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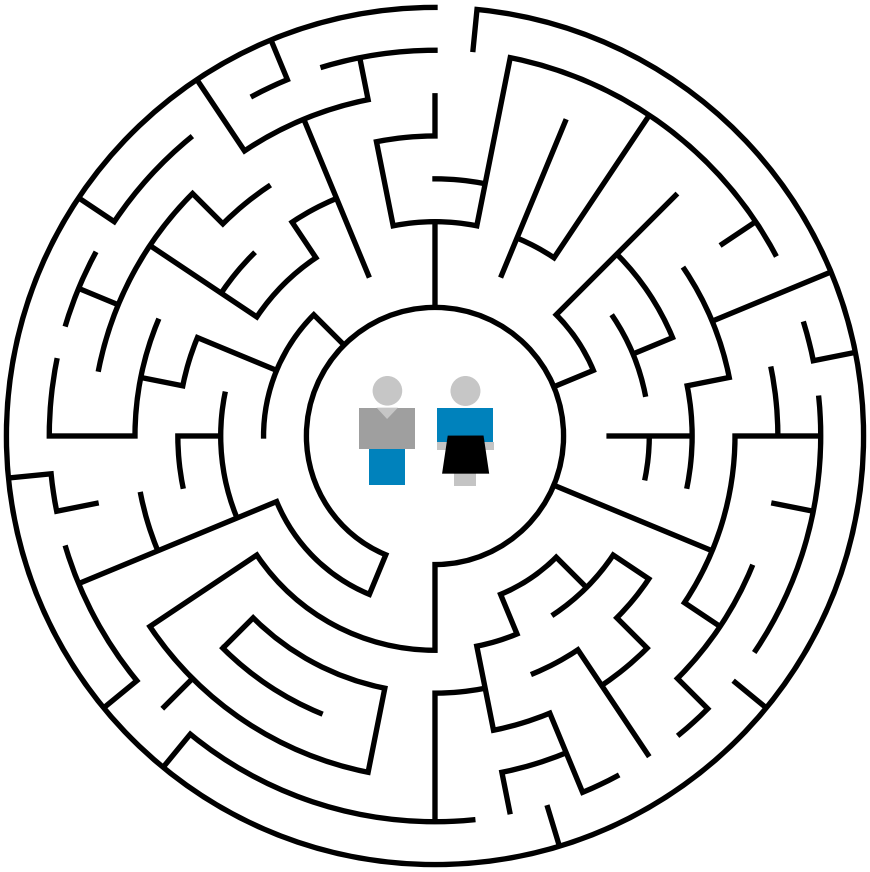
Children's Legal Centre

Securing permanent status:

Existing legal routes for children and young people without leave to remain in the UK



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Contents

Introduction

This guide was first published in 2013[1] to outline to individuals, organisations and policy-makers the ways in which individuals can attain legal status in the UK where they are currently undocumented. This updated paper will consider the possible routes to regularisation for those without status, including citizenship, EEA rights and applications inside and outside the Immigration Rules.

This document is not intended for use to assist individuals with their immigration applications, but instead is designed to highlight the legal options to gaining status, and some of the particular hurdles, including financial and evidential requirements, that are faced when regularising immigration status. It cannot replace legal advice for someone who wants to make an application. Immigration advice can only be given by someone who is qualified and regulated to do so. It is a criminal offence to give immigration advice unless you are a regulated immigration adviser, solicitor or barrister.[2]

The complexity of the UK's immigration system is well-known, and this paper does not aim to set out every route by which a child and their family can make an application under the Immigration Rules (for example to work, study or join family) and remain in the UK lawfully. The routes outlined in this paper are only those of relevance to children, young people and families who are undocumented.

The ways in which someone can become undocumented are set out in the companion paper to this work *Securing permanence for long-term resident children in the UK*. In this paper, Coram Children's Legal Centre has made efforts to quantify how many children and young people are able to regularise their status, and what the barriers to doing so might be following changes to legal advice provision and changes to the Immigration Rules and Home Office policy since 2012.

