/2005/6, para 86. However, the Home Office has taken the view that it is not legally bound to follow the Committee's interpretation of the provisions of the UNCRC, even though the comments of the Committee are considered to be an authoritative interpretive aid, which are agreed by all States Parties when drafted (as outlined in letter from H. Ind, UK Border Agency to K. Dorling, Refugee Children's Consortium, 23 August 2010). See for example H. Keller and G. Ulfstein, *Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2011, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', p 23, at: [http://www.jus.uio.no/smr/english/people/aca/birgsc/working-papers/Schlutter\\_April.pdf](http://www.jus.uio.no/smr/english/people/aca/birgsc/working-papers/Schlutter_April.pdf)

54 The UK's reservation to Article 22 of the Convention stated: 'The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under [UK] law to enter and remain in the UK, and to the acquisition and possession of citizenship, as it may deem necessary from time to time'.

55 *ZH (Tanzania) v SSHD* [2011] UKSC 04, para 46

56 *ibid*, paragraph 34. This was further developed in the judgments of the Supreme Court, in *HH, PH, v Deputy Prosecutor of the Italian Republic (Genoa), F-K v Polish Judicial Authority* [2012] UKSC 25 at [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0128\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0128_Judgment.pdf)

57 A recent report by the Migration Observatory examined broadsheet and tabloid coverage of immigration over the past three years and found the most common word used to describe immigrants was 'illegal'. See Migration Observatory, *Migration in the News: Portrayals of Immigrants, Migrants, Asylum Seekers and Refugees in National British Newspapers, 2010-2012, 2013*, at <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Report%20-%20migration%20in%20the%20news.pdf>

under the UN Convention on the Rights of the Child'. The Committee noted that 'support for children is too inconsistent across the country, especially during the transition to adulthood, because of resource constraints, uncertainties about the legal framework and a lack of specialist expertise'.<sup>58</sup>

Home Office decision making all too often fails to consider the best interests of children adequately and the case law on section 55 demonstrates clearly that the emphasis on immigration control continues to dominate thinking in the Home Office.<sup>59</sup> The government's revisions to the Immigration Rules in 2012 attempted to impose on decision-makers and the courts a narrow construction when interpreting human rights, especially Article 8 of the European Convention on Human Rights (ECHR) and the best interests of the child.<sup>60</sup> This illustrates what can be seen as an attempt to constrain the application of a child-rights based approach in the context of family and private life claims. The Immigration Bill seeks to put this in statute. Section 3.3 outlines the problems with accessing the narrower routes to regularisation that now exist under the Immigration Rules, many of which require repeat applications made over the course of up to ten, or even 20 years before indefinite leave to remain will be granted.

Despite the principle espoused by the Supreme Court that children should not be blamed for the actions taken by their parents,<sup>61</sup> what seems to be a punitive approach to undocumented migrants invariably affects children and undermines permanence and stability in their lives.

### Case study 5 - Failure to consider best interests

In 2013, Coram Children's Legal Centre intervened in the case of *SM and TM and JD and Others v SSHD*<sup>62</sup> which involved undocumented children of Jamaican parents who were either born in the UK or who had lived here for up to ten years. Applications to regularise their status had been made but the Court held that the Home Office policy of granting short periods of discretionary leave to remain, rather than the more stable and long-term indefinite leave to remain<sup>63</sup> was unlawful as it failed to consider the welfare and best interests of the child before deciding the period of time for which leave to remain should be granted. The Secretary of State argued that there is a need to ensure that those who have breached immigration law, by, for example, overstaying their permitted leave, do not benefit from indefinite leave to remain, that they should not be 'rewarded' for being in the UK unlawfully. In contrast, the High Court recognised that successive grants of short periods of leave to remain can leave children in limbo and may, therefore, be contrary to their welfare<sup>64</sup> and required the Secretary of State for the Home Department to amend the relevant discretionary leave policy to make it lawful.

This case illustrates the extent to which the welfare of children is seen as secondary to the need to control immigration, with the result that many children and young people are deprived of a stable future in the UK and many of the opportunities that come with such stability and permanence.

58 Joint Committee on Human Rights, 'In their best interests?', 12 June 2013, at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/publication-of-first-report-human-rights-of-unaccompanied-migrant-children-and-young-people/>

59 See for example *R (on the application of TS) v SSHD* [2010] EWHC 2614 (Admin) especially Winn J at paragraph 59

60 See *Statement of Changes to Immigration Rules* HC 194 dated 13 June 2012

61 *ZH (Tanzania) v SSHD* [2011] UKSC 04, paras 33, 44

62 *SM and TM and JD and Others v SSHD* [2013] EWCA 1144 (Admin).

63 The case addressed the policy that was in force at the time the decisions in question were made

64 The case concerned foreign national children who had been granted discretionary leave to remain for three years under Article 8 of the European Convention on Human Rights. The children had asked for indefinite leave to remain but had been refused. The challenge was to the refusal to grant indefinite leave to remain. CCLC provided the Court with evidence of the consequences on a child's mental health, welfare and development caused by temporary status, as well as expert opinion on the government's duties to safeguard children under section 55 of the Borders, Citizenship and Immigration Act 2009. In addition, it addressed the UK's obligations under the UN Convention on the Rights of the Child to consider children's best interests in immigration decisions, as well as the public interest in promoting the wellbeing of children as a benefit to society.

## Part 2. Access to support, accommodation and essential services

*'Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation... In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services.'*<sup>65</sup>

International law makes clear that access to adequate support and services is integral to a child's development and well-being. The UN Convention on the Rights of the Child recognises 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development' and outlines that states 'in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing'.<sup>66</sup>

The UNCRC also recognises the right of a child to 'the enjoyment of the highest attainable standard of health'<sup>67</sup> and imposes 'a strong duty of action by States parties to ensure that health and other relevant services are available and accessible to all children, with special attention to under-served areas and populations. It requires a comprehensive primary health-care system...[and] barriers to children's access to health services, including financial, institutional and cultural barriers, should be identified and eliminated.'<sup>68</sup> The UN Committee on the Rights of the Child has stated that 'children are entitled to quality health services, including prevention, promotion, treatment, rehabilitation and palliative care services. At the primary level, these services must be available in sufficient quantity and

quality, functional, within the physical and financial reach of all sections of the child population, and acceptable to all.'<sup>69</sup> The Committee urges states to place children's best interests at the centre of all decisions affecting their health and development, including the allocation of resources, and the development and implementation of policies and interventions that affect the underlying determinants of their health.<sup>70</sup>

Article 28 of the UN Convention on the Rights of the Child makes clear that states which have ratified the Convention must 'recognise the right of the child to education', and work to achieve this right 'progressively and on the basis of equal opportunity' (it only commits states to making primary education compulsory and free).<sup>71</sup>

These international standards are not fully reflected in UK domestic legislation. With regards to accommodation and support, UK law expressly excludes undocumented families and young people from social housing and access to welfare benefits, with those who are destitute only able to avail themselves of support either from the Home Office (if they have claimed asylum) or from local authorities under the Children Act 1989, which is often not adequate for their needs. Separated children will be looked after by a local authority, but young people who have been in the care of a local authority may have their support cut off due to their immigration status once they reach the age of 18. The increasing exclusion of asylum seeking and other migrant families from mainstream welfare provision and paid employment since the Immigration and Asylum Act 1999 has 'led to the re-emergence of levels of child poverty that had previously been eradicated'.<sup>72</sup>

The difficulties faced by families in accessing asylum support and the inadequacies of the support itself are well documented and leave many living in poverty and vulnerable to exploitation.<sup>73</sup>

65 Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard (CRC/C/GC/12).

66 Article 27 of the UNCRC.

67 Article 24 of the UNCRC.

68 UN Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)\*, 17 April 2013, CRC/C/GC/15, paras 28-9

69 *ibid*, para 25

70 *ibid*, para 13

71 Under Article 28 and 29 of the UN Convention on the Rights of a Child. This is echoed in Protocol 1 Article 2 of the European Convention on Human Rights, at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), and under Article 13 of the International Covenant on the Economic, Social and Cultural rights, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, in recognition of the importance of education for every child's general well-being and personal development

72 The Children's Society, *Written evidence to Birmingham City Council Enquiry: Children and Families with No Recourse to Public Funds*, 2013 at [http://www.childrensociety.org.uk/sites/default/files/tcs/bcc\\_migrant\\_families\\_enquiry\\_final.pdf](http://www.childrensociety.org.uk/sites/default/files/tcs/bcc_migrant_families_enquiry_final.pdf)

73 The risk of exploitation faced by women seeking asylum who are made destitute is highlighted in K. Dorling, M. Girma and N. Walter, *Refused: The experiences of women denied asylum in the UK, Women for Refugee Women*, 2012, p 36 at <http://www.refugeewomen.co.uk/images/refused.pdf>

Common reasons for the destitution of families include having asylum support refused or cut off, abusive relationships and subsequent family breakdown, and bureaucratic delays and confusion. Those turning to a local authority for support may face obstacles not only in accessing assistance, but in accessing assistance sufficient to meet children's needs. The accommodation provided through both of these routes is designed to be temporary and can be both unsuitable, as agencies face their own budget restrictions, and poor quality. Some local authorities also see the provision of support to undocumented families as a measure that could deter families from voluntarily going back to their country of origin.

For undocumented migrant children, access to healthcare is also limited, under current legislation, to primary healthcare and emergency care. GPs can, at their discretion, register any individual as a patient on a temporary or permanent basis, irrespective of their immigration status.<sup>74</sup> Prior to 2004, anyone who had lived in the UK for more than a year qualified for free secondary healthcare, but now migrants must prove that this period of residence was lawful.<sup>75</sup> Access to free education is permitted by law for those in compulsory education, but for those wishing to study after the age of 16, immigration status will often be a barrier to their so doing.

Even when engaging with education, healthcare and other statutory or voluntary services is permitted by law, practice can often prove very different. The issue of trust is central to the ways in which undocumented migrants develop and establish networks,<sup>76</sup> and a fear of authorities can have a significant impact on access. The experience of the Migrant Children's Project shows clearly that where there is a perceived link between an agency or institution and the Home Office, children, young people and families are less likely to engage, based on a real or perceived fear as to how such interaction might impact on their ability to remain in the UK.<sup>77</sup> A clear example of this was a young client who refused

to meet with a legal representative at Coram Children's Legal Centre's offices, because when he had last attended an appointment at social services, immigration officials had been waiting for him there. This blurring of lines between the Home Office and frontline services can only have a deterrent effect on young migrants accessing support.

Another key issue is the understanding of rights and entitlements on the part of professionals and individuals themselves, which is crucial if the rights of young migrants are to be realised. Even where legislation and policy echoes international law and protects the right to education and healthcare for children, misunderstanding and misinterpretation can result in children being denied access.

There is an increasing trend for central government to outsource the task of migration management<sup>78</sup> to local government, with social workers, school teachers and healthcare professionals facing the challenge of balancing their statutory duties to children with increasing pressure from the Home Office to perform tasks of immigration control. This can be seen in proposals to enhance data sharing between the NHS and the Home Office to ensure that foreign nationals unable to pay their NHS debts are 'refused entry to the UK in the future',<sup>79</sup> the Home Office's plan to develop joint operations with schools to combat truancy among undocumented migrant children,<sup>80</sup> and the duty placed on local authorities (including social services) to supply information in respect of a person where it is reasonably suspected that the person has committed specified immigration offences.<sup>81</sup> Increased controls on access to public services, rather than acting as an incentive for irregular migrants to leave the UK as is the Home Office's intention, are more likely 'to cause irregular migrants to reduce their contact with mainstream structures and systems', and in turn increase 'the vulnerability of irregular migrants to exploitation, forced labour or criminal activity'.<sup>82</sup>

74 Powers to charge those not ordinarily resident have existed since 1949 and have been applied through regulations covering secondary care services in hospitals since the early 1980s. So far, these powers have not been used to introduce charges to primary medical care and consequently there are no immigration restrictions on who may register at a GP practice or for other primary care services. The use of discretion by a GP is limited by the fact that it cannot be discriminatory.

75 The NHS (Charges to Overseas Visitors)(Amendment) Regulation was introduced in 2004 to 'protect finite NHS resources' and as a response to 'health tourism', the term used to describe occasions where foreign nationals travel to the UK purposefully to access free NHS healthcare. *Proposed Amendments to NHS Health Service (Charges to Overseas Visitors) Regulations 1989: A consultation*, 28/07/03 para 1, cited in N. Kelley & J. Stevenson, *First do no harm: denying healthcare to people whose asylum claims have failed*, Refugee Council, 2006.

76 N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, p 77 at <http://www.staff.city.ac.uk/yum/documents/Young%20Undocumented%20Migrants%20report.pdf>

77 The Oxfam report *Coping with Destitution* highlighted that destitute asylum seekers are often deterred from accessing support from large voluntary organisations because of a perceived lack of independence of these organisations from the Home Office - see section 2.1 for more information on asylum support.

78 S. Lengar and M. LeVoy, *Children First and Foremost: A guide to realising the rights of children and families in an irregular migration situation*, Platform for International Cooperation on Undocumented Migrants (PICUM), 2013, p 67 at <http://picum.org/picum.org/uploads/publication/Children%20First%20and%20Foremost.pdf>

79 Department of Health, *Review of access to the NHS by foreign nationals: Consultation on proposals*, 2010, cited in N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 37

80 UK Border Agency, *Protecting our border, protecting the public*, Home Office, 2010, cited in N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 37

81 Under Section 129 of the *Nationality, Immigration and Asylum Act 2002*

82 S. Lukes, R. Stanton, M.A. Mackintosh, B. Vollmer, R. Grove-White, D. Flynn, *Irregular Migrants: the urgent need for a new approach*, Migrants' Rights Network, 2009, at <http://www.migrantsrights.org.uk/publications/policy-report/irregular-migration-urgent-need-new-approach>

## 2.1 Asylum support

Asylum seekers who would otherwise be destitute are unable to work but can obtain support from the Home Office under section 95 of the Immigration and Asylum Act 1999. Families with children are entitled to this help from the time they arrive in the UK until they are granted refugee status, at which point they would become eligible for mainstream benefits and permitted to work.<sup>83</sup> If refused asylum, a family whose children were born before the refusal of the asylum claim will remain entitled to section 95 support until they leave voluntarily or are forcibly removed from the UK.

In 1999 the level of support provided to asylum seekers was reduced to 70% of mainstream Income Support, on the basis that this support was intended only to provide for 'basic subsistence' in the short term and that the Home Office would cover accommodation and utility bills separately.<sup>84</sup> The amount of financial support under Section 95 depends on a family's household circumstances and the child's age. For example, a mother and child will receive £96.90 per week, with their accommodation, utility bills, council tax and household equipment provided in addition.<sup>85</sup> The Home Office system also offers some additional support, for example, a single one-off payment of £300 for maternity costs and additional payments for children under three.<sup>86</sup> Children aged 16 and 17 years old are given support at a similar rate to that of adults.

If an adult or couple has a child *after* their asylum claim has been refused but they cannot leave the UK, they may be entitled to what is called 'section 4 support', providing they

satisfy extra requirements in addition to being destitute. In general there has to be an obstacle that prevents them from leaving the UK – for example if they are too sick to travel or if there is no viable route of return – or they must demonstrate that they are taking steps to return.<sup>87</sup>

This 'cashless' section 4 system can be seen as 'part of a wider hostile environment to which refused asylum seekers are subjected in an effort to encourage them to return to their country of origin'.<sup>88</sup> Under section 4 families may only live in accommodation designated by the Home Office and, instead of cash, they only receive money to cater for essential living needs on a payment card - the 'Azure Card'. This card can only be used at designated retail outlets to purchase food, essential toiletries and other items to the value of £35.39 per person per week, which is the equivalent of £5 a day per person, making section 4 supported claimants even worse off than those on section 95 support.<sup>89</sup> A single adult receives £1.23 a week less than they would on section 95, while a child under three is £17.57 worse off. Some additional support may be provided, for example a maternity grant of £250, which is lower than for mothers on section 95.<sup>90</sup>

### Problems with asylum support

Asylum support regulations are complex, and applicants for section 95 and section 4 support often suffer from delay and errors, which are frequently the cause of destitution. Research

83 The Home Office will withdraw asylum support after 28 days because the family will become eligible for mainstream benefits.

84 Still Human Still Here, *Evidence on the destitution of asylum seekers for the Home Affairs Select Committee inquiry*, 2013, para 1.3, available at: <http://stillhumanstillhere.files.wordpress.com/2013/04/home-affairsselect-committee-evidence-from-shsh-20-april-2012.pdf>

85 For current asylum support rates, see the Home Office website at <http://www.ukba.homeoffice.gov.uk/asylum/support/cashsupport/currentsupportamounts/>

86 See <http://www.ukba.homeoffice.gov.uk/asylum/support/cashsupport/extra/>

87 To be eligible for section 4 support, an asylum-seeker must show that they are destitute and that they fall under one or more of the specified eligibility criteria. Being destitute means they do not have adequate accommodation and/or money to pay for their and their dependants' living costs at present or within the next 14 days. The eligibility criteria are:

- They are taking all reasonable steps to leave the UK or place themselves in a position to be able to leave the UK.
- They are unable to leave the UK because of a physical impediment to travel or for some other medical reason. People who are pregnant and within six weeks of their expected due date or who have a baby under six weeks old are accepted as being unable to travel.
- There is no viable route of return. This only applies where the Home Office declares that there is no viable route of return to that particular country.
- They have applied for Judicial Review of the decision on their asylum claim and the High Court has granted permission to proceed (or sometimes where they have applied for permission to the High Court but this has not yet been granted).
- Where accommodation is necessary to avoid a breach of the person's human rights. Article 3 of the European Convention on Human Rights (ECHR) - the prohibition on torture and inhuman and degrading treatment - and Article 8 of the ECHR - the right to respect for private and family life - are relevant. In cases where the individual is a defendant in criminal proceedings or a party in civil proceedings, removal from the UK may infringe their rights to a fair and public hearing under Article 6.

See Home Office, *Section 4 Support* at <http://www.ukba.homeoffice.gov.uk/asylum/support/apply/section4/>

88 Report of the Parliamentary Inquiry into Asylum Support for Children and Young People, January 2013, p 9 at [http://www.childrensociety.org.uk/sites/default/files/tcs/asylum\\_support\\_inquiry\\_report\\_final.pdf](http://www.childrensociety.org.uk/sites/default/files/tcs/asylum_support_inquiry_report_final.pdf),

89 See Home Office, *Section 4 Support* at <http://www.ukba.homeoffice.gov.uk/asylum/support/apply/section4/>

90 See the Migrant Children's Project Factsheet, 'Additional assistance from the UK Border Agency for pregnant women & parents of young children who are seeking asylum' at [www.childrenslegalcentre.com](http://www.childrenslegalcentre.com)



## Comparison of mainstream benefit and asylum support levels for 2012/13

Rates per individual	Mainstream benefit	Section 95 asylum support		Section 4 Asylum support	
		Section 95	% of mainstream benefit	Section 4	% of mainstream benefit
Single adult (18-24)	£56.25	£36.62	65%	£35.39	65%
Single adult (25+)	£71.00	£36.62	52%	£35.39	50%
Couple (no children)	£111.45	£72.52	65%	£70.78	64%
Couple (children)	£128.85	£72.52	56%	£70.78	59%
Lone parent	£88.40	£43.94	50%	£35.39	40%
Pregnant woman (25+)	£71.00	£39.62	56%	£38.39	54%
Child under 1 year	£64.99	£57.96	89%	£40.39	62%
Child 1-3 years	£64.99	£55.96	86%	£38.39	59%
Child 4-15 years	£64.99	£52.96	81%	£35.39	54%
Child 16-17 years	£64.99	£39.80	61%	£35.39	54%
Disabled child (additional)	£56.63	£0.00	0%	£0.00	0%

Source: Report of the Parliamentary Inquiry into Asylum Support for Children and Young People, January 2013

by the Asylum Support Appeals Project found a number of weaknesses in Home Office decision making on destitution cases and highlighted that 82% of decisions in support applications were overturned on appeal. In many of the applications children were listed as dependents, yet not one decision letter made reference to how the children's welfare had been taken into account during decision making.<sup>91</sup>

As set out above, asylum support levels differ significantly from income support and other mainstream benefit levels. The reduced level of support is justified on the basis that housing and utilities bills are paid for separately. However, in 2010, Still Human Still Here calculated that, even taking this into account, once support levels drop below 70% of

Income Support, asylum support will not be enough to meet an individual's living needs<sup>92</sup>. Furthermore, while income support payments rose by 5.2% in 2012-13, no increment has been added to asylum support for the current financial year. The Asylum Support Inquiry of 2012 found that 'the current levels of support provided to families are too low to meet children's essential living needs', let alone their wider needs to learn, grow and develop. The inquiry heard evidence of the reality of living on as little as £5 per day, as parents are forced to skip meals to feed their children and are unable to buy them warm clothing in the winter'.<sup>93</sup> Many families relying on asylum support are provided with unsafe, dirty and overcrowded accommodation and, without sufficient support

91 Asylum Support Appeals Project, *No credibility: UKBA decision making and section 4 support*, April 2011 at <http://www.asaproject.org/wp-content/uploads/2013/03/no-credibility.pdf> and *Audit on UKBA decision making: One year on, still 'no credibility'*, May 2013, at <http://www.asaproject.org/wp-content/uploads/2013/05/ASAP-Audit-on-decision-making-2013.pdf>

92 Still Human Still Here, *At the End of the Line: restoring the integrity of the UK's asylum system*, 2010, p 34 at <http://stillhumanstillhere.files.wordpress.com/2009/01/at-the-end-of-the-line-2010.pdf>

93 Report of the Parliamentary Inquiry into Asylum Support for Children and Young People, January 2013, p 2

but denied the right to work, many are left vulnerable to exploitation in order to survive.<sup>94</sup>

There is 'no correlation between levels of support and numbers of asylum seekers in the UK'<sup>95</sup> and the premise that making things difficult for families will somehow lead more people to leave the UK has been described as 'dangerously flawed', with serious repercussions for children's well-being and safety.<sup>96</sup> There is a growing body of evidence that destitution does not lead to undocumented migrants returning to their country of origin, and that the risks associated with continuing to pursue this approach are enormous, with significant implications for wider society. Arguably, a destitute immigrant population is ultimately a more expensive and urgent social problem for any administration to deal with than simply affording basic entitlements from the outset. Although exact numbers are not available, it is estimated that there are 10,000 children living on asylum support, including almost 800 children on section 4 support,<sup>97</sup> with families who are unable to return staying on this support for many years. The additional hardship suffered by families is all the more unreasonable given that in providing section 4 support the government has acknowledged that the family is unable to return to their country of origin through no fault of their own. In one report, many asylum seekers were found to have been destitute for more than six months and a significant proportion for more than two years, illustrating that refused asylum seekers are prepared to face long periods of destitution in the UK rather than returning to their country of origin.<sup>98</sup> Young people and families may be forced into street homelessness and will rely on friends and charities, facing a day-to-day struggle to secure food and shelter. The British Red Cross compared giving food to destitute asylum seekers in the UK to distributing food in Sudan, stating 'the humanitarian need is the same'.<sup>99</sup>

### Case study 6 - Inadequacy of asylum support

K, from Pakistan, was living as the dependent of a student in the UK, with their 11 year old son. However, she was the victim of domestic abuse and feared return to her home country because of reprisals by her husband's family for reporting the abuse in the UK. The family had been living in London, and their son had been receiving healthcare from a specialist hospital in London for a longstanding condition which required repeated surgery.