1 https://www.phf.org.uk/wp-content/uploads/2014/10/PHF-SOI-Routes-to-regularisation-Nadine-Finch.pdf

2 Immigration and Asylum Act 1999, section 84

1. Common issues

Best interests

Article 3(1) of the United Nations Convention on the Rights of the Child 1989 ('UNCRC') provides:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

'Best interests', broadly speaking, refer to a child's general well-being, which takes into consideration a wide range of factors, including the views of the child, the need for a safe environment, family and close relationships, access to education and healthcare, and development and identity needs.[3]

It is now clearly settled law in the UK that the best interests of the child are relevant to all decisions and decision-making processes directly or indirectly affecting a child.[4] In addition, Section 55 of the Borders, Citizenship and Immigration Act 2009 contains a mandatory duty on the Home Office and others making immigration decisions to safeguard and promote the welfare of children in the UK as they carry out their functions.[5] All asylum and immigration policies and practices at every stage of the process must comply with the duty to treat a child's best interests as a primary consideration. The same duty applies to both separated children and children in families.

Failure to comply with section 55 or to address the child's best interests may make a decision unlawful. A decision can be appealed to the tribunal on the basis that the Home Office has failed to consider the child's best interests. Consideration of best interests must be meaningful; merely reciting that best interests have been considered does not fulfil the Home Office's duties.

The Home Office has issued statutory guidance to accompany the duty under section 55[6] and there is a detailed section on the best interests of the child in the family and private life guidance.[7]

Since the section 55 duty came into force, there have been a number of important cases that have considered how section 55 should be considered. The landmark case of *ZH (Tanzania) v Secretary of State for the Home Department* held that the best interests of the child should be considered first before other factors and that the child's views had to be taken into account. There have been further cases and principles since *ZH (Tanzania)* that developed the principles of consideration of best interests.[8]

For many children who have lived in the UK for many years, an assessment of what is in their best interests is a crucial component of any application for leave to remain in the UK. Additionally, the power of the Home Office to grant a person leave to remain in the UK, contained in section 3(1)(b) of the Immigration Act 1971, includes a discretion to grant leave or indefinite leave to remain.[9] There is therefore now scope within policy to argue for longer period of leave or indefinite leave to remain.[10] When applying for leave to remain for a child or a family, representations should be made as to the length of leave, including indefinite leave, taking into account the best interests of the child.

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3 UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, May 2013, paras 52 – 84 at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

4 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

5 Section 55, Borders, Citizenship and Immigration Act 2009 http://www.legislation.gov.uk/ukpga/2009/11/section/55

6 Home Office, Every Child Matters: Change For Children https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf

7 Section 11, Home Office, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10-year_routes_guidance_August_2015.pdf

8 For further information, see *HH -v- Deputy Prosecutor of The Italian Republic, Genoa* [2012] UKSC 25 – CCLC's information note on this case at http://bit.ly/1TUUpHN; *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 http://www.bailii.org/uk/cases/UKSC/2013/74.html; *Kaur (children's best interests/public interest interface)* [2017] UKUT 14 (IAC) http://www.bailii.org/uk/cases/UKUT/IAC/2017/14.html; *JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 (IAC) http://www.bailii.org/uk/cases/UKUT/IAC/2014/%5B2014%5D_UKUT_517_iac.html; and *MK (section 55 – Tribunal options)* 2015 UKUT (223 (IAC) https://tribunalsdecisions.service.gov.uk/utiac/2015-ukut-223

9 The courts have previously found Home Office policy on the length of leave granted to be unlawful as it was not compliant with section 55. See *SM and TM and JD and Others v SSHD* [2013] EWHC 1144 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/2013/1144.html

10 See, for example Section 11.3.1, Home Office, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10-year_routes_guidance_August_2015.pdf

Legal Advice & Legal Aid

Immigration legal advice is highly regulated and anyone who gives immigration advice must be qualified to do so.[11] Anyone providing immigration and asylum legal services to clients under a legal aid contract from the Legal Aid Agency must additionally be accredited within a scheme called the Immigration and Asylum Accreditation Scheme, which is operated by the Law Society.[12] Those providing legal aid services to unaccompanied asylum-seeking children must be accredited as a level 2 senior caseworker.