K left her husband and claimed asylum, based on her fear of return to Pakistan. Following the asylum claim, she and her son were accepted as being destitute and in need of asylum support, but despite the urgent medical care he was receiving in the capital they were dispersed far away from London and their networks of support. It took a long time to get services in place, to register with a GP and to explain that the son needed to be re-referred for treatment. Both hospitals where the son could receive treatment in their new location were a long distance from the dispersal accommodation but the Home Office refused to pay for the necessary travel. K was distraught and felt powerless to act in her son's best interests.

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94 The inquiry 'heard how families are living in poorly maintained, overcrowded accommodation which can be damp, dirty, cold and unsafe; infested with mice, cockroaches and other pests, rotting floorboards and locked windows. One submission characterized this as 'death trap' accommodation.' Refugee Action said that it had supported female clients who have 'engaged in begging, transactional relationships and prostitution in order to access cash to alleviate destitution. Destitute and homeless women are particularly vulnerable to sexual exploitation. Pregnant women reported being exploited in return for accommodation. Such survival strategies not only put the individuals and their children at risk but also have social and financial consequences for the wider community.

95 For example, in 1999 when support payments were reduced and vouchers were introduced, asylum applications increased. When cash was reintroduced, the numbers went down steadily for years afterwards

96 *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People*, January 2013, p 4

97 House of Lords Hansard, Minister of State Lord Henley's written answer, 22 June 2012

98 H.Crawley, J. Hemmings and N. Price, *Coping With Destitution: Survival and livelihood strategies of refused asylum seekers living in the UK*, OXFAM, 2011 at <http://policy-practice.oxfam.org.uk/publications/coping-with-destitution-survival-and-livelihood-strategies-of-refused-asylum-se-121667>. See also P. McIntyre and E. Mogire, *Between a rock and a hard place: the dilemma facing refused asylum seekers*, Refugee Council, 2012, at [http://www.refugeecouncil.org.uk/assets/0000/1368/Refugee\\_Council\\_Between\\_a\\_Rock\\_and\\_a\\_Hard\\_Place\\_10.12.12.pdf](http://www.refugeecouncil.org.uk/assets/0000/1368/Refugee_Council_Between_a_Rock_and_a_Hard_Place_10.12.12.pdf) and K. Dorling, M. Girma and N. Walter, *Refused: The experiences of women denied asylum in the UK*, Women for Refugee Women, 2012, at <http://www.refugeewomen.co.uk/images/refused.pdf>

99 British Red Cross, *Not gone, but forgotten: The urgent need for a more humane asylum system*, 2010, at [http://www.redcross.org.uk/About-us/Advocacy/~media/BritishRedCross/Documents/About%20us/Not%20gone%20but%20forgotten%20destitution%20report.pdf](http://www.redcross.org.uk/About-us/Advocacy/~/media/BritishRedCross/Documents/About%20us/Not%20gone%20but%20forgotten%20destitution%20report.pdf)

## 2.2 Local authority support

'No recourse to public funds' (NRPF) is a condition imposed by the Home Office on many categories of person subject to immigration control,<sup>100</sup> giving them no entitlement to welfare benefits or public housing. Those without valid leave to remain in the UK have no recourse to public funds and are also not permitted to work.<sup>101</sup> Therefore a family that is destitute will not be able to support themselves, nor to rely on any state benefit to assist them in rising out of poverty.

However, as financial support from a local authority under community care and children's legislation is not a 'public fund', if a person with no recourse to public funds becomes destitute and/or homeless they may be entitled to support with accommodation and subsistence from the local authority, particularly:

- Under section 17 of the Children Act 1989 (a child in need and their family)
- As a looked after child or care leaver under the Children Act 1989
- As an adult in need of care and attention not otherwise available (section 21 National Assistance Act 1948)

Individuals with mental health problems, physical health problems, disabilities, older people, expectant and nursing mothers, and those suffering domestic violence may be entitled to local authority services, and support may be provided by a local authority to a family under the Children

Act 1989, where a child is considered to be a 'child in need', or to former looked-after children. The majority of families supported who are in the UK lawfully have outstanding immigration applications or are unable to travel back to their country of origin, due to illness, for example.

Section 17 of the Children Act 1989 places a general duty on local authorities to safeguard and promote the welfare of all children 'in need' in their area and to promote the upbringing of such children by their families. In meeting this duty, a local authority is empowered to offer a wide range of services for those children's needs,<sup>102</sup> including providing accommodation and giving financial assistance.

If a parent or young care-leaver is unlawfully in the UK the local authority will need to consider whether it would be a breach of their human rights (or where applicable, Community Treaty rights) to withhold or withdraw support.<sup>103</sup> Therefore, a 'child in need' assessment,<sup>104</sup> under the Children Act 1989, and a Human Rights Assessment must both be carried out when working with migrant families who cannot support themselves. Temporary accommodation can be provided to a destitute family under section 17 while these assessments are carried out.

Key groups of undocumented migrants relevant to this report to whom local authorities may provide support include:

- Former unaccompanied asylum-seeking children whose appeal rights are exhausted and are receiving leaving care support;

100 A person subject to immigration control" means a person who is not a national of an EEA State and who— .

- (a) requires leave to enter or remain in the United Kingdom but does not have it; .
- (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds; .
- (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or .
- (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.

Under Section 115(9) of Immigration and Asylum Act 1999

101 Or may have been granted leave subject to a maintenance undertaking, showing that they will not rely on state support. For a list of what counts as a public fund, see paragraph 6 of the Immigration Rules at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/introduction/>

102 Subsection 3 of Section 17 provides:

'Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.'

103 Certain categories of person are excluded from accessing support under section 17 of the Children Act 1989 by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, including:

- those granted refugee status by another EEA state and their dependants
- EEA nationals and any dependents
- refused asylum seekers who have failed to comply with removal directions
- people who are unlawfully present in the UK (this includes people who have overstayed their visas or failed asylum seekers who made their initial asylum claim in-country).

However, Schedule 3 does not apply to children, and support should be provided to parents if it is assessed, in a Human Rights Assessment, that to withhold or withdraw support would breach the family's human rights under the European Convention on Human Rights or their Community Treaty Rights.

104 The 'child in need' assessment should be child-focused, based on the needs of the child and on any potential risk there is to the child. This assessment should consider whether the child is 'in need' in the UK and whether the child would be 'in need' if they were to return to the parent's country of origin.

## GROWING UP IN A HOSTILE ENVIRONMENT

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- Families who have overstayed and are waiting for a decision from the Home Office on an application for leave to remain on human rights grounds;
- Women with children fleeing domestic violence who are waiting for a decision from the Home Office on an application for leave to remain under the Domestic Violence Rule.

A local authority's assessment may involve determining whether there is an obstacle to the family leaving the UK and whether this could be practically overcome (for instance, by paying for travel). If the family has made an application for leave to remain in the UK on human rights grounds (which may be, for example, based on Article 8, the right to respect for private and family life) they should not be removed from the UK until this has been dealt with, and the local authority should support the family until that application is decided unless the application is obviously hopeless.<sup>105</sup> This is a complex area of work involving immigration, community care and human rights law and these assessments can prove extremely challenging for social workers.

In 2011, the No Recourse to Public Funds Network reported a 'dramatic increase' in the numbers of supported children and family cases, with the vast majority of these cases involving those who had entered the UK on visas and overstayed, were waiting for a decision on human rights applications for leave to remain in the UK from the Home Office and would be destitute without local authority support. 1,729 children and family cases (involving 2,919 dependents) were supported during the financial year 2009/10 and almost £19m spent on children and family cases by 37 local authorities in this period.<sup>106</sup> By comparison, £11.4m was spent on these cases by 32 local authorities in 2007/8 and £9.5m was spent in 2006/7.<sup>107</sup> Local authorities do not receive any funds from central government for providing support, including accommodation and subsistence, to individuals with NRPF and the report noted that this provision can last for several years' because of delays in decision-making on immigration claims to the Home Office.<sup>108</sup>

For a significant proportion of NRPF cases there will be a barrier to removal, such as pending immigration applications and waiting for decisions on immigration applications costs local authorities an estimated £46.5 million per year.<sup>109</sup>

Failed asylum seekers may also seek local authority support. Some may have submitted fresh representations to the Home Office and have been refused accommodation and subsistence support under section 4 or have not applied for this support. The case of *R (VC and others) v Newcastle City Council* clarified that, where a child of a refused asylum seeker is found to be a 'child in need', the powers under section 4 are residual and there is no prohibition on the provision of financial support to the family under section 17 of the Children Act 1989. In other words, if a family presents to a local authority, a child in need assessment must be carried out and section 4 support cannot be considered 'otherwise available' in that assessment unless the Home Office is already providing it or has stated its intention to do so. Crucially, the case also clarified that it must be shown that section 4 support will meet the child's assessed needs.<sup>110</sup>

Another group reliant on support from a local authority are former separated asylum-seeking children when they turn 18. The majority of separated young people when they turn 18 should be entitled to leaving care support up to at least the age of 21.<sup>111</sup> The judgment in *R(SO) v Barking and Dagenham* in 2010 made it clear that, if a young person over 18 is entitled to leaving care support, this should be provided by the local authority, rather than the Home Office through asylum support. However, many of these young people face possible destitution after turning 18 if they have been refused asylum and have exhausted their rights to appeal, a problem which is explored below. A total of 606 'appeal rights exhausted' (ARE) post-18 unaccompanied asylum seeking children were supported in the financial year 2009/10 by 14 authorities at a cost of £4m.<sup>112</sup> More recent figures place the number of ARE young people in local authority care in London at 350.<sup>113</sup>

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105 See *R (Clue) v Birmingham City Council* [2010] EWCA Civ 360

106 The data shows that on average, accommodation and subsistence support costs approximately £9,000 per annum for a single adult and £11,000 per annum for a family. This rises to approximately £10,000 per annum and £12,500 per annum in London, respectively. NRPF Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, p 10, at [http://www.nrpfnetwork.org.uk/policy/Documents/NRPF\\_national\\_picture\\_final.pdf](http://www.nrpfnetwork.org.uk/policy/Documents/NRPF_national_picture_final.pdf), p 10

107 Although data from 37 children's services departments were collected for this research, five more than in 2008, expenditure declared on this particular client group has almost doubled

108 Around 60% of cases involving children and families who were supported by local authorities were resolved within two years, but a significant proportion of families remain supported for several years beyond this. NRPF Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, at [http://www.nrpfnetwork.org.uk/policy/Documents/NRPF\\_national\\_picture\\_final.pdf](http://www.nrpfnetwork.org.uk/policy/Documents/NRPF_national_picture_final.pdf)

109 NRPF Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, p 5

110 *R (VC and others) v Newcastle City Council*, [2011] EWHC 2673 (Admin), paras 87 and 89

111 By virtue of having been accommodated by a local authority under Section 20 of the Children Act 1989 for at least 13 weeks subsequent to their 14th birthday. They are known as 'former relevant children' and a local authority has a duty to provide them advice, support, financial assistance, and accommodation, if their welfare requires it, as part of their leaving care support

112 NRPF Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, p 9

113 Based on Freedom of Information Act requests collated by Tower Hamlets Law Centre and The Children's Society

## Problems in accessing local authority support

It could be argued that social services departments have, in effect, become accommodation providers for the Home Office whilst it makes decisions on immigration claims, a role that many local authorities view as unwelcome and one that brings significant financial pressure on local government.<sup>114</sup> Negative experiences highlighted by CCLC's casework include being refused any assistance in securing support, having support withdrawn unexpectedly, and parents being threatened with the taking of their child into care. CCLC cases have included those where a homeless mother has been forced to sleep in a bus station with her baby after being refused support, and another driven to begging and prostitution in order to provide for her children.

Of the 31 local authorities in Greater London to whom CCLC sent Freedom of Information requests, 26 provided replies and between them were supporting 1,117 NRPf families at the time of the request (June/August 2013). The responses revealed great variation in local authority practice, with many children and families being turned away when requesting support. Some local authorities supported as few as 36% of families who presented to them; others supported all of the families who turned to them for support.<sup>115</sup> Outside of London, the Children's Society has highlighted that in Birmingham, only 8% of families whom they had referred to children's services since 2008 had received support initially, while 86% were eventually supported following an intervention from a solicitor.<sup>116</sup>

While local authorities have the power to accommodate a child in need and the child's family, they are not under a duty to accommodate the child and their family together. CCLC's casework has highlighted the significant problem of local authorities arguing that they can fulfil the duty to the child by separating families and providing accommodation for the child only, threatening to take children into care rather than support the family unit as a whole. This is concerning as a local authority should only consider taking a child into care where the threshold is met: that the child is suffering or at risk of suffering significant harm. Where adequate parental care is available, destitution alone would not meet the threshold.

As well as a child's best interests and rights under Article 8, it actually costs more to take a child into care than to support them to remain with their family,<sup>117</sup> so in many cases this would seem to be either misconceived or used as a deterrence measure. In the vast majority of NRPf cases, there are no parenting concerns and social services intervention only takes place because of the existence of destitute children.<sup>118</sup>

Recent case law has made clear that to require the return of a family with children who have been in the UK for a long time, and particularly where the children have spent their formative years in the UK, can amount to a disproportionate interference with their right to respect for their private life and that, apart from in 'hopeless or abusive cases', a local authority's duty to support in order to avoid a breach of human rights 'does not require or entitle them to decide how the Secretary of State will determine an application for leave to remain, or, in effect, determine such an application themselves by making it impossible for the applicants to pursue it'.<sup>119</sup> In other words, a local authority should not deny or withdraw support before an individual or family has received a decision on their case or had the opportunity to pursue their right of appeal. However, they will need to have an arguable case and adequate evidence base to demonstrate the strength of their immigration case. In this way, their immigration or asylum application is the gateway to their support, but without that support they may be unable to pursue their claim due to the costs involved and their inability to access legal advice – this is explored further in section 3.1.

Although entitled to leaving care support, many of the young people who have been looked after by a local authority as children also face possible destitution because they are discharged from children's services after turning 18, having been refused asylum and having exhausted their rights to appeal. The majority of these came to the UK alone to seek protection from violence, abuse and persecution, while some were brought here as victims of exploitation and human trafficking. Rather than being granted refugee status, most are refused asylum and given a temporary form of leave to remain that comes to an end before they turn 18. They may then become 'appeal-rights exhausted'. Often these young people have had very poor quality legal representation that has undermined their asylum claim. Although most

114 NRPf Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, p 13

115 In the NRPf report, figures also varied greatly between local authorities, with some taking on as many as 90% of referrals and others taking on 0%. NRPf Network, *Social services support to people with no recourse to public funds: A national picture*, 2011, p 11

116 The Children's Society, *Written evidence to Birmingham City Council Enquiry: Children and Families with No Recourse to Public Funds*, 2013

117 'Care costs for children are higher than Eton fees, says Big Issue Founder', *The Telegraph*, 22 June 2010 at <http://www.telegraph.co.uk/education/educationnews/7841457/Care-costs-for-children-are-higher-than-Eton-fees-says-Big-Issue-Founder.html>; Z. Williams, 'Who profits from being in care? It's not the children', *The Guardian*, 31 October 2012, at <http://www.theguardian.com/commentisfree/2012/oct/31/who-profits-from-being-in-care>

118 *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People*, January 2013, p 16

119 See *Birmingham City Council v Clue* [2010] EWCA Civ 460 and *R (on the application of KA) v Essex County Council* [2013] EWHC 43 (Fam)

should continue to receive support until issued with removal directions, so as to prevent a breach of their human rights,<sup>120</sup> practice among local authorities still varies widely,<sup>121</sup> and many find themselves in limbo – unable to leave the UK but left with no support or accommodation. A recent report from The Children’s Society’s report, ‘I don’t feel human’, found ‘a sharp rise in the number of young people who are experiencing destitution and homelessness’,<sup>122</sup> and CCLC has dealt with a number of cases where young people have been told their leaving care support will be withdrawn based on their immigration status.

### Inadequate support

Of the 26 local authorities in Greater London who replied to our Freedom of Information Act requests, only 12 had formal written policies on the provision of accommodation and/or financial support to NRPf families. A further five were in the process of drafting such policies. The lack of any formal

guidance causes inevitable inconsistency in terms of local authority responses to this group.

Recent CCLC cases, in conjunction with these FOI requests, illustrate that over half of the local authorities who had policies or pre-defined support rates are providing support under section 17 to destitute families at the equivalent level to the section 95/section 4 support provided by the Home Office, or even less, despite evidence demonstrating that Home Office support is not sufficient to meet children’s needs. Rates of financial support given by one local authority were as low as £30 per week for an adult and £10 for a child, significantly lower than Home Office support. Another provided £44.24 to an adult and £15.21 for a child below 11, but expected families to cover the costs of utilities including gas and water from that amount. Only two local authorities based their support on mainstream benefit rates. One CCLC client received only £35 a week to support her and her young son – an amount that was increased to £102 a week after legal challenge.

#### Case study 7 - Refusal of support

J came to the UK in 2007 from Nigeria on a student’s visa to study Law. During her time in the UK she met and started a relationship with W, a British man, and moved in with him. J applied to extend her visa to stay in the UK before it expired in 2009 and then found out she was pregnant. J then planned to apply for a spousal visa.

When J’s daughter was born, W took her to the hospital but never returned. He subsequently changed the locks on the flat they shared and refused to have any contact with his daughter, nor to let J access her belongings. He also refused to provide any financial support to J for their daughter.

Unable to support herself, J initially resorted to staying with friends but this arrangement then broke down. She was offered bed and breakfast accommodation by the local authority but this was subsequently withdrawn. J does not feel she can return to Nigeria because her daughter’s father is in the UK and the fact that she is a Muslim and had a child out of wedlock to a man who is neither Nigerian nor a Muslim would result in her and her daughter being disowned by her family in Nigeria – she would be left destitute in Nigeria.

Once paternity had been established, J intended to apply for a new birth certificate for her daughter and a British passport. However, unmarried parents need to present together to the Registry Office to enable registration.

The local authority asserted that J and her daughter could return to Nigeria, and so they did not need support. This is despite the fact that J’s daughter is a British citizen having been born to a British father in the UK. As an alternative, the local authority proposed taking the child into care.

120 The law on the withdrawal or withholding of local authority support to young people is included in Schedule 3 of the Nationality, Immigration and Asylum Act 2002, which prevents certain categories of migrants from accessing ‘leaving care’ and other types of support. Paragraph 6 of Schedule 3 states that young people who are considered to be ‘failed asylum-seekers’ are entitled to continue to receive leaving care support from a local authority up to the point where they ‘fail to comply with the removal directions’ set by the UK Border Agency (a removal direction details the time and place of removal from the UK). In other words, being a failed asylum seeker is not sufficient cause on its own to withdraw or withhold social services support – they must, in addition, have failed to comply with removal directions issued in respect of them. However, many ‘end of line’ young people, rather than being defined as ‘failed asylum seekers’, will fit into another category detailed in Schedule 3: ‘persons unlawfully in the UK’.<sup>9</sup> If a young person is found to be a person ‘unlawfully in the UK’, then they can have their leaving care support withdrawn, providing that to do so would not breach their rights under the European Convention on Human Rights (ECHR) or under the European Community Treaties.

121 K. Dorling and A. Hurrell, *Navigating the System: Advice provision for young refugees and migrants*, Coram Children’s Legal Centre, 2012, p 38 at [http://www.seekingsupport.co.uk/images/navigating\\_the\\_system\\_final.pdf](http://www.seekingsupport.co.uk/images/navigating_the_system_final.pdf)

122 I. Pinter, *I don’t feel human: Experiences of destitution among young refugees and migrants*, The Children’s Society, 2012, at [http://www.childrensociety.org.uk/sites/default/files/tcs/research\\_docs/thechildrensociety\\_idontfeelhuman\\_final.pdf](http://www.childrensociety.org.uk/sites/default/files/tcs/research_docs/thechildrensociety_idontfeelhuman_final.pdf)

Local authorities appear to be assessing their responsibilities in terms of meeting the basic needs of families to avoid destitution, rather than assessing whether support is adequate to meeting children’s full range of needs as set out in statutory guidance.<sup>123</sup> This provision fails to recognise the distinction between Children Act services and those ‘simply’ required to avoid a breach of human rights as outlined in the case of *R (VC & ors) v Newcastle City Council*<sup>124</sup> which held:

‘section 4...provid[es] an austere regime, effectively of last resort, which is made available to failed asylum seekers to provide a minimum level of humanitarian support. Section 17 in contrast is capable of providing significantly more advantageous source of support, its purpose being to promote the welfare and best interests of children’<sup>125</sup>

### Comparison of rates of support provided by Home Office, one local authority and the Department of Work and Pensions<sup>126</sup>

	Amount per week - section 95	Amount per week - section 4 (by Azure payment card used to buy food and essential toiletries)	Amount per week – example local authority rates	Amount per week – main-stream benefits
<b>Mother and child (between 1 and 3 years)</b>	£99.90	£73.78	£59.35	£153.39
<b>Mother and child (aged 11-15)</b>	£96.90	£70.78	£66.52	£153.39

(This table is for illustrative purposes only - local authority rates vary depending on the authority)

### Case study 8 - Inadequate support for family of four

M came to England from Jamaica in 2002 with her eldest child, then 14 months old, on a visitor’s visa. In England she had had two more children, now aged 7 and 3. M overstayed her visa and, following the breakdown of her relationship with the children’s father, had been living in shared privately rented accommodation, sharing one bedroom with her three children. One child has severe eczema and bronchial asthma which required emergency hospital care. M made an application for leave to remain to the Home Office in 2011 which was refused in 2012, but she had been advised that she was eligible to make another application for leave to remain under the Immigration Rules. However, she was unable to pay the application fee of £1877.

Due to her inability to pay the rent, M’s arrears had built up and she was facing eviction. Despite contacting the local authority two months before the eviction date, no assessment was carried out until the day before eviction, and only after CCLC had sent a letter before action to the local authority. The family were finally provided with accommodation in a two-bedroom flat but were only given £50 a week, a level of subsistence well below that provided by the Home Office (under section 95 rates, a family of this size would receive £202.84 a week). The bus pass alone required to get M’s children to and from school cost £19.60, leaving just over £30 a week to clothe and feed three children. No assessment of the family’s needs was undertaken and it was unclear how the local authority had determined that £50 a week plus accommodation was sufficient for a mother with three children.

M was only able to provide for her children adequately by using money she had been given in donations from her church, which also helped her pay for the application to the Home Office. She was only able to buy the bare minimum for her children and they had to go without stationary and books. They were also unable to go on schools trips or take part in any activities outside of school. Coram Children’s Legal Centre challenged the inadequate provision of support through judicial review.

123 Department for Education, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, 2013 at <http://www.education.gov.uk/aboutdfe/statutory/g00213160/working-together-to-safeguard-children>

124 *R (VC & ors) v Newcastle City Council* [2011] EWHC 2673 (Admin)

125 *ibid*, para 87

126 Home Office, Asylum Support, at <http://www.ukba.homeoffice.gov.uk/asylum/support/>

Often care-leavers who are provided with support on the basis that a failure to do so would breach their human rights are also given the bare minimum in terms of support, which does not adequately meet their needs.

### Case study 9 - Inadequate support for a care-leaver

M arrived in the UK from Iraq as an unaccompanied asylum-seeking child at the age of 14. He became a looked-after child but, after five years in the UK, his asylum claim was refused and his rights of appeal on the asylum matter became exhausted. M had repeatedly tried to trace his family to no avail; he strongly believed that no-one, at any stage, had looked at his case properly but his only option seemed to be to return to Iraq – he was very fearful of this as he had no family members left and believed it to be a dangerous place. M tried to build his life in the UK and was pursuing education, but he had become highly anxious and was extremely vulnerable. The local authority provided M with very little support. He did not have a functioning Pathway Plan,<sup>127</sup> nor a Personal Adviser, and he was receiving minimal financial support as a care leaver – only £40 per week cash, which he had to cross London to collect every week. Since having his asylum appeal refused, M had been sofa-surfing with no settled accommodation. He became unable to enrol again at college because he had become undocumented, and was living an increasingly isolated and unproductive life. The Migrant Children's Project was able to give M legal advice to challenge the local authority's lack of support, and referred him for pro bono advice on his Article 8 immigration case.

Even when a family or individual is able to make a successful application on family and private life grounds to the Home Office, dependency on local authority support can be prolonged by the attachment of a no recourse to public funds condition to the leave that is granted to them, introduced under the changes to the Immigration Rules that came into force on 9 July 2012. Home Office guidance states that certain types of leave will have an NRPF condition attached 'unless there are exceptional circumstances' and that these will exist 'where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income'.<sup>128</sup> It is in the interests of the local authority to ensure that those granted leave in the UK have access to public funds so that they can access mainstream benefits and the local authority does not continue to hold responsibility for supporting them over a long period, but many do not realise that arguments about the unsuitability of an NRPF condition and evidence of this need to be put forward with the application for leave made to the Home Office. If a family cannot access legal representation, then they may not have the necessary assistance in providing the relevant information and the only way to challenge a no recourse to public funds condition is through judicial review, which is a mechanism involving an application to the High Court that is used to challenge unlawful acts or omissions by public authorities.<sup>129</sup> As outlined in section 3.1, judicial review as a means of redress is currently under threat.

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127 Every eligible young person in care should receive a comprehensive Pathway Plan when they turn 16. This plan should map out a clear route to independence.

128 Immigration Directorate Instructions Family Members under the Immigration Rules Section FM 1.0 Partner and Article 8 ECHR Guidance, p. 51, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/partners.pdf?view=Binary>.

129 For more information, see Migrant Children's Project factsheet on 'No recourse to public funds conditions on leave granted on family and private life grounds', at [http://www.childrenslegalcentre.com/index.php?page=faqs:\\_families\\_support](http://www.childrenslegalcentre.com/index.php?page=faqs:_families_support)



## 2.3 Private rented housing

Undocumented families have no recourse to public funds, which includes housing under Part 6 and Part 7 of the Housing Act 1996, as well as housing benefit and council tax benefit. They are also ineligible for social housing. The lack of access to benefits and social housing for undocumented families means that many undocumented families rely on the private housing market, mostly in the private rented sector as home ownership is out of reach, with migrants disproportionately represented at the poorer end of this market, including in houses in multiple occupation (HMOs).<sup>130</sup> The significant problems with the private rented sector are well known,<sup>131</sup> and many of these are exacerbated for undocumented migrant families and undocumented single young people due to their vulnerability and precarious immigration status.

As outlined above, the only safety net available to prevent homelessness among undocumented families and undocumented single young people is local authority support under community care legislation (primarily the Children Act 1989 and the National Assistance Act 1948). In practice, many children who potentially meet the statutory definition of a child in need have not been identified or had their needs assessed by a local authority, with many of these children likely living in the private rented sector, often in inadequate conditions.

Undocumented migrants may face racism, exploitation and discrimination by private landlords.<sup>132</sup> The 2010 report, 'No right to dream', found that 'overcrowding, poor quality, small rooms, lack of communal space, high rents, tied accommodation (provided by their employer) and conflict with fellow tenants are familiar experiences' among young

undocumented migrants.<sup>133</sup> Unregulated landlords are able to provide poor-quality housing at extortionate rates, safe in the knowledge that undocumented migrants are unlikely to report abuse by landlords for fear of detection, losing their home or losing their children to social services. As a result, many are forced to live in sub-standard, overcrowded and unsanitary accommodation, based on informal arrangements and agreements that offer no security or stability.<sup>134</sup> Research carried out by the Organisation for Economic Co-operation and Development (OECD)<sup>135</sup> revealed that across OECD countries, 32% of children in immigrant households faced overcrowding issues. Families may have to change accommodation frequently, move at short notice and rely on friends or family, or homeless support agencies for housing.

There is overwhelming evidence that low-income, poor housing and parental stress create disadvantages for children in the short and long-term.<sup>136</sup> Frequently moving accommodation breaks support networks in local communities, and the lack of a permanent address to give at GPs' surgeries can mean families forgo preventative treatments and are forced to use emergency healthcare such as A&E when health concerns become more urgent.

Because of the insecure housing situation for undocumented migrants and the limited safety nets that exist for this group, undocumented migrants are at significant risk of homelessness. One survey of homelessness agencies revealed that over 50% assisted migrants who were sleeping rough, with 41% of agencies stating that immigration concerns were the cause of homelessness.<sup>137</sup>

130 John Perry, 'UK migrants and the private rented sector: A policy and practice report from the Housing and Migration Network', February 2012, available at <http://www.jrf.org.uk/publications/uk-migrants-private-rented-sector>

131 See Shelter's 'Fixing private renting' campaign at [http://england.shelter.org.uk/campaigns/fixing\\_private\\_renting](http://england.shelter.org.uk/campaigns/fixing_private_renting)

132 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p. 20

133 N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, at <http://www.staff.city.ac.uk/yum/documents/Young%20Undocumented%20Migrants%20report.pdf>

134 Similar housing concerns are also experienced by undocumented migrants across Europe, as highlighted in a PICUM report – see R. Van Parys and N. Verbruggen, *Report on the Housing Situation of undocumented migrants in six European countries*, PICUM, 2004, at <http://picum.org/picum.org/uploads/publication/Report%20on%20Housing%20and%20Undocumented%20Migrants%20March%202004.pdf>. For example in Belgium, landlords have taken advantage of the legal inferiority of undocumented migrants. However the Belgian government has responded to this and has passed policy which states that landlords can be prosecuted for not providing humanitarian help to illegal migrants, and also that the tenant can be protected by oral lease as well as written. The report recommends a change of attitude of governments and at the EU level, to benefit the social rights of families and children who are categorised as 'illegal'. See also M. Martiniello A. Rea, *Belgium's immigration policy brings renewal and challenges*, Migration Policy Institute, 2003, at <http://www.migrationinformation.org/feature/display.cfm?ID=164>

135 *Settling in: OECD indicators of integration*, OECD publishing, 2012, at [http://www.keepeek.com/Digital-Asset-Management/oece/social-issues-migration-health/settling-in-oece-indicators-of-immigrant-integration-2012\\_9789264171534-en](http://www.keepeek.com/Digital-Asset-Management/oece/social-issues-migration-health/settling-in-oece-indicators-of-immigrant-integration-2012_9789264171534-en). It should be noted that the research was carried out through collecting data from household surveys and did not include homeless persons. With this in mind, it is likely that the real picture of housing concerns is not fully gauged when one considers that permanent accommodation is often difficult to obtain for undocumented families. The use of surveys to conduct the research is also limited, bearing in mind the fear of detection that is present in undocumented households.

136 Joseph Rowntree Foundation, *Estimating the costs of Child Poverty*, 2009, at <http://www.jrf.org.uk/sites/files/jrf/2313.pdf>

137 160 agencies which assist with homeless people and other migrant groups were asked to complete a survey. See *Homelessness among migrant groups*, Homeless link, 2010, at [http://homeless.org.uk/sites/default/files/Migrants%20and%20Homelessness%20report\\_March\\_prm.pdf](http://homeless.org.uk/sites/default/files/Migrants%20and%20Homelessness%20report_March_prm.pdf)

Recent policy responses that have affected undocumented migrants in the private rented sector include a crackdown on so-called 'beds in sheds' – inadequate and often unsafe accommodation in buildings and illegal structures that are not houses, including sheds and garages.<sup>138</sup> In April 2012, the government announced a new national taskforce, including the police, the Home Office, local councils and HM Revenue and Customs, to tackle the issue 'by taking action against criminal landlords and removing illegal immigrants'.<sup>139</sup> In May 2012 the housing minister announced a £1.8 million fund to assist the nine worst affected councils (Brent, Ealing, Hillingdon, Hounslow, Newham, Peterborough, Redbridge, Slough and Southwark)<sup>140</sup> and guidance for local authorities on tackling rogue landlords was launched in August 2012.<sup>141</sup>

Those living in 'beds in sheds' can include migrants with valid leave, EU citizens and British nationals, but undocumented migrants are particularly affected by the government's approach, which has sought to target poor living conditions and pursue immigration enforcement at the same time. Action to tackle illegal and exploitative accommodation and assist those living in appalling conditions has been welcomed by housing practitioners, but its focus on 'illegal immigrants' risks undermining the policy's effectiveness and raises questions about its purpose – as one commentator observed, 'if the main objective of raids like that in Ealing is to tidy up an environmental problem and track down people who've overstayed their visas, let's not pretend that they are for the benefit of the people living in appalling conditions'.<sup>142</sup> Local authority involvement in such operations should result in their undertaking needs assessments of children who are

identified, who are potentially 'in need' and to whom they may owe duties, but it is unclear whether this has been part of the response to families encountered through crackdowns on illegal privately rented housing.

Further government proposals have been brought forward in the Immigration Bill that will potentially have dramatic consequences for undocumented migrants throughout the private rented sector, which involve requiring landlords to conduct immigration status checks on potential tenants, with penalties for those who let to undocumented migrants. The government's proposals have been heavily criticised. They vastly underestimate the complexity of understanding someone's immigration status and increase the risk of homelessness and exploitation for families with children and single young adults, including those who are undocumented but also among all others who are unable to prove their status, or who are assumed to be 'riskier' tenants or are victims of discriminatory treatment. CCLC and others have argued that the proposals will force a deeper underground culture of sub-standard accommodation and further increase overcrowding and housing instability, while giving landlords greater control over the lives of vulnerable migrant families and single young people.<sup>143</sup>

### Case study 10 - Poor housing conditions

K is an Indian national. She lives with her husband, who works illegally, and their two children, now aged four and six. They live in a shared house with three other families. The family live in one room of the house. There is mould and damp across the walls. During the winter, the landlord refused to put the heating on during the day. K took the children to the local children's centre for some of the day, but at other times K and the children were forced to sit in the cold. The family share one bed.

They share a small kitchen and bathroom with three other families (a total of approximately eight adults and ten children). The family have moved several times over the past year; they are frequently told by landlords that they need to move on at very short notice. They feel they have no choice but to move when they are told to. They currently pay £800 per month for the room.

138 See for example, 'Housing crisis causes surge in sheds with beds', *The Independent*, 10 May 2012, at <http://www.independent.co.uk/news/uk/home-news/housing-crisis-causes-surge-in-sheds-with-beds-7729179.html>

139 See <https://www.gov.uk/government/news/national-taskforce-to-end-the-problem-of-beds-in-sheds--3>

140 See <https://www.gov.uk/government/news/1-8-million-to-tackle-scandal-of-beds-in-sheds>

141 Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7575/2206919.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7575/2206919.pdf). Ealing, Hillingdon, Newham and Redbridge received extra funding in March 2013

142 See John Perry, 'Rogue landlords or rogue migrants?' at <http://www.migrantsrights.org.uk/migration-pulse/2012/rogue-landlords-or-rogue-migrants> and John Perry, 'Beds in sheds' at <http://www.migrantsrights.org.uk/migration-pulse/2012/beds-sheds>

143 See CCLC's response to the government consultation at [http://www.childrenslegalcentre.com/index.php?page=migrant\\_children\\_consultation\\_responses](http://www.childrenslegalcentre.com/index.php?page=migrant_children_consultation_responses)

## 2.4 Education

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*'We want every child to succeed, and we will never give up on any child... Ensuring every child enjoys their childhood, does well at school and turns 18 with the knowledge, skills and qualifications that will give them the best chance of success in adult life is not only right for each individual child and family, it is also what we must do to secure the future success of our country and society'*<sup>144</sup>

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As well as providing necessary educational opportunities, schools play an important role in offering a sense of belonging and stability in undocumented children's lives, and are vital for a child's development.<sup>145</sup> That all children are entitled to primary and secondary education is recognised in UK law,<sup>146</sup> and to date there has been little, if any, tension between domestic and international legislation when it comes to compulsory education. The Education Act 1996 clearly states that local authorities have a duty to provide suitable full-time education for all children of compulsory school age resident in that local authority, irrespective of their immigration status, race and nationality and appropriate to their age, ability and any special educational needs they may have.<sup>147</sup> Furthermore, local authorities and schools must comply with both the Race Relations Act 1976 and Race Relations (Amendment) Act 2000, which make discrimination on school admissions and school places on the grounds of race unlawful. While proof of address will need to be supplied, there is no duty on a school to determine the immigration status of a child or their parents. In turn, parents also have a duty to 'cause their child to receive appropriate and efficient full-time education'.<sup>148</sup>

It might be assumed then that school attendance is one of the few areas where immigration status should have no impact. Yet many migrant children still find it difficult to access, and remain in, appropriate school education. There may be practical reasons for this, such as language and communication problems or difficulties in affording travel, lunch or school uniforms<sup>149</sup>. Less direct issues, including the housing uncertainty and precarious living conditions that undocumented families are faced with, can also affect both a child's attendance and performance at school.<sup>150</sup>

Barriers to accessing education include waiting times to access places; confusion over entitlement to financial assistance; different admission rules according to the types of school; difficulties in navigating the English education system; and discriminatory or inconsistent admissions policies.<sup>151</sup> There is evidence to suggest that discriminatory practice still exists in the treatment of migrant children, so that access to education varies significantly from local authority to local authority.<sup>152</sup>

For children in families there are often misplaced concerns in schools about a child's immigration status, or that of their parents', and how this affects their entitlement to education. Parents may be concerned about being detected as undocumented migrants and keep their children away from school as a result.<sup>153</sup> While, under section 129 of the Nationality, Immigration and Asylum Act 2002, there exists an obligation on local authorities to supply information in respect of a person where it is reasonably suspected that the person has committed specified immigration offences and is, or has been, resident in the local authority's area, this duty *does not* apply to individual schools, and nor does it have a bearing on a child's enrolment at a school. That said, although immigration-related documentation is not required for registration at a school, some form of identification is still

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144 Department for Children, Schools and Families, *Your child, your schools, our future: building a 21st century schools system*, June 2009, at <http://www.educationengland.org.uk/documents/pdfs/2009-white-paper-your-child.pdf>

145 *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, 2008, at [http://picum.org/picum.org/uploads/file\\_/PICUM%20Undocumented%20Children%20in%20Europe%20-%20%20EN.pdf](http://picum.org/picum.org/uploads/file_/PICUM%20Undocumented%20Children%20in%20Europe%20-%20%20EN.pdf)

146 See K. Dorling, *Seeking Support: the rights and entitlements of separated children*, 2012, Coram Children's Legal Centre, pp63-71 at <http://www.seekingsupport.co.uk>

147 Under section 13A of the Education Act 1996, at <http://www.legislation.gov.uk/ukpga/1996/56/part/II/chapter/III/crossheading/general-functions>

148 Education Act 1996, section 7

149 Coram Children's Legal Centre, *The right to education in England: Alternative report to the UN Committee on the Rights of the Child*, 2008 at <http://www.childrenslegalcentre.com/userfiles/file/Right%20to%20education%20final%20copy.pdf>

150 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 30

151 K. Dorling, *Seeking Support: the rights and entitlements of separated children*, 2012, Coram Children's Legal Centre, pp63-71

152 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

153 *ibid*, p 30

required<sup>154</sup> and there exists confusion and fear on the part of parents over the extent to which schools should be sharing information with the Home Office.

Undocumented children are not entitled to free school meals, financial support for uniforms or transport to and from school,<sup>155</sup> which can have serious ramifications with regard to their academic performance and integration. The problem of children in poverty not receiving free school meals has attracted recent attention,<sup>156</sup> and is of significance not just because of the needs of children for a free school meal but also because of the relationship between a child's receipt of free school meals and a school receiving the Pupil Premium. It is estimated that there are 1.2 million children in poverty who are not entitled to free school meals.<sup>157</sup> Those who are not entitled include all children who are not receiving either one of the passporting benefits or section 95 asylum support (see section 2.1 on asylum support). This excludes those on section 4 asylum support (an estimated 800 children),<sup>158</sup> children in families with no recourse to public funds who are supported by a local authority under the Children Act 1989, and undocumented families who are receiving no statutory support at all. Those children who are excluded are frequently experiencing exceptional poverty and are among the poorest in the UK.

Some local authorities have already addressed the problem by providing all primary school pupils in their area with free school meals and the announcement that all pupils aged five to seven in England will get free school lunches from September 2015 was widely welcomed and is an example of a policy that puts the interests of all children first, regardless of status.<sup>159</sup> As the benefits system is changing with the introduction of Universal Credit from October 2013, there has been a call to extend the free school meals entitlement to all children in families receiving Universal Credit. This would be a welcome development but would not address the needs of children in undocumented families because they are not entitled to welfare support. The criteria would need to additionally include all children receiving asylum support (both section 95 and section 4) as well as all children in

families with no recourse to public funds who are supported by a local authority under the Children Act 1989.

### Case study 11 – Access to primary education

T, aged four, was born in the UK. He had been attending his local nursery and was enrolled in the same school for reception class starting in September. In the summer, T's father was picked up by Home Office for working illegally. The Home Office contacted the child's school and told them that they should not accept the child at the school, as the whole family were undocumented and had no recourse to public funds. This is despite the fact that education is not a public fund according to the Immigration Rules. The school, after consulting with its governors, told the family that they would take T off the roll for the reception class the following September and he would not be able to attend the school. Following interventions by a dedicated support worker (who rang our enquiry line for legal advice), the school reinstated the reception place.

The proposal considered by ministers, revealed by the press in 2013, to tackle 'education tourists'<sup>160</sup> by making schools check the immigration status of pupils raises further concerns. This came a year after the University of Oxford report 'No Way Out, No Way In' highlighted that increased demands on public authorities by the Home Office – such as asking social services to report suspected irregular migrants – were pushing families and children away from essential services, including schooling. Frontline professionals, including teachers, are increasingly being asked to check the legal status of children in their care and act as 'de facto immigration control officers'.<sup>161</sup> Extending immigration enforcement duties to schools could hinder the duty to promote the 'safety and wellbeing' of a child,<sup>162</sup> increase the potential for discrimination and enhance the anxiety of undocumented children and families, pushing them further

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154 *ibid*, p 30 and 39. The enrolment process commonly includes an initial interview where an adult has to be present, and some form of identity documents, proof of address, achievement results from the previous school, and some basic information such as who the GP is, are requested.

155 Under section 509 of the Education Act 1996, at <http://www.legislation.gov.uk/ukpga/1996/56/section/509>, Check this. Ref Seeking Support?

156 See The Children's Society's Fair and Square campaign at <http://www.childrenssociety.org.uk/fairandsquare>

157 L. Rodrigues, *Food for Thought: A survey of teachers' views on school meals*, Children's Society, at <http://www.childrenssociety.org.uk/sites/default/files/tcs/food-for-thought-final.pdf>

158 'Although exact numbers are not available, it is estimated that there are 10,000 children living on asylum support, including almost 800 children on Section 4 support intended for refused asylum seeking adults.' See [http://www.childrenssociety.org.uk/sites/default/files/tcs/asylum\\_support\\_inquiry\\_report\\_final.pdf](http://www.childrenssociety.org.uk/sites/default/files/tcs/asylum_support_inquiry_report_final.pdf)

159 'All infants in England to get free school lunches', *BBC News*, 17 September 2013, at <http://www.bbc.co.uk/news/uk-politics-24132416>

160 S. Malik and P. Walker, Ministers planning crackdown on 'education tourists', *The Guardian*, 2013, at <http://www.guardian.co.uk/politics/2013/mar/27/ministers-immigration-crackdown-education-tourists>

161 'No Way Out, No Way In: Migrant children fall through the net' at <http://www.rsc.ox.ac.uk/news/no-way-out>

162 As outlined in *Working together to safeguard children*, Department for children, schools and families, 2010, <http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/00305-2010DOM-EN-v3.pdf>

away from essential services.<sup>163</sup> It is vital, if all children in the UK are to receive the support they need, that teachers and schools do not fall prey to the common misconception that immigration control somehow trumps children's welfare and a child's right to education.