Legal aid is funding provided by the government to help meet the costs of some types of legal advice to people otherwise unable to afford legal representation. Those applying for legal aid are subject to a means and merits test. Since April 2013, as a result of changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, there have been a number of areas of law that are no longer eligible for legal aid, including most immigration cases. This means that applications based on family or private life, citizenship applications and statelessness applications are not covered by legal aid. Legal aid is still available for: asylum and protection cases, victims of trafficking who have a positive reasonable grounds decision, indefinite leave to remain (ILR) applications under the domestic violence rule, and judicial review.

When cuts were made to civil legal aid, it created a 'safety net' provision to grant legal aid in exceptional cases where funding is necessary to avoid a breach of someone's human rights or a breach of European Union law. An applicant who cannot obtain legal aid, for example for an immigration application on the basis of family or private life, can apply for exceptional case funding to enable them to obtain legal aid.[13]

Fees and Immigration Health Surcharge

Most immigration and nationality applications require a fee to be paid. Fees are normally increased around the start of the financial year. The figures noted throughout this paper are correct as of time of writing. Always check the gov.uk website for the most up to date fees.

Applicants must also pay the Immigration Health Surcharge per applicant. This will be calculated on an annual basis and at a cost of £200 per year, so if applying for leave on the basis of family life, which is granted for two and a half years, this will be £500, payable with the application. Where an application is unsuccessful, the application fee and surcharge are not refundable.

There is a fee exemption available for children being looked after by the local authority under section 20 or section 31 of the Children Act 1989.[14] For those who do not meet the exemption but cannot afford the fee, a fee waiver can be applied for. This waiver applies where someone is either:

- Destitute so that they cannot meet housing costs, or cannot afford basic necessities
- Would be rendered destitute by paying the fee
- There are exceptional circumstances relating to their financial circumstances and ability to pay the fee such that the fee should be waived in their case.[15]

The application must be made using the form appendix 1 FLR(O)/FLR(FP); it can only be used in cases that relate to family and private life. The Home Office fee waiver policy states that an applicant can rely on the provision that they will be made destitute by paying the fee where:

> (a) They have no additional disposable income such that they could either:
>
> > (i) pay the fee now; or
> >
> > (ii) save the required amount within a reasonable period (12 months) (and it would be reasonable in all the circumstances to expect the applicant to delay their application for this length of time);
>
> in either event, without compromising their ability to accommodate themselves adequately or meet their other essential living needs; and
>
> b) They have no ability to borrow the required amount from family or friends; and
>
> c) There is no basis for concluding that the applicant's financial circumstances are likely to change within a reasonable period (12 months) (and it would be

11 For further information on the OISC, SRA and levels of accreditation, please see the OISC website https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner and SRA website https://www.sra.org.uk/home/home.page

12 Law Society, What is the Immigration and Asylum Law Accreditation? available at: http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/

13 Para. 30, Part 1, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012, http://www.legislation.gov.uk/ukpga/2012/10/introduction/enacted

14 'Being looked after by a local authority' means being looked after under section 22(1) of the Children Act 1989. See The Immigration and Nationality (Fees) Regulations 2017

15 See Home Office, Immigration Directorate Instruction Fee Waiver for FLR (FP) and FLR (O) forms, April 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf

reasonable in all the circumstances to expect the applicant to delay their application for this length of time).[16]

Where someone is granted a fee waiver or exemption, then the health surcharge is also waived. However, if on making the application the fee waiver is rejected, then the application will be treated as invalid unless the fee is paid. This is particularly an issue for those who are making a further application after a period of leave, as they risk losing the time accumulated towards their ten years of lawful residence (see below). Someone who is eligible for the fee waiver at the time of application will also be eligible for a fee waiver if applying for a review of a refused application.