Further education, post-16, also provides an important opportunity to learn and enhance skills which can improve the opportunities for young people and play an important role with regards to their integration within society. In addition continuing in further education is not just of benefit to the individual but can bring significant social and economic benefit to the country.<sup>164</sup> However, young undocumented migrants face a number of institutional and practical barriers to accessing further education which can place a significant constraint on their lives and developmental aspirations.<sup>165</sup> While all young people are entitled to apply to study at a sixth form college or a further education college, local authorities are not obliged to provide school places for 16-18 year olds<sup>166</sup> and current regulations make clear that a learner must be lawfully resident in the UK in order to secure a free place in further education. The one exemption to this is those in receipt of section 4 support.<sup>167</sup> The same applies to higher education, where undocumented young people will usually be charged overseas fees and will not be eligible for student support. Therefore, for the many undocumented young people who have clear ambitions to continue their studies in further and higher education, there exist significant financial obstacles to their doing so. In addition, recent research has highlighted the lack of understanding of the education system on the part of professionals, as well as the lack of Information, Advice and Guidance (IAG) for young people, further enhancing the confusion faced in relation to understanding entitlements and support.<sup>168</sup>

### Case study 12 – Access to further education

S is a 16 year old originally from India whose family have lived in the UK for ten years. Despite several attempts to regularise their immigration status, they have been unsuccessful. No attempts have been made to remove the family, and the children have received all of their education here. S did very well in her GCSEs and wanted to progress to sixth form at the school she had been attending to study for 'A' Levels. Unfortunately, when S came to enrol for sixth form, the school wanted to see that she had leave to remain in her Indian passport, and was lawfully present in the UK, to show she was an 'eligible' student. Without this documentation, the school would not enrol her as the places in the sixth form were oversubscribed. Thus, despite the education 'participation age' having been raised to 17, this young person was being prevented from accessing further education.

Denying children access to education is not only unlawful but highly detrimental to those children. Access to compulsory education must remain free for all children and be kept entirely separate from immigration control, so as not to risk deterring some groups from accessing schools. Furthermore, the barriers that prevent children from thriving in school, such as hunger and poverty, must also be addressed through interventions such as free school meal provision for all.

163 [http://www.childrenslegalcentre.com/index.php?page=migrant\\_children%C3%A2%E2%82%AC%E2%84%A2s\\_access\\_to\\_education](http://www.childrenslegalcentre.com/index.php?page=migrant_children%C3%A2%E2%82%AC%E2%84%A2s_access_to_education)

164 Department for Business, Innovation and Skills, *BIS Research Paper Number 104: The Impact of Further Education Learning*, 2013, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69179/bis-13-597-impact-of-further-education-learning.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69179/bis-13-597-impact-of-further-education-learning.pdf)

165 N. Haywood et al, *Engaging all young people in meaningful learning after 16: a review*, Equality and Human Rights Commission, 2009, at [http://www.equalityhumanrights.com/uploaded\\_files/engaging\\_all\\_young\\_people\\_in\\_meaningful\\_learning\\_after\\_16\\_a\\_review.pdf](http://www.equalityhumanrights.com/uploaded_files/engaging_all_young_people_in_meaningful_learning_after_16_a_review.pdf); N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, p 42

166 K. Dorling, *Seeking support: A guide to the rights and entitlements of separated children*, Coram Children's Legal Centre, 2012

167 See the Migrant Children's Project factsheets on access to further education at [http://www.childrenslegalcentre.com/index.php?page=faqs\\_access\\_to\\_further\\_and\\_higher\\_education](http://www.childrenslegalcentre.com/index.php?page=faqs_access_to_further_and_higher_education)

168 L. Doyle and G. O'Toole, *A lot to learn: refugees, asylum seekers and post -16 learning*, Refugee Council, 2013, at [http://www.nuffieldfoundation.org/sites/default/files/files/RC-A%20lot%20to%20learn-web\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/RC-A%20lot%20to%20learn-web(1).pdf)

## 2.5 Healthcare

The core principles of the National Health Service (NHS) promote the idea of equal and free treatment for all and the Health and Social Care Act 2012 places a legal duty on the Secretary of State and NHS England to reduce inequalities by improving the health outcomes of groups including the marginalised and vulnerable.<sup>169</sup> Yet while children in care are granted equal access as nationals, undocumented children, young people and families are only eligible for 'essential' healthcare, despite the fact that they may be equally at risk, and suffer from their own specific set of vulnerabilities that arise from being undocumented. For example, 'the combination of precarious immigration status, restricted rights of access to healthcare and financial hardship can have negative effects on migrant's physical and mental health' and financial and immigration insecurities may cause stress, exhaustion and anxiety.<sup>170</sup> A report by Amnesty International has highlighted the domino effect of problems triggered by immigration concerns, with 'health problems and degrees of psychological distress directly related to this painful limbo existence.'<sup>171</sup> In another report, examining the situation of young Afghans refused asylum in the UK, all but one of the young people who identified themselves as currently living outside of the system spoke of health problems, including serious mental health and psychological problems, with several having self-harmed.<sup>172</sup>

### Eligibility for healthcare

At the time of writing, primary healthcare, including registration with a GP, was available to all children and families, regardless of immigration status. The NHS is not a 'public fund' for the purposes of the provisions relating to 'no recourse to public funds'. GPs are not required to ask for evidence of immigration status and it is a matter of discretion for individual GP practices whether or not they register those unlawfully in the country, although if a GP refuses to register an individual then he or she is required to give reasons for this decision and they must have reasonable grounds for refusal, which are not based on race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition.<sup>173</sup>

Secondary health care, the second stage of treatment usually provided by a hospital, is only available on the National Health Service for those who are 'ordinarily resident' in the UK. A person is regarded as 'ordinarily resident' if they are lawfully living in the UK voluntarily and for a settled purpose.<sup>174</sup>

Those with leave to remain are entitled to free secondary health care, but undocumented migrants are not eligible because they are not considered to be either 'lawfully resident' or 'ordinarily resident'. However, those who are being supported by the UK Home Office under section 4 or section 95 of the Immigration and Asylum Act 1999 are exempt from charges,<sup>175</sup> as are all children in the care of a local authority under the Children Act 1989 and victims of trafficking.<sup>176</sup>

169 See Sections 1C, 13G, 14T of the NHS Act 2006 and 62(4) of the Health and Social Care Act 2012. The first core principle of the NHS is: 'The NHS provides a comprehensive service available to all'. This principle applies irrespective of gender, race, disability, age, sexual orientation, religion, belief, gender reassignment, pregnancy and maternity or marital or civil partnership status. The service is designed to diagnose, treat and improve both physical and mental health. It has a duty to each and every individual that it serves and must respect their human rights. At the same time, it has a wider social duty to promote equality through the services it provides and to pay particular attention to groups or sections of society where improvements in health and life expectancy are not keeping pace with the rest of the population. See <http://www.nhs.uk/NHSEngland/thenhs/about/Pages/nhscoreprinciples.aspx>

170 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 34

171 Amnesty International, *Down and Out in London: The road to destitution for rejected asylum seekers*, 2006, at [http://www.amnesty.org.uk/uploads/documents/doc\\_17382.pdf](http://www.amnesty.org.uk/uploads/documents/doc_17382.pdf)

172 The young people spoke extensively of depression and hopelessness and 'their sense that they were in a metaphorical prison'. None were willing to consider voluntary return. C. Gladwell and H. Elwyn, *Broken futures: young Afghan asylum seekers in the UK and in their country of origin*, Refugee Support Network, 2012 p 19-20 at <http://refugeesupportnetwork.org/sites/default/files/files/Broken%20futures%20final%20version.pdf>

173 Under Article 14, Human Rights Act and section 20, Race Relations Act 1976. This does not mean though that a practice which is already over-subscribed and has closed its list has to accept new applicants.

174 *National Health Service (Charges to overseas visitors) Regulations SI 2011/1556*. Section 175, National Health Service Act 2006 provides that those who are not 'ordinarily resident' in the UK could be charged for treatment

175 *Department of Health Guidance on implementing the overseas visitors hospital charging regulations*, 2011 (updated October 2012), para. 3.63. In 2006, the High Court ruled that refused asylum-seekers should be categorised as 'ordinary residents'. Consequently, they should have access to free NHS services - *R (A) v Secretary of State for Health & West Middlesex University Hospital NHS Trust*, at [http://www.medact.org/article\\_refugee.php?articleID=830](http://www.medact.org/article_refugee.php?articleID=830)

176 *Department of Health Guidance on implementing the overseas visitors hospital charging regulations*, 2011 (updated October 2012), paras 3.66 and 3.68

Certain treatments are always free of charge, regardless of the immigration status of the patient,<sup>177</sup> including treatment for certain communicable diseases such as malaria, treatment for sexually transmitted diseases, and treatment as an out-patient in a hospital's Accident and Emergency department or walk-in centre.<sup>178</sup> Furthermore, whilst hospitals can withhold treatment in some circumstances, they also have discretion to provide treatment without payment in others. Care which is considered to be 'immediately necessary treatment' or 'urgent treatment' must be provided, without delay, whether or not the individual is able to pay.<sup>179</sup> Maternity care should be viewed as 'immediately necessary treatment' and must not be withheld for any reason, but those who are not deemed 'ordinarily resident' may be required ultimately to pay for this treatment.<sup>180</sup>

## Problems in accessing healthcare

Despite their eligibility for free primary healthcare, confusion around the availability of support and obligations when treating undocumented migrants can put pressure on professionals and individuals alike. Key issues for those accessing and receiving good healthcare are language barriers - which can affect both the registration process and communicating health needs - and a general lack of awareness of their entitlements.<sup>181</sup> This can be compounded by confusion on the part of professionals themselves. There is increasing confusion around GPs responsibilities to treat migrants who do not have leave to remain the UK, and that the decision to register someone is at the discretion of a GP results in varied experiences of accessing healthcare for undocumented migrants, although a GP cannot legally refuse to register a patient on grounds of their immigration status. Research in 2011 found that one in ten Primary Care Trusts were not registering failed

### Case study 13 – Registering with a GP

M is a 12 year old who was brought to the UK aged 3 from Somalia, to live with his aunt and cousins who had been refugees but had gained British Citizenship. M was eventually given 3 years' discretionary leave to remain but an attempt to extend this leave appears to have failed because the immigration legal aid firm used by the family went out of business and the case file was destroyed. A further attempt to obtain discretionary leave was made by the aunt with the help of the family support worker at M's primary school but, following an enquiry by the MP, the Home Office reported that that application also appeared to have been 'lost'.

It was only when M's secondary school queried doctor's details and vaccination record that it emerged that the GP with whom the rest of the family was registered had refused to register M because he had no 'current identity or status papers'. Following the involvement of the Migrant Children's Project and the personal intervention of the family support worker, the GP agreed to register M and bring his health checks up to date. We were also able to place the case with a Law Centre which assisted in making a settlement application for M so that he was on a path to status equivalence with the rest of his extended family.

asylum seekers and that some PCTs were advising GPs to ask for proof of immigration status when registering.<sup>182</sup> Many of the initial decisions to register an undocumented migrant are made at reception and individuals are often deterred from visiting GPs as result of the discrimination they face, at times, from staff.<sup>183</sup> In one report, a number of

177 *ibid*, Regulation 6

178 This does not extend to services provided once the patient has been admitted as an in-patient

179 Patients may be able to access treatment by arguing that:

- Their condition will deteriorate significantly or their prognosis will be affected if they do not get treatment, and;
- They cannot pay for the treatment in advance, and;
- They cannot return to their country of origin immediately (for example because they are too ill to fly, or there is no safe route, or they have made a further application for leave to remain in the UK that has not yet been considered). They are still liable to be charged, but treatment should not be refused if they cannot pay.

*Department of Health Guidance on failed asylum-seekers and ordinary/lawful residence; and when to provide treatment for those who are chargeable*, published April 2009. See also *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225

180 Although guidance allows to the relevant NHS body to write off a debt for accounting purposes where 'given the patient's financial circumstances, it would not be cost effective to pursue it (e.g. they are a destitute failed asylum seeker or are genuinely without access to any funds or other resources to pay their debt)' See para. 6.26, *Department of Health Guidance on implementing the overseas visitors hospital charging regulations, 2011* (updated October 2012)

181 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

182 A. McNicoll, 'GPs treating asylum seekers unfairly targeted by PCOs', *Pulse*, 18 July 2011; Inclusive Health, *Documentary proof of identity, residency and immigration status prior to GP registration leads to decreased access for disadvantaged groups*, London, 2010 cited in N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

183 PICUM, *Access to Health Care for Undocumented Migrants in Europe*, 2007 at [http://picum.org/picum.org/uploads/file\\_/Access\\_to\\_Health\\_Care\\_for\\_Undocumented\\_Migrants.pdf](http://picum.org/picum.org/uploads/file_/Access_to_Health_Care_for_Undocumented_Migrants.pdf)

undocumented migrants interviewed were unable to register with the first GP they approached and had to make several attempts with different GPs before being able to register.<sup>184</sup>

The Department of Health has acknowledged that there is 'confusion among both GPs and PCTs' in relation to the current entitlement to free healthcare and noted 'a prevailing incorrect belief that a person must be ordinarily resident in the UK in order to qualify for free primary medical services. Some practices have deregistered or failed to register people they believe to be 'ineligible' in some way due to their immigration status'.<sup>185</sup>

The exclusion of undocumented migrants from receiving free secondary healthcare means that hospitals and practices are obliged to check the immigration status of patients<sup>186</sup> and undocumented migrants are expected to pay the full cost of any treatment or diagnosis, including maternity care.<sup>187</sup> Not only may these costs be prohibitive, and difficult to recoup, but the link between status and the provisions of services may deter those who fear engagement with the Home Office from accessing any care at all. Some may choose not to register with a GP or to seek health care in any form.<sup>188</sup> Healthcare professionals have already lamented the Home Office's 'invasion of public services', which undermines the trust between public service providers and users and is particularly important given the precarious nature of migrants' legal status and their fear of detection.<sup>189</sup>

## Latest government proposals

Current government proposals suggest limiting access to healthcare for migrants further, by establishing that all migrants, except those with 'permanent residence' must pay for primary healthcare. This is despite the Department of Health having identified that some undocumented migrants 'are likely to be vulnerable, living in conditions typically associated with greater individual health needs. They may also be destitute with no means to pay... [and] have no alternative to the NHS to meet their immediate health needs.<sup>190</sup> These charges are designed to tackle 'health tourism', despite the lack of robust data on migrants' access to the NHS,<sup>191</sup> and to ensure that the NHS does not 'act as an incentive to break the UK's immigration laws'<sup>192</sup>. The Immigration Bill, published on 10 October 2013, makes provision for non-EEA 'temporary' migrants to pay a health surcharge, and adopts a revised definition of 'qualifying residence'. The Department of Health states that other charges can be made through amendments to secondary NHS legislation.<sup>193</sup>

However, this approach puts together all those without indefinite leave to remain and does not distinguish between those visiting for health purposes and long-term residents. The government's proposed definition of 'permanent residence' fails to take into account the many people who have been living in the UK for many years, who may be on a route to settlement and will settle in the UK. The Department of Health consultation defined 'temporary migrants' as 'those who come to the UK under immigration controls to live for a period of up to five years (mainly students, workers and newly arriving family members of existing UK citizens'<sup>194</sup> and 'permanent residents' as those who have indefinite leave

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184 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 35

185 Department of Health, *2012 Review of overseas visitors charging policy, Summary report*, April 2012, para.21, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/210439/Overseas\\_Visitors\\_Charging\\_Review\\_2012\\_-\\_Summary\\_document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210439/Overseas_Visitors_Charging_Review_2012_-_Summary_document.pdf)

186 PICUM, *Access to Health Care for Undocumented Migrants in Europe*, 2007 [http://picum.org/picum.org/uploads/file\\_/Access\\_to\\_Health\\_Care\\_for\\_Undocumented\\_Migrants.pdf](http://picum.org/picum.org/uploads/file_/Access_to_Health_Care_for_Undocumented_Migrants.pdf)

187 HUMA Network, *Access to health care for undocumented migrants and asylum seekers in 10 EU countries: Law and practice*, 2009, at [http://www.episouth.org/doc/r\\_documents/Rapport\\_huma-network.pdf](http://www.episouth.org/doc/r_documents/Rapport_huma-network.pdf)

188 The Oxfam report *Coping with Destitution* highlighted that many refused asylum seekers are unaware of their entitlements to free primary healthcare, or are anxious about contact with the authorities and therefore do not access health services. See H. Crawley, J. Hemmings and N. Price, *Coping With Destitution: Survival and livelihood strategies of refused asylum seekers living in the UK*, Oxfam, 2011. The report *No Right to Dream* highlighted the fear felt by many undocumented migrants that deterred them from accessing healthcare, even for their children – N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, p 43-44

189 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

190 Department of Health, *Sustaining services, ensuring fairness: A consultation on migrant access and their financial contribution to NHS provision in England*, 2013, paras 3.60-3.61

191 Seven years of data from Doctors of the World's walk in clinic in east London shows that service users had, on average, been living in the UK for three years before they tried to access healthcare. Only 1.6% of people using the service had left their country of origin for personal health reasons. See Doctors of the World International Network, *Access to healthcare in Europe in times of crisis and rising xenophobia*, 2013 – the full report including all UK statistics can be downloaded at [www.mdminternational.org](http://www.mdminternational.org)

192 Home Office, *Controlling immigration: regulating migrant access to health services in the UK - response*, 22 October 2013, at <https://www.gov.uk/government/consultations/migrant-access-to-health-services-in-the-uk>

193 House of Commons Library, *NHS charges for overseas visitors*, 18 October 2013

194 Department of Health, *Sustaining services, ensuring fairness: A consultation on migrant access and their financial contribution to NHS provision in England*, 2013, para 14



to remain,<sup>195</sup> based on the assumption that a 'long term commitment' to the UK is only evidenced by those who have indefinite leave to remain. This is fundamentally flawed. For example, Coram Children's Legal Centre works with a number of children and families who will have been living in the UK for a number of years in a variety of circumstances and may make an application to remain in the UK on the basis of Article 8 of the European Convention on Human Rights, which protects their right to family and private life. There is no question that these are children whose lives are, and will permanently be, in the UK. As outlined in the Appendix, there are many different routes to indefinite leave to remain, some of which can take longer than five years. Those who cannot be returned because of their right to family life under Article 8 are only granted limited leave for 30 months which can be extended for up to ten years. In short, many individuals who will ultimately settle in the UK spend a very long time in the UK before they do so.

Given the significant evidence showing the barriers migrants face in accessing GP services, despite their current entitlement, these proposals are likely only to worsen the situation for children, young people and families, and result in fewer engaging with the health system at all.<sup>196</sup> The system of identity checks for all patients that will be necessary for these proposals to operate will not only result in NHS staff being involved in immigration control and identity checks but will also be costly and inefficient. The complexity of immigration law means that ascertaining a patient's immigration status is far from simple, and the confusion that is likely to result from the proposals threaten their workability.

Charging for primary care will create a further barrier to promoting the health and well-being of children and undermine the government's own commitment to an effective childhood immunisation programme with an aim to reduce the incidence of childhood infections.<sup>197</sup> Health protection is normally afforded to children, via surveillance, screening and immunisation in the Primary Care setting<sup>198</sup> and National Institute for Health and Care Excellence has already highlighted several groups as being at particular risk of not being immunised including 'those from some minority ethnic groups, those from non-English speaking families, and vulnerable children, such as those whose families are travellers, asylum seekers or are homeless'.<sup>199</sup>

Primary care is vital for public health and most effective and successful when it reaches the widest range of people possible. The purpose of primary care is to assess the broadest range of health needs and identify how best to meet them. Where an individual is unwilling or unable to access primary healthcare because of charging, there is a high probability that they will eventually present in A&E as an emergency when they are seriously ill and in need of (often expensive) treatment, a problem already identified by the Department of Health in 2012.<sup>200</sup>

It is essential that children are able to access primary healthcare and that families are not deterred from accessing GPs when they have health concerns. This is important both for child development but also public health. While the Department of Health is proposing to exempt certain groups from charges, such as refugees, children in local authority care and victims of trafficking, these exemptions do not cover all children, nor do they include young people and families who are destitute.

195 This is echoed in Article 34 of the Immigration Bill 2013

196 See Coram Children's Legal Centre, *Sustaining services, ensuring fairness: A consultation on migrant access and their financial contribution to NHS provision in England*, September 2013 at [http://www.childrenslegalcentre.com/userfiles/file/DoH\\_health\\_consultation\\_CCLC\\_Final.pdf](http://www.childrenslegalcentre.com/userfiles/file/DoH_health_consultation_CCLC_Final.pdf)

197 National Institute for Health and Care Excellence, 'Reducing differences in the uptake of immunisations' at <http://publications.nice.org.uk/reducing-differences-in-the-uptake-of-immunisations-ph21/public-health-need-and-practice>

198 In the form of, the Healthy Child Programme (HCP) – see Department of Health, *Healthy Child programme: pregnancy and the first five years of life*, 2013 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/167998/Health\\_Child\\_Programme.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/167998/Health_Child_Programme.pdf)

199 National Institute for Health and Care Excellence, *Reducing differences in the uptake of immunisations*, at <http://publications.nice.org.uk/reducing-differences-in-the-uptake-of-immunisations-ph21/public-health-need-and-practice>

200 Department of Health, *2012 Review of overseas visitors charging policy, Summary report*, April 2012, para.28. GP consultations cost on average £20, compared to £110 for average A&E attendance – T, Yates; J. Crane; M. Rushby, 'Charging Vulnerable migrants for healthcare', *Student British Medical Journal* 15, 2007, pp 427-470

# Part 3. Regularising immigration status

## 3.1 Legal advice and representation

As discussed in the introduction to this report, many young people will not realise that their immigration status is an issue. Others, such as those who have been through the asylum system and been refused, will be only too aware of their status but may have had poor legal representation in the past and may be unable to access further legal advice or representation, for example to make a fresh claim. A recurring problem encountered by the Migrant Children's Project's advice services is that most people do not know what their legal options are and many have received poor or inadequate legal representation in the past.

Publicly funded legal advice and representation for children, young people and families is vital to ensuring the voice of the child is heard in all administrative and legal proceedings, to enabling fair and equal treatment before the law, and to upholding children's best interests. Expert advocacy and legal representation are of critical importance for children where government agencies are making decisions about their future and where effective redress is required in the event of a government agency acting unlawfully.<sup>201</sup>

While, for children who are not in detention, there is no express provision in the UN Convention on the Rights of the Child for access to free legal representation, Article 12 provides that they should have 'the opportunity to be heard in any judicial and administrative proceedings affecting [them], either directly or through a representative'. The UN Committee on the Rights of the Child has emphasised that 'children who come to a country following their parents in

search of work or as refugees are in a particularly vulnerable situation. For these reasons, it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings.'<sup>202</sup> The Committee has also recently issued guidance on the right of the child to have their best interests treated as a primary consideration and has stated that a child 'will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies'.<sup>203</sup> In addition, the Committee of Ministers of the Council of Europe guidelines on child friendly justice state that:

3.7 Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

3.8 Children should have access to free legal aid, under the same or more lenient conditions as adults.<sup>204</sup>

In October 2002 the UN Committee on the Rights of the Child recommended that the UK Government 'carry out a review of the availability of legal representation and other independent advocacy to unaccompanied minors and other children in the immigration and asylum system'.<sup>205</sup> In March 2007, having received evidence that legal aid cuts were contributing to destitution among asylum seekers, the Joint Committee on Human Rights expressed its concern that 'the shortage of competent immigration advice and representation may indirectly result in destitution'.<sup>206</sup>

201 K. Dorling and A. Hurrell, *Navigating the System: Advice Provision for Young Refugees and Migrants*, Coram Children's Legal Centre, 2012, at [http://www.seekingsupport.co.uk/images/navigating\\_the\\_system\\_final.pdf](http://www.seekingsupport.co.uk/images/navigating_the_system_final.pdf)

202 UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 123, at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.doc>. As the Committee's own analysis of the wording of Article 12 UNCRC makes clear, "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. This obligation contains two elements in order to ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.'

203 UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para 96

204 *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, (adopted by the Committee of Ministers on the 17 November 2010 at the 1098th Meeting of the Ministers' Deputies), at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM>

205 *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland* (October 2002), para. 48 (f)

206 Joint Committee on Human Rights, *Tenth Report of Session 2006-07 on The Treatment of Asylum Seekers*, 2007, p 35, at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf>

Six years later children and young people are still unable to secure access to the specialist legal advice needed to ensure that they are properly supported and able to challenge instances where their rights are violated. As access to advice diminishes further, the UK is at risk of letting down and further marginalising some of the most at risk children and young people in the UK, and violating our domestic and international legal obligations to ensure that all children are safeguarded and have access to justice. In its report following the inquiry into the rights of separated migrant children, the Joint Committee on Human Rights in 2013 suggested that the Government should conduct an 'immediate assessment' of the availability and quality of legal advice and representation<sup>207</sup> in order to obtain a better understanding of the importance of legal representation for a number of migrant children which includes those that are undocumented.

## Cuts to legal aid

For a number of years, there have been difficulties in accessing good-quality, experienced legal representatives in the area of immigration, asylum and nationality law. Many very skilled and experienced solicitors, registered advisers and barristers practice in this area, including in the legal aid sector, but there are still significant problems for many in accessing good legal representation, which existed even prior to recent changes to legal aid.

Finding good-quality legal representatives with the capacity to take on new cases has long proved problematic, especially in certain parts of the country where there have been 'advice deserts', such as the South West of England. Difficulties not just in finding an immigration solicitor to refer to, but finding one with the necessary experience and expertise for working on children's cases, were experienced.<sup>208</sup> These were exacerbated by the closure of key legal aid immigration providers including Refugee and Migrant Justice, in June 2010, and the Immigration Advisory Service, in July 2011, as well as the legal aid immigration departments in a number of law firms, as it became impossible to cover costs while doing a thorough job on legal aid rates. While other providers expanded to fill the gap in the sector, a lack of capacity among good providers means that finding someone you trust to take a case on is frequently a time-consuming and challenging task.<sup>209</sup>

Furthermore, despite the complexity of immigration law and the significant impact that the outcome of immigration cases can have on an individual's life, under the Legal Aid, Sentencing and Punishment of Offenders act 2012 (LASPO) free legal advice and representation is now no longer available for immigration cases, following the introduction of changes on 1 April 2013. Only those cases where an individual has an asylum or protection claim are now covered by legal aid,<sup>210</sup> while non-asylum claims have been cut as they are considered to be cases where 'life and liberty is not at stake'.<sup>211</sup> This means that no public funding is now available for legal representation in immigration claims such as those based on rights to family and private life and children's best interests. Consequently, undocumented children, young people and families are not entitled to free advice or representation to regularise their status or extend their leave to remain.

Where someone has an asylum/protection claim (a claim about risk on return), they are – subject to financial eligibility tests and merits tests – still eligible for legal aid, but in practice legal aid providers may be unwilling to take on cases of undocumented migrants for which they would have to explore very long immigration histories where there may have already been several previous Home Office decisions or Tribunal determinations and possibly poor legal representation in the past. With all the pressures legal aid firms are under, they may not have the time to explore potential protection elements to a claim (which would attract legal aid) where the main part of a person's case is their immigration Article 8 claim (which would not attract legal aid), and may instead decline to take the case on entirely. This will leave people unable to find someone to assist them to exercise their rights, even where they know those rights exist in law and there is in theory (some) legal aid available.

As a supposed safeguard to protect those who lost access to legal aid on 1 April 2013, the LASPO system does allow for the Legal Aid Agency to grant legal aid funding for so-called 'exceptional cases', where legal aid is deemed necessary to prevent a breach of human rights or an EU law right. However, the government has made clear its view that otherwise out-of-scope immigration cases will not be granted exceptional funding,<sup>212</sup> even in cases brought by separated children on their own. During the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill, it was argued that immigration cases 'do not raise issues of such fundamental importance as asylum applications, where

207 Joint Committee on Human Rights, *Human rights of unaccompanied migrant children and young people in the UK*, June 2013, at <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>

208 K. Dorling and A. Hurrell, *Navigating the System: Advice provision for young refugees and migrants*, Coram Children's Legal Centre, 2012

209 *ibid*, p 38

210 Under paras 25 and 30 in Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, at [http://www.legislation.gov.uk/ukpga/2012/10/pdfs/ukpga\\_20120010\\_en.pdf](http://www.legislation.gov.uk/ukpga/2012/10/pdfs/ukpga_20120010_en.pdf)

211 Lord Wallace response to ILPA March 2012, at <http://www.ilpa.org.uk/data/resources/14384/12.03.26-Lord-Wallace-re-legal-aid-for-children.pdf>.

212 *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)* at <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guideexceptional-funding-non-inquests.pdf>

the issue at stake may be, literally, a matter of life and death' and that those involved in immigration cases 'will usually have made a free and personal choice to come to or remain in the United Kingdom'.<sup>213</sup>

At the time of writing, CCLC was only aware of one exceptional funding grant in an immigration case nationally since the system was introduced and CCLC's experience with our own clients has been that applications for exceptional funding have all been refused by the Legal Aid Agency. Experience with the exceptional funding system so far therefore suggests that it in no way functions as a safeguard for children, young people or families with immigration claims. No applications from unrepresented children have been granted Legal Aid funding under the exceptional funding scheme.<sup>214</sup>

### The need for professional legal assistance

The law in this area is voluminous and extremely complicated. The Supreme Court, and its predecessor the House of Lords, whose work is confined to deciding the most complex points of law, has given more judgments on Article 8 in recent years than on almost any other area of law.<sup>215</sup>

Not having legal assistance undermines people's ability to put forward the necessary evidence and legal arguments and have their cases fairly determined. For example, in order to make an application under Article 8, it is necessary to gather extensive evidence demonstrating the extent to which a child has developed a personal life and connections within the UK. Expert evidence, for example from child psychologists, is often required, as might be evidence from a child's carer, teachers, therapists or medical professionals, mentors and friends. It is vital not only to understand and obtain evidence but also present this appropriately, and this requires guidance from legal professionals to ensure that all relevant matters informing a best interests assessment are addressed. The number of cases in which the Home Office has been found to have failed to comply with its duties to consider a child's best interests is demonstrative of the importance of having legal representation to ensure that children's rights are enforced.

The disappearance of legal aid in immigration cases is even more problematic for undocumented migrant children, families and single young people because it has coincided

with a time when making immigration claims has become significantly more difficult and complex, due to changes to the Immigration Rules relating to private and family life, which were primarily introduced on 9 July 2012. For example, although the Immigration Rules now provide a specific route for applying for leave to remain for children who have lived in the UK for seven years or more, proving entitlement to remain under that rule is not necessarily straightforward, as there may be no records of when that child arrived in the UK and evidence must be put forward to demonstrate that it is not 'reasonable' to expect them to leave, as well as why the family should not be excluded under the 'suitability' criteria, which relate to issues such as whether they have committed any criminal offences. Even if the right evidence is submitted with the correct application form and the correct application fee and a family on the face of it appears to meet the requirements of the Immigration Rules, the Home Office frequently refuses applications and an appeal to the Tribunal is likely to be necessary.

Without legal representation it can be impossible to understand and navigate what is, in effect, a complex, two-stage process for these kind of private and family life claims. Recent case law makes clear that consideration of the requirements contained in the Immigration Rules does not amount to an exhaustive consideration of Article 8 private and family life rights and a child's best interests. For example, children who have resided in the UK for less than seven years do not meet the requirements of the Immigration Rules, but may still have strong grounds for remaining in the UK. Therefore the courts are to apply a two-stage approach, in which they first consider whether an applicant meets the requirements of the Immigration Rules, before going on to consider whether to remove them from the UK would amount to a disproportionate breach of their Article 8 rights.<sup>216</sup> This is too legally challenging for any litigant in person, and children may experience additional challenges in negotiating cases of such complexity. Children and families will clearly need legal advice and assistance to advance their claims and gather relevant evidence.

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213 For further information, see Refugee Children's Consortium, *Briefing on impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 on refugee and migrant children*, July 2012 at [http://www.refugeechildrenconsortium.org.uk/images/RCC%20LASPO%20Act\\_Final.pdf](http://www.refugeechildrenconsortium.org.uk/images/RCC%20LASPO%20Act_Final.pdf)

214 For more information see M. Spurrier, 'Exceptional funding: a fig leaf, not a safeguard', Public Law Project, July 2013 at: [http://www.publiclawproject.org.uk/documents/exceptional\\_funding\\_blog.pdf](http://www.publiclawproject.org.uk/documents/exceptional_funding_blog.pdf).

215 Immigration Law Practitioners Association, *Briefing for Adjournment Debate on Legal Aid 15 December 2010* at [http://www.ilpa.org.uk/data/resources/12850/10-12-15-ILPA-Briefing-Adjournment-debate-legal-aid-\\_2\\_.pdf](http://www.ilpa.org.uk/data/resources/12850/10-12-15-ILPA-Briefing-Adjournment-debate-legal-aid-_2_.pdf)

216 See the High Court cases: *Nagre v SSHD* [2013] EWHC 720 (Admin) and *MM v SSHD* [2013] EWHC 1900 (Admin). See the Upper Tribunal cases: *Green (Article 8 – new rules)* [2013] UKUT 254 (IAC), *Izuazu* [2013] UKUT 45 (IAC), *MF (Article 8 – new rules) Nigeria* [2012] UKUT 393 (IAC) and *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC).

## A cost-shift to local authorities?

Many local authorities are supporting unaccompanied migrant children, care leavers and children in migrant families who have lost access to legal aid for their immigration cases. It has been argued that local authorities' obligations to these children will extend to considering their need to have their immigration status issues resolved and need for legal services.<sup>217</sup> As a result, their duties to meet children's needs could include procuring private legal services for a child, care leaver or family. Such costs would be at private rates and likely to be significantly more expensive than legal aid rates, resulting in a substantial transfer of cost from the Ministry of Justice to local authorities. A failure to assist the child to obtain legal advice and/or representation could amount to a breach of statutory duties.<sup>218</sup>

For migrant children and young people in the UK, withdrawing legally-aided support may therefore 'simply shift spending from the legal aid budget to already stretched local budgets'.<sup>219</sup> It was estimated that the lack of legal aid for non-asylum cases for unaccompanied children could cost local authorities £10 million annually<sup>220</sup>, a significant increase on the figure at the end of 2010 given by NRP Network regarding the legal costs for local authorities which was just over £230,000.<sup>221</sup> LASPO will therefore not only affect individuals, but agencies involved in safeguarding and promoting the welfare of children.<sup>222</sup>

However, it is the Migrant Children's Project's experience that, to date, few local authorities have been willing to pay for legal advice for children in their care, or for families they are supporting under section 17 of the Children Act, despite the fact that a duty/power to provide such advice can be read into their statutory functions under the Children Act. Even before the changes to legal aid, many local authorities were not taking the necessary steps to ensure that children in their care were accessing legal advice and representation at the earliest opportunity, with the result that many were turning 18

without having their immigration status addressed. Now, while local authorities can work with local law centres and other not-for-profit providers to try and arrange free legal advice for their clients, often this will only be initial advice rather than the provider actually taking the case on for representation and may not be enough to meet the individual's needs. It is expected that the coming months and years are likely to see developments in this area, as local government struggles to ward off further financial burdens resulting from cuts made by other government departments, including the Ministry of Justice.

Also, as outlined above, for destitute individuals or families there is a close link between their immigration claim and their eligibility for support. The lack of legal aid will leave many potentially unable to submit an immigration application or appeal a decision, and consequently unable to access support from a local authority, despite the fact that if they were in receipt of said support, they might be eligible for further assistance with their immigration issues. This creates a cycle of destitution and dependency, where undocumented migrants are unable to access the step-up that would allow them to move forward with improving their lives, and ultimately supporting themselves.

## The current landscape

Following the cuts to legal aid, thousands of people are simply left without any option but to try somehow to find the money to pay privately, sometimes putting themselves at risk of exploitation. In our experience, young people and families often try to find the money to pay for legal services even when they can clearly not afford this, or have had to ask for help for these expenses from relatives and friends. In one stark case, a destitute young mother was forced to take on illegal work as a cleaner just two weeks after having given birth in order to try and get together the funds to pay for legal advice and representation.

217 During the passage of the Act, the issue of legal advice for children was raised repeatedly, with concerns raised regarding the estimated 2,500 cases involving children under 18 relating to immigration matters which would not be covered and the government pressed to retain legal aid for children. However, the government argued that unaccompanied children with non-asylum cases could be provided with assistance in applying for further leave to remain by their social worker – see Letter from Damian Green, Minister for Immigration, to Sophie Barrett Brown; Immigration Law Practitioners Association, October 2011 <http://www.ilpa.org.uk/data/resources/13825/11.10.20-Damian-Green-MP-to-ILPA-relegal-aid.pdf>. This suggestion illustrates the lack of appreciation of the importance of good quality legal advice. Social workers are not trained lawyers, and any social worker purporting to give legal advice and assistance would potentially be committing a criminal offence under section 91 of the Immigration and Asylum Act 1999 if doing so without the necessary exemption or registration, at the right level. Furthermore, non-asylum immigration applications made by children are not simply a matter of 'form filling'. The proposal was subsequently abandoned.

218 Legal opinion provided to the Refugee Children's Consortium has outlined that a failure to provide a child in its care with free legal advice and representation would amount to a breach of Article 12 of the UNCRC. Local authorities will be under a strict obligation to undertake appropriate measures to fully implement this right for all children, and must ensure a child is provided with advice and representation so that he or she can fully understand the care and present a proper legal response. See also *General Comment No. 12 on The right of the child to be heard*, UN Committee on the Rights of the Child CRC/GC/12 20 July 2009 para 19.

219 Joint Committee on Human Rights, *Human rights of unaccompanied migrant children and young people in the UK*, June 2013

220 Local Government Association, *Legal Aid, Sentencing and Punishment of Offenders Bill - 23 April 2012* at [http://www.local.gov.uk/c/document\\_library/get\\_file?uuid=539ceff8-a19a-4e15-8ff6-17d7935b97ae&groupId=10180](http://www.local.gov.uk/c/document_library/get_file?uuid=539ceff8-a19a-4e15-8ff6-17d7935b97ae&groupId=10180)

221 *Social services support to people with no recourse to public funds: A national picture*, NRP Network, 2011

222 All Party Parliamentary Group on Migration, *Immigration Advice, Regulation and the Legal Aid, Sentencing and Punishment of Offenders Bill 2012*, at [http://www.appmigration.org.uk/sites/default/files/APPG\\_Migration-Legal\\_Aid\\_BP-Feb\\_2012.pdf](http://www.appmigration.org.uk/sites/default/files/APPG_Migration-Legal_Aid_BP-Feb_2012.pdf)

Pushing more people into the private legal services market has increased the risk of people being exploited by firms providing a poor-quality service. Problems encountered include money being taken without a receipt being given and without a clear understanding of what will be done for the fee, lack of client care, and poor advice on someone's legal position. It is very difficult for undocumented young people and families to judge when they are getting a good service, especially if they have little idea of what their solicitor is actually doing (or not doing) for them.

Where there is no way to pay, undocumented migrants may struggle to navigate the incredibly complex administrative and legal system alone. The changes are seeing a rise in self-represented applicants and litigants, struggling to make applications on their own and represent themselves in court proceedings without legal representation. In his judgment in *Tufail v Riaz*, Mr Justice Holman highlighted that 'any changes which are made to reduce legal aid and cut the cost of litigation are likely to have a knock-on effect on the cost of the courts. Less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge time...'.<sup>223</sup>

Alternatively, they are simply unable to make the applications they would need to make in order to regularise their and their children's immigration status. This may force some people, including appeal rights exhausted single young adults who were previously in the care system, underground. The risk that people will be less likely to come forward and attempt to regularise because of the lack of legal aid was raised during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is questionable whether the implications of the Ministry of Justice's cuts for the Home Office, and for integration and communities more generally, has been properly considered.

In this context, the Migrant Children's Project and others have begun to provide some, very limited immigration services not funded through legal aid. CCLC's immigration advice is focused on its advice line, a service that was already in operation well before the legal aid cuts and which has seen demand rise, as well as outreach legal advice work. The outreach programme operates across Greater London, working within existing, trusted projects and services, including children's centres, schools, youth groups and other organisations. Both of these services are designed to support individuals and families, and professionals supporting them, to understand their situation and their options, and what their options are, with help provided to make referrals given

where appropriate. The services do not provide full legal representation but offer initial advice, though some cases are taken on by CCLC's legal practice for legal representation.

Other remaining services include some immigration advice provision across the country, including that provided by law centres and Citizens Advice Bureaux. However, such services are often limited to advice alone, rather than cases being taken on by these organisations, or individuals being represented by them (for example submitting applications or representing them at appeal). In the experience of CCLC, provision is scant and only a few lucky individuals will be able to benefit from the few services that are able to continue to provide legal representation in this area.

### Further proposed changes to legal aid

In the wake of already enormous cuts to civil legal aid brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012,<sup>224</sup> the government suggested more changes in its 'Transforming Legal Aid' consultation in 2013 which, if taken forward, will further endanger access to justice to migrant children, young people and their families. Alongside changes to judicial review, the proposed introduction of a 'residence test' will prevent migrant children and families accessing legal aid in those areas of law where civil legal aid still exists, such as public law, community care, special educational needs, homelessness and public, and certain private, law family proceedings.

The residence test limits legal aid through a requirement that an applicant for legal aid be 'lawfully resident' in the UK at the time and a requirement that the applicant has resided lawfully in the UK for 12 months, with the aim of excluding 'illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid' because they are perceived not to have a 'strong connection to the UK'.<sup>225</sup> This test will mean that where unlawful decisions are made there will be undocumented children who have meritorious claims and who have a right in law to challenge the decision but who will effectively be without any remedy because they will be unable to access legal advice or representation. This would have a significant effect on destitute undocumented migrant children and families, many of whom rely on legal support to ensure that they are able to access the support from local authorities to which they are entitled (see Section 2.2) and to ensure that they are able to challenge unlawful decisions made about their cases.

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223 *Tufail v Riaz* [2013] EWHC 1829 (Fam) – Mr Justice Holman quoted from the recent public lecture to the Institute for Government by Lord Neuberger of Abbotsbury, the President of the Supreme Court

224 See previous Refugee Children's Consortium briefings on the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at [www.refugeechildrenconsortium.org.uk](http://www.refugeechildrenconsortium.org.uk)

225 Ministry of Justice, *Transforming legal aid: delivering a more credible and efficient system*, 2013, para 3.49, at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

### Case study 14 – Lack of local authority assistance

AS was brought to the UK from Jamaica to join her mother in the UK when she was four. The visa on which she travelled was, like her mother's, a visitor visa, and so she became an overstayer as a child. AS's mother died when she was 12 and she was initially looked after by extended family, being passed from one aunt to another. Social Services were aware of AS's situation as she had some problems at school but, as she was considered to be in 'Kinship Care', the Local Authority were not involved in supporting her and she was not given a social worker, despite the fact that no-one had parental responsibility for her. No-one seemed to realise that AS had no status in the UK, and her relatives failed to contact the Home Office on her behalf.

AS was 17, nearly 18, when she left home because of a difficult relationship with her aunt's partner. The local authority did arrange hostel accommodation for AS – when they realised that as no-one had parental responsibility they had no option but to offer to accommodate under Section 20 Children Act 1989 - but subsequently realised that she would be unable to claim Housing Benefit to pay for it when she became 18 two months after she approached them, as she had no recourse to public funds. AS was not entitled to Leaving Care Support at reaching 18 as she had not been looked after for 13 weeks at that point. AS was left in a desperate situation. By the time AS's advocate contacted her, she had turned 18 and was unable to apply to register as British at the discretion of the Home Office as she was an adult. The only route, but one which was open to AS, was a private life/long residence application under the immigration rules, but she needed legal advice about the application and there is no legal aid. AS had to go back to relying on the charity of her friends and what the pro bono/not for profit sector could offer her. If her claim is successful, she will not be eligible for settled status for another ten years, despite already having lived in the UK for 14 years.

For example, if a local authority acts unlawfully and does not comply with its duties to the children under section 17 of the Children Act 1989, the family will not be able to access legal aid for a community care solicitor. Judicial review proceedings in these cases are a key safeguard in ensuring a local authority does not act in breach of the law by unlawfully refusing support and forcing a family into destitution, but they will have no access to legal aid to bring proceedings and are, in our experience, completely unable to bring such proceedings unaided.

Another extremely vulnerable group that would be hit by the proposed residence test is separated undocumented migrant children in local authority care. A significant number of children with no regular immigration status may end up in the care of a local authority, for example a child who has long overstayed a visa through no fault of their own and where a private fostering arrangement has broken down or they have been the subject of care proceedings after suffering abuse or neglect. Some of these children will not be claiming asylum so will not fall into the asylum-seeker exception outlined in the proposals. If the local authority acts unlawfully and does not comply with its duties to the child (for example, placing

the child in unsuitable accommodation or undertaking an unlawful age assessment), the child would have no legal aid for a community care solicitor to challenge this treatment which breaches their rights. Where a child or young person does not fall into the asylum-seeker exception, there would be no legal aid in order to challenge an unlawful decision by the Home Office (as Competent Authority) on whether someone is to be recognised as a victim of trafficking within the National Referral Mechanism process.<sup>226</sup>

These proposals have been described as a 'brutal assault on the rule of law and the principle of equality of arms in the UK legal system', with the intention of creating a 'silenced minority' unable to have their cases heard, regardless of their merits or what is at stake.<sup>227</sup> The Ministry of Justice's Impact Assessment assumes that 'individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.'<sup>228</sup> The MCP's advice provision and casework illustrates that the children, young people and families it works with are unable to adopt

226 See, for example, Anti-Trafficking Monitoring Group briefing 'Trafficked children' at [http://www.ecpat.org.uk/sites/default/files/atmg\\_briefing\\_trafficked\\_children.pdf](http://www.ecpat.org.uk/sites/default/files/atmg_briefing_trafficked_children.pdf) and Anti-Trafficking Monitoring Group briefing 'Discrimination in the identification process' at [http://www.ecpat.org.uk/sites/default/files/atmg\\_briefing\\_discrimination\\_in\\_the\\_identification\\_process.pdf](http://www.ecpat.org.uk/sites/default/files/atmg_briefing_discrimination_in_the_identification_process.pdf)

227 Bindmans, 'Government decision to press on with "unprecedented and brutal assault" on the Rule of Law is condemned by human rights specialists Bindmans', 5 September 2013, at <http://www.bindmans.com/news-and-events/news-article/government-decision-to-press-on-with-unprecedented-and-brutal-assault-on-the-rule-of-law-is-condemned-by-human-rights-specialists-bindmans>

228 Ministry of Justice, *Transforming legal aid: scope, eligibility and merits (civil legal aid) Impact Assessment*, September 2013 para 9

alternative approaches that will resolve the issues they face. Most children and families who have previously been able to apply for legal aid, many of whom will be dealing with legal issues around support and accommodation, will be unable to pay for private representation, and may be left at risk of abuse and exploitation as they seek alternative means of funding legal services.

A recent No Recourse to Public Funds briefing outlined that over a quarter of the dependent children support by the local authorities surveyed were British children dependent on non-British parents, emphasising that homelessness and destitution affects many children who do have a strong connection to the UK but who would still be affected by the residence test as it would prevent their parents from accessing legal advice to stop the family becoming homeless.<sup>229</sup> It predicted that the government's proposed residence test could cost councils an extra £26m per year in total.<sup>230</sup>

Apart from the devastating impact on individuals, there will be wider impacts on the legal services sector as a whole. It cannot be assumed that alternative sources of advice exist or will continue to exist, as the legal services landscape is changing so dramatically. Many law centres and other not-for-profit organisations have already suffered significant cuts under LASPO, and it is not realistic to expect voluntary sector advice agencies or pro bono solicitors to offer alternative source of advice on many issues. The government's changes threaten the very existence of certain legal providers, and undermine any sense of clarity about the future operating environment, so it is not at all clear who would be left to do any pro bono work. In any case, pro bono work is by its nature limited in terms of the amount of advice that can be offered and advice providers will not necessarily have capacity to meet clients' needs, either in terms of the potential volume of people seeking help, or the specialist knowledge and experienced required for more complex cases.

### Case study 15 - Challenges faced in accessing quality trusted advice

V arrived in the UK in 2000, aged 13, from Uganda. She now understands that she came on a 6 month visa. She was brought to the UK to live with a family friend, U. V was forced to do all of the cooking, cleaning and caring for U's young son.

V only realised in her late teens that she did not have status, when she tried to apply for a part time job. She has no contact with her family in Uganda. V formed a relationship with a British national and they had a baby. V's partner subjected her to domestic violence and they broke up.

When we met V, she was still living with U who had brought her to the UK. The relationship was extremely difficult as her U had thrown V and her daughter out of the house on previous occasions. She had been verbally and physically abusive to V in the past. V was relying, financially, on occasional handouts from a friend. V had paid a solicitor privately to make an immigration application for her last year (having saved money by doing casual illegal work for two years). The application was submitted in 2012 but we had concerns that the submissions were weak and they had not explored the possibility that V had been trafficked to the UK. When we met V during a home visit she was extremely vulnerable and socially isolated and felt as if she had been sent from one advice agency to another, with no one able to give her any assistance.

V said that she was pleased that our service would help to address all of her problems together. We made a referral to an immigration solicitor (who was able to open a file for V before the changes in Legal Aid). We also made a referral to a community care solicitor for advice in relation to obtaining support from Social Services, which could enable her to move out of U's house. Finally, we made a referral to a therapeutic organisation. V began attending appointments with her new solicitors and was pleased to feel that things were moving forward for her. She was recently granted leave to remain in the UK.

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229 No Recourse to Public Funds Network, *Shadow Impact Assessments for the Proposed Residence Test*, 2013, at <http://www.nrpfnetwork.org.uk/policy/Pages/default.aspx>

230 'Residence test on legal aid could cost councils millions', 19 September 2013, *Community Care*, at <http://www.communitycare.co.uk/2013/09/19/residence-test-on-legal-aid-could-cost-councils-millions/>



## 3.2 Providing advice to undocumented migrant children, young people and families

The Migrant Children's Project advice line, which has been in operation for over six years, deals with a range of queries from a range of individuals. Many in need of advice call back again and again and the same query can require extensive follow up. An estimated 40% of these callers really need face to face advice and it is clear from our work that telephone advice provision on its own is inadequate for most migrant children and families. Since 2012, the Migrant Children's Project has been working to provide holistic, quality legal advice to undocumented migrants living in Greater London, operating within, and building the capacity of, established projects, which already work with large numbers of children, young people and families. We have explored ways of engaging hard to reach migrant groups to see what are the most effective means of ensuring that they are able to access advice and representation. Our work has highlighted that there are families living effectively 'in hiding' and that they are not sending their children to school or accessing services even when they are available, preferring instead to remain hidden and separate. It is crucial that we continue to work imaginatively and in collaboration with other professionals and community based organisations to ensure that we are able to reach these most vulnerable of families and young people.

Problems relating to immigration status often arise at key junctures – such as at the birth of a child or when enrolling a child at school. We have attempted to focus on making contact with professionals working with families at these key times (such as midwives, health visitors and school teachers) to ensure that individuals and families can access detailed advice and support as soon as the problem is identified.

We have invested a significant amount of time in raising awareness and building relationships with the managers of the local children's centres, local schools, healthcare teams and local support organisations. Building networks has been vital, and we have taken time to discuss the key issues affecting families in the local area and some of the obstacles to seeking advice. Professionals have emphasised the need for gaining the trust of potential service users, as many families would be reluctant to disclose information about their case to a 'stranger'.

They have suggested that families are more likely to come to us if our service is seen to be endorsed by a professional they trust, such as a Coram Outreach worker or a teacher. Time has been spent at children's centres and schools in order to meet with families on an informal basis. On several occasions, this has resulted in parents approaching us to ask for more information, or to arrange an appointment.

Rather than make use of 'drop in' sessions, many of the families we have worked with have preferred to arrange an appointment and meet at a children's centre or another convenient location. This is for a range of reasons: firstly, the reassurance of being able to speak to an adviser on the telephone initially before meeting us in person, so they can feel sure of the confidentiality of the service and to find out more about what an appointment will entail. Secondly, families who are associated with one children's centre are often reluctant to visit another, as they will not know the staff members there and it may be relatively far for them to travel on foot or by public transport. Finally, families with young children may be reluctant to face the prospect of waiting for long periods of time before they are seen. Making an appointment allows them to come at a time when they do not have other commitments such as taking or collecting older children from school.

Booking appointments to meet with individuals enables us to ensure that our advice has been fully understood, to guide clients through the referral process (if applicable) and to build on the relationship of trust in order that they will be confident to contact us again in the future, if necessary. We consider it important that, once we have gained the trust of children, families and young people, they do not feel that they have simply been 'passed on' to another agency, organisation or solicitor and that we are working together to address their problems.

Several initial and follow up appointments have taken place as 'home visits'. Home visits are particularly welcomed by those who have young children and who may find leaving the house, particularly in the winter, difficult. It is also appealing to those who, due to their fear of being 'discovered', choose not to engage with the services at children's centres, or do not want to be seen meeting with a lawyer at their children's schools.

Some families, after being fully advised of the legal options available to them, choose not to take up an offer of a referral. This is unsurprising, particularly for families whose immigration cases are likely to be refused following an initial application or for families who have been living without status for several years. It is important to remain easily contactable and to make it clear to families that they can get in touch with us at any time to re-consider their options and to discuss making appropriate referrals.

Several clients have used text messages to make initial contact with us. This seems to be a useful service for those who have limited phone credit, or those for whom making initial contact can be a difficult step.

At present, the successful provision of advice cannot be measured by how many young migrants are granted status. Instead it is about ensuring that they are able to secure legal advice and representation, and a means of addressing not just their immigration status, but also wider social welfare issues. By integrating this kind of support within other frontline services it is possible to reach more vulnerable and hard to reach groups and assist in securing long-term positive change for children and families.

### The role of children's centres

The Migrant Children's Project has received many referrals in the course of our outreach project from children's centre staff. From our experience, children's centre staff members tend to be well trusted within the local community and families often turn to them at a time of crisis. In addition, many families have come to our outreach sessions having seen our promotional material in the centre, or having heard about the service through friends. We offer frequent appointment slots in children's centres, as well as a number of drop ins.

Children's centres in England are Ofsted Regulated. As part of their inspections, Ofsted consider how each centre 'helps families with young children access services, including those families who find it difficult or are unwilling to do so'.<sup>231</sup> They also consider how the children's centre 'improves the well-being of young children and their families'<sup>232</sup>. Inspectors are required to consider the overall needs of families across the group's reach area<sup>233</sup> and whether the services directly provided are appropriate and relevant for the needs of targeted families in that area.<sup>234</sup> Ofsted's definition of 'target groups' includes children from 'low income backgrounds', 'transient families' and other 'vulnerable groups'.<sup>235</sup>

As a consequence, some children's centres go to considerable efforts to ensure that they are engaging with 'target' groups within their local communities. For many families, these centres offer the only stable and constant service provision in often difficult and chaotic lives. Further, given the high levels of migration in the areas we work in, managers of children's centres are keen to demonstrate their attempts to ensure that these families are accessing immigration legal advice and advice regarding their rights and entitlements. The centres we have worked with include our sessions on their weekly or monthly timetables and promote our service widely amongst the families who use the centre.

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231 <http://www.ofsted.gov.uk/early-years-and-childcare/for-parents-and-carers/childrens-centres>

232 *ibid*

233 *Ofsted Children's Centre inspection handbook*, March 2013, No. 130056, p.36

234 *ibid* p.29

235 *ibid* p.40 -41

## Case study 16 - Domestic violence

L is a Nepali national. She came to the UK six years ago with her husband, F, and her son, who is now six. F had been violent to L throughout their relationship. L had no choice in relation to coming to the UK; F told her that she had to go and when they arrived in the UK he confiscated her passport. F works illegally and has forced L to do domestic work in local people's homes. F tells L that he has no intention of trying to regularise their immigration status and that he plans to continue to work illegally. F regularly assaults L. He hits her, throws things at her and he verbally abuses her. She does not socialise with friends as he follows her when she goes out. L feels that she cannot call the police when F is violent to her as she is frightened of the police contacting the Home Office.

In the course of our outreach work we have encountered several undocumented women experiencing domestic violence, and in many of these cases immigration status is used as a form of abuse and control. In some circumstances, these women's partners have immigration status and they work, but they have refused to provide the fee for immigration applications or they have been obstructive in providing evidence to support an application. In other cases, the women, their partners and their children are undocumented but the women are nevertheless dependent on their husbands, who provide for the family financially by working illegally. Immigration status can be used as a form of control over women in abusive relationships and trafficking situations, a situation which is only worsened by the narrowing options these women have in accessing advice and support.

The women we have worked with in these circumstances have expressed their fears of reporting their partners to the police as they believe that it would lead to the police contacting the Home Office. The undocumented women we have met who are experiencing domestic violence have been extremely socially isolated and have not felt able to share their experiences with anyone. As a consequence, they are not aware of how or where to seek advice – either in relation to the violence they are suffering or their immigration position. In some circumstances, women who have contacted national domestic violence organisations have been told that, due to their immigration status, they cannot be assisted. These cases raise serious concerns about how women in these situations will be able to safeguard their children without adequate support.

We have encountered many women in these circumstances through our work with children's centres and schools. It seems that women have felt able to disclose information about the violence they are suffering and their immigration status in the accessible, safe and neutral environment of their local children's centre or their children's school.

### 3.3 Routes to regularisation

As explored in the Introduction to this report, many measures taken to restrict migrants' access to services and support appear to be predicated on the assumption that they have no right to be in the UK and that, given that the Home Office (and their private sector subcontractor Capita) will be unable to forcibly remove them all, worsening conditions for them – creating a 'hostile environment' – will encourage them to leave.<sup>236</sup> The focus on creating hostile conditions for 'illegal migrants' appears to be a way to deal with the so-called 'deportation gap' – the difference between the number of people in the UK who have no valid legal status and the number of people actually removed or deported by the government and the limited resources available for this.<sup>237</sup>

Yet, there are a number of reasons why many undocumented children, young people and families simply cannot, or should not, leave or be removed from the UK. These include human rights constraints and the often very strong legal human rights claims people have to stay in the UK, the cost to the government of removing and deporting people, geopolitical considerations, and the unwillingness of some countries of origin to accept returnees. This situation leaves hundreds of thousands of people in limbo – unable to leave or be removed from the UK but unable to engage fully with, and contribute to, everyday life in the UK, and with limited opportunities – especially following legal aid cuts and a tightening of the long residence rules – to regularise their status.

Children are a particular group in this regard, especially as many children are born into irregularity – an estimated 65,000 of the 120,000 undocumented children in the UK were born here. Families with children are not a priority group for removals,<sup>238</sup> which means that they often spend long periods of their childhood, adolescence and adulthood in the UK, feeling completely rooted yet having no regular legal immigration status.

The undocumented status of these children and the legal limbo they grow up in clashes markedly with the developing norms and practices around children's rights and children's development, including an emphasis on stability and permanence. Both international and domestic law place great importance on planning for children's futures and ensuring

they are able to develop to their maximum potential. Article 6 of the UNCRC places an obligation on states to 'ensure to the maximum extent possible the survival and development of the child'. The Committee on the Rights of the Child explores the concept of development in General Comment No. 5 and it:

expects States to interpret 'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.<sup>239</sup>

Equally in domestic law, the concept of 'permanence' underpins many decisions in the family courts, and the Department of Education's Care Planning Regulations and Guidance stress the importance of securing 'permanence' for all children, outlining 'the framework of emotional permanence (attachment), physical permanence (stability) and legal permanence...which gives a child a sense of security, continuity, commitment and identity'.<sup>240</sup>

Given the impact that a lack of regular immigration status can have on a child's life and future, there is a clear need for routes to regularisation and secure immigration status to be put in place for undocumented children in the UK in order to promote their well-being. In addition to ensuring access to vital services and support for all children, regularising status is the clear way to ensure stability and security and the future fulfilment of their rights. Living with the stress and anxiety of not knowing whether they are able to remain in the UK, or discovering in their teenage years that they have no regular status and may have to move to a country to which they have never been or left as a young children and where formal and informal support systems may be limited or non-existent, is likely to impact directly in a severe way on a child's development and indirectly via the effect on their parents.

Regularisation is the process by which undocumented migrants can either temporarily or permanently gain regular immigration status, that is, legal permission to remain in the UK. Regularisation can be a useful mechanism for states as it allows them to better account for, and integrate, undocumented migrant populations, as well as being a corrective instrument for defects in immigration legislation

236 A. Travis, 'Immigration bill: Theresa May defends plans to create "hostile environment"', *The Guardian*, 10 October 2013, at <http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment>

237 N. Sigona, 'Deportation, non-deportability and precarious lives: The everyday lives of undocumented migrant children in Britain', *Anthropology Today* vol 28 no. 5, October 2012

238 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

239 UN Committee on the Rights of the Child, General Comment no. 5 (2003) Measures of implementation for the convention on the rights of the child (CR CRC/GC/2003/5) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement>

240 Department for Education, *Care Planning Regulations and Guidance*, 2010, Para 2.3

and past administrative failures and backlogs. Regularisation is a long-term means ensuring a more transparent labour market and system whereby migrants can contribute directly to society and not face barriers to accessing legal rights. For children, regularisation can ensure they have access to healthcare and education and will increase the opportunities available to them in the future. However, there is often reluctance on the part of governments to implement regularisation programmes due, in part, to an anticipation of negative media coverage and hostile public opinion, the fear that regularising undocumented migrants may attract more unauthorised migrants<sup>241</sup> and an idea that the use of regularisation programmes reflects an acceptance that the current system to regulate immigration is flawed or ineffective.<sup>242</sup>

Different types of regularisation programme exist. One-off regularisation programmes aim to regularise a finite number of immigrants in a finite period of time, whereas permanent regularisation programmes are ongoing and have no set quotas. Permanent regularisation programmes are arguably most beneficial for the sustainable protection of undocumented migrants' access to rights, although the length-of-stay criteria tend to be prolonged and do not always help to resolve any immediate discrimination, destitution or vulnerability undocumented migrants face.

The US provides an interesting example of government response to undocumented migrants. In 2011, there were estimated to be over 11 million undocumented migrants in the US,<sup>243</sup> including 1.5 million children and young people.<sup>244</sup> The DREAMERS movement began in the mid-2000s in response to the frustration felt at the lack of rights for US-born children of undocumented parents, who 'existed in the shadows... in fear of deportation, unable to seek scholarships, to drive, to work legally or to vote'.<sup>245</sup> The

movement has since developed as a campaign to improve the regularisation opportunities for undocumented migrants, its impact demonstrated by President Obama's decision in 2012 to stop the deportation of young undocumented migrants.<sup>246</sup> The subsequent Deferred Action for Childhood Arrivals (DACA) program, whilst not granting a path to legalization and citizenship, provides an opportunity for a segment of the undocumented immigrant population to remain in the country without fear of deportation, allows them to apply for work permits, and increases their opportunities for economic and social incorporation.<sup>247</sup> The deferred-action program was presented as a stop-gap measure until Congress passed legislation that would allow this group to obtain legal status and eventually citizenship. In June 2012, the Senate passed a sweeping immigration reform bill under which young people could apply for temporary legal status first, then for permanent residency five years after that.<sup>248</sup> As soon as they received their green cards, they would be able to apply for citizenship.<sup>249</sup>

In the UK, means of regularisation exist through a number of different routes (for more details, see Appendix I), including under nationality legislation, immigration and asylum legislation, human rights law, and the Immigration Rules. However, the options available have been significantly narrowed in recent years. Changes to the Immigration Rules have made it harder and more onerous for undocumented migrant children and families to regularise their status on the basis of long residence and their right to private and family life under Article 8 of the European Convention on Human Rights. In short, under the new Rules an individual can apply for leave to remain on the grounds of private and/or family life. An application form must be submitted unless for example the individual is in immigration detention and/or subject to removal directions. The requirements for leave to remain include a condition of residence for a set period,

241 'Much of the evidence for such incentives however relates to countries with much illegal immigration across land borders from nearby countries. The likelihood of large-scale additional irregular immigration is far lower in the UK, where most irregulars come from much further afield – and could only occur if border controls were ineffective.' I. Gordon, K. Scanlon, T. Travers & C. Whitehead, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London School of Economics, 2009, p 113

242 Over 40 formal regularisation programmes have been implemented in the EU and US over the last 25 years, illustrating that it is not a one-off policy instrument, but a well-used and necessary mechanism in modern-day migration management. In her research on the various regularisation programmes in Europe and the United States, Levinson highlights the different programmes that exist. These include a permanent regularisation system which has been present in the UK since the 1960s; between 1968-1973 1,809 out of 2,430 undocumented migrants were regularised (2005: 29) and in 1977, 462 people out of 641 were regularised. A. Levinson, *The regularisation of unauthorized migrants*, 2005, at <https://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/Regularisation%20Report.pdf>

243 J. Passel and D. Cohn, *Unauthorized immigrants: 11 million in 2011*, Pew Research, 2012, at <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>

244 'Who and where the DREAMers are: A demographic profile of immigrants who might benefit from the Obama Administration's deferred action initiative', Immigration Policy Center, 2012, at [http://www.immigrationpolicy.org/sites/default/files/docs/who\\_and\\_where\\_the\\_dreamers\\_are\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/who_and_where_the_dreamers_are_0.pdf)

245 T. Hayden, 'What next for the Dreamers?', *The Nation*, 11 February 2013, at <http://www.thenation.com/article/172824/whats-next-dreamers>

246 T. Cohen, 'Obama administration to stop deporting some young illegal immigrants', *CNN*, 2012, at <http://edition.cnn.com/2012/06/15/politics/immigration>. In June of 2012, the Obama administration announced that it would accept requests for Deferred Action for Childhood Arrivals (DACA), an initiative designed to temporarily suspend the deportation of young people residing unlawfully in the U.S who were brought to the United States as children, have graduated from U.S. schools and generally match the criteria established under legislative proposals like the DREAM Act.

247 R. G. Gonzales, and V. Terriquez, 'How DACA is Impacting the Lives of Those Who are Now DACAmented: Preliminary Findings from the National UnDACAmented Research Project', Immigration Policy Center, August 2013, at <http://www.immigrationpolicy.org/issues/DREAM-Act>

248 At the time of writing the Senate immigration bill remains stalled in the House, where Republicans are expected to lay out their own plan for tackling immigration reform in September.

249 D. Gonzalez, 'A year later, immigrants face DREAM Act's limits', *USA Today*, 13 August 2013, at <http://www.usatoday.com/story/news/nation/2013/08/13/a-year-later-immigrants-face-deferred-action-programs-limits/2651235/>

dependent upon the age of the applicant: an adult applicant must have lived in the UK for at least 20 years or have no remaining ties in his country of origin; if under the age of 18 years, the requirement is at least 7 years; if over 18 but under 25 years, the individual must have lived in the UK for most of his life. This excludes many who have lived in the UK for years.

### Problems with regularising status

In the UK, few undocumented migrants are able to regularise their status easily, if at all, not least because of the complexity of the procedures and evidential requirements put in place. Further obstacles also include:

- Lack of quality free legal representation;
- Discretion and poor-quality initial decision-making;
- Application fees;
- Lack of awareness on the part of children, young people and families.

Many children, young people and families with whom CCLC works demonstrate confusion over their legal status in the UK. Many will have made an application to the Home Office, but will be unclear as to the exact content of that application, or their rights to appeal refusals. Others are unsure as to their possible options or may be reluctant to address their immigration status for fear of putting themselves on the government's 'radar'. Some may only engage with the issues of their immigration status when forced to by another 'crisis point' in their lives, such as separation from family or losing their housing. Their progressing their case, or taking positive steps, will on the whole depend on the availability of reliable legal advice and ability to pay the fee or access a lawyer who can help them to avoid the fee if they are destitute. As outlined in Section 3.1, though, publicly funded immigration advice is no longer available, leaving many unable to pursue their claims.

Where a child or young person is in local authority care, too often the local authority is unaware of, or simply does not address, the resolution of immigration issues within the care planning process. CCLC has come across a number of cases where someone has been in care, whether under a full care order under section 31 or accommodated under section 20, where nothing has been done to address immigration status and refer the child or young person to an immigration solicitor. It is particularly disappointing to discover unresolved immigration cases in care at the current time, because had the referral to a solicitor been made before 1 April 2013, legal

aid would have been available, saving money for the local authority. Social workers need to be addressing immigration status proactively in care plans, and probing the issue, even where the child or young person themselves, and everyone around them, may assume that they are British. Resolving immigration status is integral to meeting a child's needs and will determine all their entitlements and their future. In relation to children in private fostering arrangements, too, this issue needs to be addressed. As referred to in section X, local authorities will need to develop policies on paying for private legal services and for application fees where no legal aid is available.

#### Case study 17 - Lack of local authority action

E arrived in the UK in 2004 from Eritrea, aged 10, and claimed asylum. As an unaccompanied child he was looked after by a local authority as a child in need. His asylum claim was refused but he was granted discretionary leave until 2007, at which point he needed to apply to extend his leave. However, his social worker failed to ensure that an application was made in time, meaning that E was unlawfully in the UK. At the age of 13 he had become an undocumented migrant through no fault of his own.

This mistake was realised years later, and now E once more has discretionary leave. However, had the initial extension application been made he would have received indefinite leave to remain in 2010. E has thrived at school and gained three As at A-Level. E is now 19 and was offered a place at university to study Mathematics. However he is unable to go to university because the type of leave he has means he cannot access home fees or a student loan. He will not be able to apply for indefinite leave to remain until 2015.

A very significant obstacle to regularisation is the poor quality of Home Office decision-making. Decisions on Article 8 applications (private and family life and long residence) are being made on an overly restrictive set of criteria contained in the Immigration Rules that do not reflect the law on Article 8. But even on the basis of those requirements, applications that appear to meet the criteria are refused, with poor quality refusal letters that do not engage with the evidence provided or the legal arguments presented, and which too frequently fail to consider children's best interests. In the year ending September 2012 the number of people granted permission to stay in the UK fell by 28% to its lowest level in the last five years.<sup>250</sup>

<sup>250</sup> Home Office, *Immigration statistics, July to September 2012*, at <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2012/immigration-statistics-july-to-september-2012#settlement-1>

### Case study 18 - Home Office decision making

P, a Kenyan national, was brought to the UK at the age of 12 to live with extended family. She is now 18 and has no contact with her parents. P made an application to the Home Office which was refused, and the refusal letter did not engage with any of the arguments made by P's solicitors with regard to her family life in the UK. The refusal letter was just a few lines long and contained several errors. For example, it stated that P had not family in the UK (in fact she has an uncle and cousins) and referred to her relationship with her grandfather in the UK, even though her grandfather is not alive. It can only be assumed that this was copied from another case. The decision also did not make reference to the fact that P was a child at the time of the application.

### Case study 19 - No right of appeal

M, a Tanzanian national, was brought to the UK by an agent to join her mother and sister, who lived here, at the age of 16. She now has an eight-year-old daughter, who was born in the UK. M made an application for leave to remain in 2010 on the basis of her and her daughter's length of residence in the UK, and their close relationship with M's mother and sister. This application was refused in early 2011. However, because M was an overstayer at the time the application was made, she did not have a right of appeal. Unable to work and support herself, M is 'sofa surfing' with her daughter and relying on ad hoc payments from friends while waiting for her removal decision so that she could appeal, which could take two years or more.

Many migrants and their families then get caught in a situation where they apply to the Home Office for permission to stay, are rejected but then are unable to appeal the decision to the immigration tribunal because no automatic right of appeal exists. The right of appeal 'at least gives access to the human face of an immigration judge as opposed to the implacable visage of [the Immigration Rules]<sup>251</sup> and allows cases to be tested – in 2012/13 35% of these decisions were overturned at appeal.<sup>252</sup> Because of the way appeal rights work, some of those who have made applications which are refused do not get an immediate right of appeal, and would have to initiate litigation proceedings in order to prompt the Home Office to make a decision that will give them a right of appeal.<sup>253</sup> This has long been a problem but is becoming even more acute given the 'huge number of arbitrary refusals' that the Home Office is giving.<sup>254</sup> There is a policy on the circumstances where a removal decision can be requested and will be granted, which includes a number of cases involving children,<sup>255</sup> but the Home Office rarely makes removal decisions on its own initiative.

The obstacles faced by those seeking to regularise their immigration status in the UK and resist unlawful removal from the UK will be dramatically worsened by the Immigration Bill that had at the time of writing just been tabled. The stated aim of the Bill is to 'stop migrants abusing public services to which they are not entitled, reduce the pull factors which draw illegal immigrants to the UK and make it easier to remove people who should not be here',<sup>256</sup> including through measures on Article 8 private and family life rights and restrictions on appeal rights.

The government already attempted to codify its own very narrow approach to Article 8 in recent changes to the Immigration Rules. It now intends to give that approach statutory force, putting forward in the Bill an overly restrictive set of criteria for the determination of Article 8 (private and family life) cases and severely constricting the space for the assessment of children's best interests.

251 C. Yeo, 'Getting an appealable removal decision', *Free Movement*, 23 September 2013 at <http://www.freemovement.org.uk/2013/09/23/getting-an-appealable-removal-decision/#more-10021>

252 For 2012/13, 1072 appeals in the 'deport and other category' were determined by the First-Tier Tribunal and 32% of these appeals were allowed. See <https://www.gov.uk/government/publications/tribunal-statistics-quarterly-and-annual-jan-mar-2013-2012-13>

253 Home Office Guidance, *Requests for removal decisions*, August 2013, at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/request-removal/req-remove?view=Binary>

254 C. Yeo, 'Getting an appealable removal decision', *Free Movement*, 23 September 2013

255 The circumstances where a removal decision will be granted are those cases where one of the following applies:

- the refused application for leave to remain included a dependant child under 18 who has been resident in the UK for three years or more
- the applicant has a dependant child under the age of 18 who is a British citizen
- the applicant is being supported by the Home Office or has provided evidence of being supported by a local authority (under section 21 of the National Assistance Act 1948 or section 17 of the Children Act 1989), or
- there are other exceptional and compelling reasons to make a removal decision at this time.

256 Home Office, *Immigration Bill Factsheet: Overview of the Bill*, 2013, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249251/Overview\\_Immigration\\_Bill\\_Factsheet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249251/Overview_Immigration_Bill_Factsheet.pdf)

The criteria do not reflect established jurisprudence or the UK's obligations, including under the European Convention on Human Rights, the EU Charter and the UN Convention on the Rights of the Child. The Bill includes provision for 'little weight' to be attached to private life established while someone is unlawfully in the UK or in the UK with 'precarious' immigration status.<sup>257</sup> The government is attempting to restrict appeal rights, lessening the opportunities for effective redress for those about whom wrong decisions are made by the Home Office. If the Immigration Bill passes in 2014, the environment for undocumented migrant children in the UK, and their ability to have their legal claims to remain considered fairly, will deteriorate considerably

A further barrier to those with little or no income is the application fee required for most applications. The application fees for limited or indefinite leave to remain range from around £500 to £1,000 per application.<sup>258</sup> Given the difficulty faced in obtaining financial support for legal representation and assistance, large numbers of undocumented people will struggle to secure funds for the application process for regularisation. Thus, they are left with little choice but to continue with their irregular status. The Secretary of State has the discretion to waive a fee<sup>259</sup> but this is limited to certain circumstances.<sup>260</sup>

Even where leave is granted, either under the rules or at appeal, the leave granted is now for very short periods of time, often with no recourse to public funds, with very long routes to settlement – for example, a young person who has lived at least half their life in the UK will only be granted an initial period of leave for 30 months and will not be entitled to indefinite leave to remain until they have accumulated ten years of such leave, requiring a further three applications to be made. This creates an extremely long route to settlement and allows for individuals who cannot afford to make repeated claims, or do not fully understand the legal system, to find themselves 'falling out' of regularity and finding themselves once more unlawfully in the UK, even though they have started on the route to settlement.

Furthermore, although the Home Office should not put a no recourse to public funds condition on leave granted to a destitute family,<sup>261</sup> including a family supported by a local authority, in practice this is happening and it takes the finding of a legal aid solicitor and the initiation of judicial review proceedings to get it removed.

### Case study 20 - The impact of being granted short-term leave

L is a 17 year old Sri Lankan girl who has lived in UK since she was nine, when she came as the dependant of her father, who had a work visa. Her father's attempt to renew his work visa failed due to bad advice provided by an unregulated immigration adviser. Since becoming overstayers her parents have twice tried to regularise their position, but with both were refused with no right of appeal. Keen to support his family, L's father has worked illegally, undertaking hard manual work. The whole family live cheaply in tiny, cramped accomodation, including L's brother who was born in the UK.

L's father lives in constant worry of being picked up or detained, and this possibility is highly stressful for the whole family, who feel that they cannot return to their home country as they have no family left there and the children are well settled in the UK. Despite the difficulties, L's parents have provided as much stability for their children as possible. L has a wide social life with a large group of friends, has completed her secondary schooling at the same school, and is a very high achiever academically.

L realised that there was a problem when she came to the point of applying to university to study medicine, and discovered that she would be treated as an international student, and could not get student finance. L contacted the MCP enquiry line to find out what her family could do, if anything. It was not possible for the whole family to make an application, so L made her own application under Immigration Rules, and was subsequently granted 2 and a half years' leave to remain by the Home Office. Whilst this leave offers an element of security, it will be still ten years in total before she will be able to obtain indefinite leave to remain and this will only be after making a further three applications, paying for legal advice and the requisite application fee each time. In the meantime, L will not be able to progress with her peers. She will be considered an overseas student, will not be able to obtain a student loan and will have to completely re-think her career, as medicine cannot be studied part time.

257 Immigration Bill, Article 117B(5), at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/14110.pdf>

258 FLR (O) form, Home Office, April 2013, at [http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/flr/flro\\_formnew0420091.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/flr/flro_formnew0420091.pdf)

259 Sub-section 51(3)(c) of the Immigration, Asylum and Nationality Act 2006

260 Under the Nationality (Fees) Regulations 2010 SI 2007 No. 807. it may not be appropriate to demand a fee be paid if to do so would be incompatible with a person's rights under the European Convention on Human Rights and the person was destitute. See *Omar v Secretary of State for the Home Department*, [2012] EWHC 3448 (admin)

261 Immigration Directorate Instructions, *Family members under the Immigration Rules - Section FM 1.0 - Partner and ECHR Article 8 guidance*, p 51 at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDs/chp8-annex/partners.pdf?view=Binary>



While the courts have held in relation to an old policy that there are problems with the Home Office granting short periods of leave without considering a child's need for stability and their best interests, the new system of short periods of leave and drawn-own routes to settlement persists. For children and young people, not only should routes to regularisation be made more straightforward and efficient, but when it is recognised that they have a right to remain in the UK, then indefinite leave should be granted. Anything less only serves to leave young migrants in a precarious situation, unable to plan for their futures and at risk of once more finding themselves undocumented.

### Case study 21 - Proving parentage

D was an overstayer, with two small children by a father who was settled in the UK at the time of their birth. The children were consequently British, although D struggled to establish the children's status as the father did not want to acknowledge them and refused to put his name on their birth certificates, or provide proof of his own status. D was desperate because without the father's help her children were possibly stateless as due to the nationality rules of her own country, the children could not derive nationality from her, as they had been born in UK and she was not married to someone of the same nationality as herself. D tried to take the father to the Child Support Agency (CSA) but they told her they could not help her take a claim against him as she was undocumented and had no National Insurance Number.

D was eventually able to establish the children's nationality through a status enquiry to Home Office, although this was only possible after she borrowed a lot of money from family and friends to pay for a lawyer. She eventually became destitute and turned to the local authority for assistance under the Children Act 1989. Following confirmation of her children's nationality, D was then able to make an application for leave to remain as a parent (of a British child), but when this was issued it was (wrongly) endorsed 'No Recourse to Public Funds'. D then needed further legal advice to get this endorsement lifted, as, even if she was able to find work, D knew this would be low-paid and she would need to claim in-work benefits in order to survive – the alternative was to remain dependant on the local authority.

## Part 4. Conclusion and recommendations

*'Unfulfilled talent, low educational achievement and poor health reduce productivity and the ability of the UK to compete in the future. The poorer outcomes for children growing up in poverty create extra burdens and costs for public services and prevent them from operating effectively for everyone in society. Deprivation and inequality make it harder for communities to flourish.'*<sup>262</sup>

*'There is an ever-present sense of feeling trapped in a situation where marginality cannot be resolved and a future cannot be constructed.'*<sup>263</sup>

The previous and current governments have both made clear their commitment to eradicating child poverty by 2020, recognising that 'poverty wastes talent and opportunity and limits life chances'<sup>264</sup> and that ending child poverty requires tackling a wide range of complex issues to improve children's chances in life and empowering families to move themselves out of poverty for good. Yet, many of the cases seen at Coram Children's Legal Centre are a stark illustration of the extent to which current policy and legislation affecting migrant children is using 'child poverty as a tool of immigration control'.<sup>265</sup> The distinction between 'deserving' and 'undeserving' migrants that is fuelling ongoing policy changes leaves children, young people and families unable to access their basic social rights and facing a day-to-day struggle for survival and development.

In 2012, the Education Select Committee asserted that 'it would be outrageous if destitution were to be used as a weapon against children because of their immigration status' and called on the Government 'to review the impact of immigration policy upon child protection and children's rights to ensure that this is not the case'.<sup>266</sup> There has been little sign of this recommendation being taken forward: rather, further measures have been introduced that clearly demonstrate the negative impact of immigration policy on children's welfare. Furthermore, many of the changes implemented as part of a programme of developing a hostile environment for migrants have resulted in a shifting of responsibility and cost onto local authorities, who for many migrants are the last resort when destitute and desperate. This is placing increasing pressure on local government resources at a time when many are already struggling to maintain adequate provision for the most vulnerable in their area.

The current government's aim appears to be to dissuade undocumented migrants from pursuing claims based on Article 8 rights. By seeking to impose its own qualifications on an already qualified right, the government is seen by the public to be confronting an unpopular piece of legislation, which is perceived as making the Courts decisions overly submissive 'to Europe' and open to abuse. Not only is this approach not in accordance with the UK's legal obligations to children under the UN Convention on the Rights of the Child but, in practical terms, it also fails to address the issue of those migrants in the UK who either cannot, or should not be made to, leave the UK. These 'unreturnable' individuals include those who have been born in this country or who have spent the majority of their lives here. The 'home' to which the Home Office is urging people to return<sup>267</sup> is for many children and young people a country they neither know, nor have been to.<sup>268</sup> For others who have claimed asylum,

262 HM Government Child Poverty Unit, *Ending child poverty: making it happen*, 2009 para 3 at <https://www.education.gov.uk/consultations/downloadableDocs/8061-CPU-Ending%20Child%20Poverty.pdf>

263 N. Sigona, A. Bloch and R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, Paul Hamlyn Foundation, 2010, p 9 at <http://www.staff.city.ac.uk/yum/documents/Young%20Undocumented%20Migrants%20report.pdf>

264 HM Government Child Poverty Unit, *Ending child poverty: making it happen*, 2009, para 2

265 Platform for International Cooperation on Undocumented Migrants (PICUM), *Country brief: United Kingdom*, at [http://picum.org/picum.org/uploads/publication/UK%20Workshop%20Brief\\_updated.pdf](http://picum.org/picum.org/uploads/publication/UK%20Workshop%20Brief_updated.pdf)

266 House of Commons Education Committee, *Children first: the child protection system in England; Fourth Report of Session 2012-13*, November 2012, at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/137.pdf>

267 "'Go home" vans: Liberty targets Home Office campaign', *BBC News*, 6 August, 2013, at <http://www.bbc.co.uk/news/uk-england-london-23589448>

268 "For many young interviewees the UK was the country where they had spent most of their childhood, whether they were in fact born in the UK or had migrated at a very young age. The UK was then the place where they had completed most or all of their education, where they knew what life was like and where they wanted to continue and complete their education. Many minors in such a situation either did not know or could not remember their parents' country of origin. Going 'back' to them was the same as emigrating to a foreign country." N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012, p 27

## Case study 22

N, a Ugandan national, came to the UK in 2001 on a student visa. She subsequently extended her stay on several occasions and lived in the UK, studying and supporting herself through part-time work. However, when she made an application for indefinite leave to remain, after living in the UK for six years, this was refused. N had a relationship for two years with a Portuguese man living in the UK and they had a child together, E. Afterwards the relationship broke down and they now have very little contact. The father does not provide N or her daughter with any support.

N's daughter, E, suffers from sickle cell anaemia. This is a condition which is punctuated by unpredictable and frequent crises. Haemoglobin in her red blood cells crystallises, becomes deformed and obstructs blood flow in the body, causing severe pain. This pain may become so severe as to require hospital treatment. She has been admitted to hospital on several occasions. She has regular reviews with a consultant haematologist. Her medical reports have stressed the need for stable and secure accommodation in order to keep her medical condition under control.

When E was born, N realised that the shared house in which she lived was unsuitable for an infant, especially one with complex medical needs. Soon she also found herself unable to pay the rent, having run up a significant debt trying to manage her daughter's medical and developmental needs. N turned to her local authority, who concluded that N was a good parent but that E was at risk because she and her mother were homeless and in need of support and accommodation. It was noted that N had made another application for leave to remain that was being considered by the Home Office. However, the local authority refused to provide accommodation and instead offered only to help her to return to Uganda, together with her daughter. At the same time, N's application for leave to remain in the UK was returned to her by the Home Office on account of her inability to pay the application fee.

Coram Children's Legal Centre challenged the local authority's refusal to offer support and accommodation. The local authority replied with an offer to help N return to Uganda and to take E into care. The case went to judicial review, and the Court found that the local authority had not adequately considered the rights of both the child and her mother.<sup>269</sup>

'home' is a country to which they are too scared to return for fear of persecution or reprisal, or because war and conflict is ongoing. Some fear return to such an extent that they would rather face long-term destitution in the UK than countenance doing so.

Many young undocumented migrants who do not have valid leave in the UK cannot be removed from the UK by the government. This may be because they have an outstanding application or because they have made representations with the Home Office that have not been considered or there are barriers to a return to their country of origin. Barriers include problems with documentation, non-acceptance by the relevant national authorities, no feasible route of return or a medical condition that means they are unable to travel. However, rather than facilitate the regularisation of their immigration status, the government has sought to constrain the options available to those in this situation.

A central argument in favour of regularisation is that it draws 'a realistic' line under past waves of uncontrolled

immigration<sup>270</sup> and the government needs to accept that the failures of the immigration system in the past has created a situation where many children, young people and families have the legal right to remain in the UK. The current approach also risks 'producing a generation of disenfranchised youth, non-deportable and yet excluded from citizenship.'<sup>271</sup> Undocumented migrants are already 'one of the least integrated groups in the UK'<sup>272</sup> and social deprivation is another major barrier to integration and social inclusion. When the treatment of children in the UK is examined, the focus should not just be on the one individual or family, but on how that individual or family is to develop and contribute to society as a whole.

The UK government has a sovereign right to manage its borders and to determine who may or may not be permitted to enter and remain, subject to its various international obligations and, in accordance with the domestic enactment of laws and policies, to manage immigration. Such a system must be able to deal effectively with those individuals whose leave runs out, who do not qualify, for whatever reason, to

269 *R (EAT) v LB of Newham*, [2013] EWHC 344 (Admin)

270 I. Gordon, K. Scanlon, T. Travers & C. Whitehead, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London School of Economics, 2009

271 *Report of the Parliamentary Inquiry into asylum support for children and young people*, 2013

272 J. Rutter, *Back to Basics: Towards a successful and cost-effective integration policy*, Institute for Public Policy Research, March 2013

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enter or remain in the UK. But the development of a more effective immigration system must include empowering those who now have a legal right to remain in the UK with the means to take steps to regularise their status, and have their claims heard fairly rather than simply focussing on stricter border controls and harsher measures for those already in the country. The latter will serve only to cut off undocumented migrant from public services and drive them underground, violating children's rights while not addressing the problem and leaving long-term residents in the UK in an undending limbo.<sup>273</sup>

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<sup>273</sup> 'Government has given up catching illegal migrants – Labour', *BBC News*, 4 September, at <http://www.bbc.co.uk/news/uk-politics-23948095>

# Recommendations

***Undocumented migrant children must be treated as children first and foremost, and must be afforded the same rights and protection as any other children in the UK.***

- The government must always undertake a thorough child rights impact assessment of any proposed primary or secondary legislation.
- The Department for Education (rather than the Home Office) should be the government department with the lead responsibility for all separated migrant children as with all other looked after children and care leavers.
- All statutory safeguarding and child protection procedures and guidance<sup>274</sup> should include specific reference to undocumented migrant children requiring particular care, not just asylum-seeking children or victims of trafficking.
- The delivery of essential services, including education, healthcare and local authority support, must be kept separate and independent from immigration enforcement functions.
- All information-sharing arrangements between agencies should be in accordance with clear written agreements, not through informal practices. The sharing of such information should only be used to promote the individual child's best interests and should conform to all data protection and other legal duties and guidance.
- Training should be provided to all frontline professionals, including police, social workers, healthcare professionals and teachers, on the rights, entitlements and protection needs of migrant children and young people to build capacity to provide effective support and to counter misconceptions.

***Migrant children and young people must have access to support and services adequate for their physical, mental, spiritual, moral and social development.***

## Healthcare

- All children should have access to free healthcare based on need, not status, for as long as they are present in the UK.
- Maternity services, including ante and post natal services should be available free irrespective of status in order to protect and promote the well-being of the mother and the child.<sup>275</sup>

## Education

- Access to compulsory education should be available free of charge to all children and schools should in no circumstances be required to check the immigration status of children as part of their admissions process.
- Free school meals should be provided to all children in compulsory education, starting with all children in primary education. At a minimum, in the short-term the government should ensure that the new entitlement criteria being developed by the Department for Education and Department for Work and Pensions include groups of children who are among the poorest in the UK, namely those in receipt of section 4 support from the Home Office under the Immigration and Asylum Act 1999 and children in families receiving section 17 support from a local authority under the Children Act 1989.
- Further and higher education should be accessible to all and funding and support made available on the same basis as for settled children and young people for so long as the child or young person is present in the UK.

<sup>274</sup> For example, *Working Together April 2013* at <https://media.education.gov.uk/assets/files/pdf/w/working%20together.pdf>

<sup>275</sup> There are no rights under the UNCRC for the unborn child but there may be discrimination against pregnant migrant women without status under CEDAW, if they are deprived of necessary care at any stage of maternity compared to settled/non-migrant women. See Article 12 (1) CEDAW

### Support

- Child poverty statistics should capture the numbers of all asylum-seeking and migrant children living in poverty, including those who experience destitution.
- Asylum support rates should be in line with mainstream benefit rates, and at least 70% of Income Support. Support rates for all families with children should be increased back up to 70% of Income Support as a matter of priority.
- Section 4 support is unacceptable and inadequate, including for families. There should be only one asylum support stream – section 95 – and this should be adequate to meet children and families’ needs.
- All local authorities should have written policies on the provision of support for NRPF families and the level of support provided should be firmly based on children’s needs, and in line with mainstream benefits.
- Children should not be separated from their families should by children’s services solely on the basis of destitution.
- Schedule 3 of the Nationality, Immigration and Asylum Act 2002 should be amended or its interpretation clarified so that all young people who have been in the care of children’s services, including as children accommodated under section 20 of the Children Act 1989, should be supported under the statutory leaving care provisions until they leave the country or reach the maximum permitted age under the leaving care provisions.

### Private rented housing

- When local authorities engage in operations designed to target inadequate or illegal housing in their area, they must comply with their legal duties to identify children who are potentially ‘in need’ and should assess needs and provide necessary support in line with their duties under section 17 of the Children Act 1989. The best interests of children must guide the solution found for such families and they should be assisted to continue to live in the locality where this is in the best interests of the children.
- No landlord should be required to undertake an immigration status check on potential or existing tenants.
- Families in precarious accommodation should be assisted to access quality immigration legal advice where this is the underlying cause of their housing problems.

### ***Children’s rights must be enforceable in practice and children must have effective access to justice and procedural safeguards, including access to legal representation.***

- The Government should conduct an immediate assessment of the availability and quality of legal representation for migrant children in England and Wales across relevant areas of law, including an assessment of the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- All immigration cases involving children should be brought back into the scope of legal aid using the power contained in section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, at a minimum cases brought by children in their own right.
- Local authorities must develop policies and guidance for their staff outlining how they will assist children, young people and families whom they are supporting to resolve their immigration status.
- The Government should abandon the proposed residence test for civil legal aid which, even with the listed exemptions, is unlawful and discriminatory. At a minimum, the government should exempt from the residence test all cases relating to duties to children in need under section 17 of the Children Act 1989.
- Judicial review must be protected as a critical safeguard to protect the rights of vulnerable undocumented migrants.

### ***There must be effective routes to regularisation for long-term undocumented migrant children and young people and the best interests of children must be a primary consideration in all decisions affecting them.***

- The best interests of children must be at the forefront of all Home Office decision-making, including decisions by both Immigration and Visas and Enforcement staff at the Home Office. Training must be provided on the legal framework and the assessment of best interests and the Office of the Children’s Champion must play a proactive role in mainstreaming best interests considerations throughout the Home Office in policy development and operational decision-making.
- When making any decision which affects a child, including the removal of a parent, the Home Office must first take steps to obtain all relevant information

about the best interests of the child, and then consider the impact of any potential decision on the welfare of the child. It should in its decision set out how it has taken the best interests of the child into account.

- Children's long-term legal status and stability should be resolved as soon as it is possible to do so, and every immigration case should include a case-specific consideration of the welfare of the child concerned when making the decision on whether to grant limited or indefinite leave to remain,<sup>276</sup> not a prescriptive reliance on a ten-year (or other fixed term) route to settlement.
- A fee waiver for all immigration and nationality applications should be applied in any case where the criteria outlined in the Home Office guidance are met, rather than only in relation to specific types of application.<sup>277</sup> Where the criteria are not met, discretion should always be exercised to waive the fees to ensure that no child's rights are adversely affected by being unable to make a claim to realise their rights in law. In particular, children who have an entitlement in law to register as British citizens who cannot afford to pay the application fee, should be subject to a fee waiver.
- Where a refusal decision is made on an individual's immigration claim, there should be a right of appeal to the Tribunal in all cases. The government should rethink its proposal to severely restrict appeal rights.
- The Immigration Rules and statute must reflect the UK's legal obligations under the European Convention on Human Rights, the EU Charter, the UN Convention on the Rights of the Child, and other domestic, regional and international instruments. Children and young people's Article 8 rights and best interests must be respected in line with established domestic and regional jurisprudence. Narrowing the approach to be taken to private and family life claims, and the best interests of children, must be avoided.

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276 See Holman J in the case of *SM v SSHD* [2013] EWHC 1144 (Admin) at para 57

277 See <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idichapter1a/fee-flro/flro-waiver?view=Binary>

# Appendix 1 - routes to regularisation

Possible routes to regularisation include the following. It should be noted that the following are applications based on current policy and law for applications made now; in the many historic cases where leave has previously been granted transitional provisions and other routes may well be applicable.<sup>278</sup>

## Obtaining British citizenship

This is the most stable form of status as a British citizen is not subject to immigration control and does not need leave to enter or remain in the UK.<sup>279</sup> A child who is born in the UK is not automatically British and only acquires citizenship at birth if their mother or father is a British citizen or settled (i.e. has indefinite leave to remain).

Children are not able to 'naturalise' in the same way as adults. Instead, there is a system in which children can 'register' as British citizens. If a child's parent becomes British or settled before they turn 18,<sup>280</sup> the child can be registered. Alternatively, if a child is born in the UK and lives in the UK for the first ten years of their life without extended absences, they can register as a British citizen, no matter what their immigration status or that of their parent(s).<sup>281</sup> The Secretary of State for the Home Department also has a broad discretion under nationality legislation to register any child as a British citizen. In such discretionary applications, it will normally be expected that one of the child's parents is British or settled, but this need not be the case and applications can be made for children in a wide variety of circumstances where it is clear that their future clearly lies in the UK.<sup>282</sup> Applications must be made on the correct application form, with the correct application fee, and should be accompanied by relevant evidence including a birth certificate, medical records, and letters from schools, friends and others, and two references from adults who have known the applicant for at least three years.<sup>283</sup> The report 'No Way Out, No Way In' revealed that 3,726 children applied for registration from January 2001 to September 2011, of whom 3,280 children

were registered as citizens and 27 were refused due to lack of 'good character'.<sup>284</sup>

In practice, barriers to registration as a British citizen include, first, a lack of awareness among children, young people and parents, as well as professionals and even immigration lawyers. Second, no legal aid is available to make this kind of application, even for the more complex discretionary applications. Third, many young people and families are unable to pay the required fee, currently £673, a sum out of reach for many undocumented families. Fourth, there can be evidential issues and difficulties proving paternity where relationships have broken down. Legal aid is no longer available to apply for many orders in the Family Court, including a declaration of parentage (see case study 21).

## Leave under the Immigration Rules

Article 8 of the European Convention on Human Rights is a fiercely contested area of law, especially in the immigration context, and the government has sought, so far through the Immigration Rules, to restrict its applicability in ways that many consider unlawful. The current Immigration Rules are an expression of the how the government is currently interpreting the UK's human rights obligations and how it intends to decide applications based on private and family life rights. However, whatever decisions the Home Office make based on the Immigration Rules, the courts have held that the full body of Article 8 case law also applies and the courts have emphasised that the best interests of children are a primary consideration and factors relating to immigration control must not form part of the best interests of the child assessment.<sup>285</sup> Therefore, the following outline of applications that can be made under the Immigration Rules should be read with an understanding that even where such applications are refused by the Home Office, applicants could be successful at appeal on the basis of Article 8. The domestic and regional jurisprudence on Article 8 is voluminous and too complex to cover here.

278 This list is not exhaustive. For a full discussion of all possible legal options, see N. Finch, *Routes to regularisation for people without legal status in the UK*, April 2013, at [http://issuu.com/paulhamlynfoundation/docs/phf\\_soi\\_routes](http://issuu.com/paulhamlynfoundation/docs/phf_soi_routes)

279 Section 1(1) and 2(1)(a) of the Immigration Act 1971

280 See Sections 1(1), 1(3)(a) and 50(9A) of British Nationality Act 1981, and Section 33(2A) of the Immigration Act 1971

281 Section 1(4) of the British Nationality Act 1981. They will have to provide evidence showing birth in the UK and residence from birth to the age of ten, such as medical and school records.

282 See Section 3 of British Nationality Act and Chapter 9, paras 9.17.11 of the Home Office Nationality Instructions

283 Under chapter 8 section 8.3.6 of the UK Border Agency's Nationality instructions, at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter08/chapter8?view=Binary>, [accessed: 15/07/2013]

284 N. Sigona and V. Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK*, University of Oxford, 2012

285 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *AJ (India)*[2011] EWCA Civ 1191; *EA (Article 8 –best interests of child) Nigeria*[2011] UKUT 00315 (IAC)



## The seven-year rule for children<sup>286</sup>

A child who is under 18 and has lived in the UK for a continuous period of at least seven years may be entitled to limited leave to remain under the Immigration Rules if they meet the suitability criteria and can show that it would not be reasonable for the Home Office to expect them to leave the UK. Home Office guidance advises caseworkers to take the following factors into account:

- Any significant risk to the child's health, for example, where a child is undergoing a course of treatment for a life-threatening or serious illness and treatment would not be available in a country to which he or she would be returning;
- Whether it would be reasonable for the child to return with his or her parents;
- Any wider family ties in the United Kingdom;
- Whether they are a citizen of the country they may return to;
- Whether they have previously visited or lived in that country;
- Any family and friendship networks there;
- Any relevant cultural ties there and whether the child understands that culture having been part of a diaspora here;
- Their ability to speak, read and write a language spoken there;
- Whether they ever attended school in that country.<sup>287</sup>

If a child is successful, they will be granted limited leave to remain for 30 months and will be granted 'subject to such conditions as the Secretary of State deems appropriate', which means that they could be granted leave endorsed with a no recourse to public funds condition. The fee for an application is £578 for an application for limited leave, and £1,051 for an application for indefinite leave to remain. However, there is a fee waiver for children who are

accommodated by a local authority and applicants can argue that they should be fee exempt if they are destitute.

## Leave to remain as a parent

In certain circumstances, an undocumented parent of a child who has been in the UK for seven years or a child who is British can apply for leave to remain as a parent, relying on an 'exception'.<sup>288</sup> An undocumented migrant will not meet the normal requirements of the rule<sup>289</sup> but may meet the 'exception'. The applicant parent will have to show that they meet the general suitability requirements. The child must have lived in the UK continuously for the preceding seven years or the child must be a British national.<sup>290</sup> The parent must show that they have 'a genuine and subsisting parental relationship' with the child and, crucially, that it would not be reasonable to expect the child to leave the UK.<sup>291</sup>

If successful, limited leave will be granted for 30 months subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate, and they will be able to apply for settlement (indefinite leave to remain) after ten years of this leave.<sup>292</sup>

## Leave to remain as a young person

A young person aged between 18 and 25 who has spent at least half of their life living continuously in the UK, not including any periods of imprisonment, can apply under the Immigration Rules for limited leave to remain in the UK on the basis of their private life,<sup>293</sup> providing they meet the general suitability criteria. If successful, 30 months leave to remain will be granted in the first instance 'subject to such conditions as the Secretary of State deems appropriate', which means it could be granted subject to a no recourse to public funds condition. Further applications for leave would need to be made under the Immigration Rules<sup>294</sup> and an application for indefinite leave to remain can be made after ten years.

286 The usual application fees of £5615 for an application for limited leave to remain and £9916 for indefinite leave to remain will apply unless the child is accommodated by a local authority when the fee will usually be waived.

287 Guidance on application of EX1 – consideration of child's best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do not apply

288 Section R-LTRPT, Appendix FM of the Immigration Rules and Section EX.1, Appendix FM of the Immigration Rules

289 A parent will not be entitled to leave to remain on this basis if he or she is here in breach of the immigration rules: Paragraph E-LTRPT.3.2 of Appendix FM to the Immigration Rules

290 Section E-LTRPT 2.2, Appendix FM of the Immigration Rules

291 Section EX.1, Appendix FM of the Immigration Rules

292 Section D-LTRPT 1.1, Appendix FM of the Immigration Rules

293 Paragraph 276 ADE(v) of the Immigration Rules

294 Paras 276BE and 276DE do not explain how a young person who no longer falls within the age range of 18 to 25 after his or her initial period of limited leave can apply for further leave to remain. This is presumably a lacuna in the Immigration Rules.

### Long residence for adults

Before July 2012, an undocumented migrant could apply for indefinite leave to remain if they had been living in the UK for a continuous period of 14 years or more, even if they had been in the UK unlawfully.<sup>295</sup> Although it was often difficult to prove residence over the entire period, this rule provided a way for those living in the UK for very long periods to regularise their status – it was a ‘way in’ to society.

The 14-year rule has now been scrapped and since July 2012 undocumented migrants can only apply for limited leave to remain on the basis that they have established a private life in the UK after 20 years of continuous residence.<sup>296</sup> They will have to meet a number of suitability criteria, relating for example to whether they have committed criminal offences.<sup>297</sup> If successful, the individual will be granted limited leave to remain for up to 30 months. Indefinite leave to remain will only be granted once they have completed ten years’ limited leave on the grounds of right to private life.<sup>298</sup> Each time the individual applies to extend their leave they will have to show that they still meet the criteria, and pay the relevant fee. In effect, this creates a 30-year route to settlement for adult undocumented migrants.

In the alternative, an individual over the age of 18, who has lived in the UK for less than 20 years can apply for leave to remain if they have ‘no ties’ (including social, cultural or family) with the country to which they would have to go if required to leave the UK.<sup>299</sup> The suitability requirements apply.

### Refugee status or humanitarian protection

A number of undocumented children and young people may have applied for asylum. However, it is possible that many of their claims were not dealt with fairly and they may not have had good legal representation. Therefore, many of these undocumented migrants may be able to explore protection arguments, if they have a chance to do so with a new solicitor. There may be new evidence, new case law or new circumstances that mean they could make a fresh asylum

claim.<sup>300</sup> It is very possible that some of the undocumented migrant population in the UK are entitled to international protection under the 1951 Convention relating to the Status of Refugees. Refugee status should be granted to an individual who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to or owing to such fear, is unwilling to avail himself of the protection of the country ...’.

Undocumented migrants may also be entitled to humanitarian protection, a form of protection that comes from EU law, on the basis that they will be at risk of serious harm if returned to their country of origin.<sup>301</sup>

Those granted refugee status or humanitarian protection will be given five years leave to remain, after which they can apply for further leave. This leave is granted with access to public funds and the right to work.

### Statelessness procedure

Some children and young people may be unable to avail themselves of any nationality and may be stateless, meaning that they are not considered a national by any state.<sup>302</sup> Statelessness can arise because of discrimination in a country’s system of nationality law, or can happen when there are changes such as a state gaining independence. Some people are born stateless because a country’s system of nationality law does not recognise them as citizens. In other cases someone is stateless due to their family or they having migrated. From April 2013 the UK government introduced a new statelessness determination procedure to identify those who are stateless and provide them with a route to legal status.<sup>303</sup> Prior to this there was no dedicated route for stateless people to make an application.

This kind of application must be submitted on a particular application form and will be considered by a special Home Office team based in Liverpool. There is no fee for this type of application. No legal aid is available to get legal assistance with this type of application, except if someone was already signed up with a legal aid solicitor prior to 1 April 2013 and

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295 Any period of imprisonment will not count towards this qualification period

296 Under paragraph 276ADE(iii) of the Immigration Rules, introduced by HC 194

297 For example, an applicant will not be entitled to leave under this Rule if he or she is subject to a deportation order, has been convicted of an offence for which they have been sentenced to imprisonment for at least four years, has been convicted of an offence for which they have been sentenced to imprisonment for less than four years but at least twelve months, his or her offending has caused serious harm or he or she is a persistent offender who shows particular disregard for the law. See SLTR1.3 to 1.5 of Appendix FM to the Immigration Rules

298 Para 276ADE (a) of the Immigration Rules.

299 Paragraph 276 ADE (vi) of the Immigration Rules

300 Paragraph 353 of the Immigration Rules

301 Paragraph 339C of the Immigration Rules

303 Convention Relating to the Status of Stateless Persons, Article 1.1

303 The rules on statelessness applications are contained in the Immigration Rules at paragraphs 124 to 139

the file was not closed, or if the case involves a judicial review, which is still in the scope of legal aid. Judicial review is the main remedy if the application is refused, because there is no statutory right of appeal.

## Protection as a victim of human trafficking

Victims of trafficking often make an asylum application as many fall within the Refugee Convention and require international protection. However, there are also trafficking-specific procedures and leave can be granted on the basis of having been recognised as a victim. Potential victims, both children and adults, should also be referred to the National Referral Mechanism (NRM), the government authority assigned with deciding whether someone is a victim. In the case of anyone subject to immigration control, referral into the NRM means that the decision will be taken by the Home Office, which many view as problematic in light of its border control function and ethos.

If it is decided that there are reasonable grounds to believe that someone is a victim of trafficking, the person will be granted a (minimum) 45-day 'recovery and reflection period'. No action to detain or remove the person should be taken during this time. Before the end of the 45-day recovery and reflection period, a conclusive grounds decision on whether the person is a victim of trafficking should be made. If this is the case, the victim may be granted a residence permit for an initial period of a year if they are co-operating in a police investigation into or prosecution of the trafficker and if a residence permit is necessary due to their personal circumstances. These residence permits are renewable.

## The right to reside under EU law

Following the case of *Zambrano v Belgium*<sup>304</sup> an irregular non-EEA migrant parent is entitled to reside in the UK if he or she is the primary carer of an EU citizen child or a British citizen child and the child would be unable to reside in the UK or any other EU state if the parent were required to leave.<sup>305</sup> However, this is not the same as being granted limited or indefinite leave to remain and the right to reside is dependent upon the British citizen child remaining in the UK (or the EU) and the parent remaining his/her primary carer –

in this sense, 'Zambrano carers' will never be able to achieve permanent status in the UK. This area of law is about a child's EU citizenship rights, including their right to be looked after by their parent and enjoy their EU citizenship, rather than being about the rights of the parent.<sup>306</sup>

Despite a case in 2012<sup>307</sup> setting out that a non-EEA migrant parent of a British citizen child was not a person subject to immigration control and, therefore, entitled to housing assistance,<sup>308</sup> since then the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006<sup>309</sup> have been amended to exclude such parents from entitlement to housing. Zambrano carers, as they are known, have also been excluded from entitlement to income support, job seekers allowance, pension credit, housing benefit, council tax benefit and educational support allowance.<sup>310</sup> Therefore, although a non-EEA migrant parent of a British child can reside and work in the UK, they will have to find housing in the private sector and will not be entitled to basic welfare benefits, or they may have to turn to the local authority for support under the Children Act 1989.

304 European Court of Justice c 34/09

305 Regulation 15A of the Immigration (European Economic Area) Regulations 2006 brought into force on 8th November 2012. This right derives from the child's rights as an European Union citizen under Article 20(1) of the Treaty on the Functioning of the European Union.

306 Comes from Lisbon Treaty and EU Charter Rights Article 24 – any child's interests have to be considered as matter of EU law

307 In *Pryce v London Borough of Southwark and Secretary of State for the Home Department (intervening)* [2012] EWCA Civ 1572

308 under Section 185 of the Housing Act 1996

309 SI 2012/2588

310 by the Social Security (Habitual Residence) (Amendment) Regulations 2012, SI 2012/2587