If an application is refused with a right of appeal, then this attracts a fee. In general, these fees will not be payable where the applicant has already received a fee waiver for the application fee. Tribunal fees are also waived for a child who is accommodated by the local authority under section 20 Children Act 1989, and for children and adult carers supported under section 17 of the Children Act 1989. There have been changes to appeal rights for certain types of cases – please see the applications paragraphs in section 7 of this paper for further details.

There is no fee waiver for ILR or citizenship applications.

Applications – continuous residence and validity

There are different routes to settlement (indefinite leave to remain) depending on the type of immigration status. For example, an application for leave to remain on the basis of family life may be 5 years or 10 years. Applications on the basis of private life will be 10 years. Applications for settlement on one of these routes will require the leave in the UK to be lawful and continuous (no breaks in status).

Applicants will therefore be making multiple applications before being eligible to apply for settlement. Applicants will have to ensure that they make valid, in-time applications. Different applications have different validity requirements but generally, they must:

- Be made on the correct, up to date application form;
- Include the correct fee/fee waiver;
- Include confirmation of payment of the Immigration Health Surcharge;
- Include requested passport photographs that comply with Home Office guidance;
- Include a valid passport (unless an exception applies);
- Be fully completed and signed in the correct places; and
- Comply with their biometrics enrolment when requested.

Applications for further leave to remain need to be made in-time – usually within the 28 days before the current leave expires. As long as an applicant makes an in-time, valid application, they will continue to have the conditions of their previous leave to remain while waiting for a decision on their applications and in-time appeal(s).[17]

If an application is invalid, the Home Office may contact the applicant to inform them that the application is invalid and provide 10 days to correct the application. However, the Home Office does not always do this – Home Office guidance has different instructions depending on the type of error that is made.[18] It should be noted that an applicant will only get one chance to remedy the invalidity of the application in this situation. If an applicant does not think an application is invalid, they should challenge the decision.

If the Home Office decides not to allow the application to be fixed, or it is made after leave has expired, then the applicant will become an overstayer. An application will still need to be made and overstaying of up to 14 days can be ignored for the purpose of continuity of residence if there was a good reason.[19] However, the rights the applicant had from their previous leave will not apply. Therefore they will not have the right to work or to claim benefits etc while awaiting the outcome of the application and any appeal. Gaps between applications without good reason will likely mean that the applicant will lose all previously accrued time.

The rules are often subject to change and routes to settlement can change – for example, before July 2012, those with discretionary leave were on a 6 year route to settlement. If there are significant rule changes, those who are already on a route to settlement are normally protected by transitional provisions (as long as they continue to meet the rules they will remain on the previous route to settlement). However, this protection is not guaranteed and will depend on the type of route to settlement the applicant is on.

16 See Home Office, Immigration Directorate Instruction Fee Waiver for FLR (FP) and FLR (O) forms, April 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf

17 Section 3C & 3D, Immigration Act 1971 http://www.legislation.gov.uk/ukpga/1971/77/section/3C

18 Home Office, Guidance – Specified application forms and procedure, March 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509284/Specified-application-forms-and-procedures-v18.pdf

19 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564933/57079_-_HC_667_-_Web_Accessible.pdf

2. Citizenship

Citizenship is the legal status that offers the greatest degree of permanence for migrant children. Becoming a British citizen means that the child has a right of abode in the UK and is not subject to immigration control. Gaining citizenship for a child within a family may also give other family members routes to regularisation that they would not have otherwise had.

It is possible to move from being a child with irregular status to a British citizen without making an intervening immigration application.

2a. Children who are British citizens by birth

British citizenship, in most circumstances, is not defined by country of birth. Since 1 January 1983, a child born to foreign national parents does not gain British nationality through birth but will acquire their parents' nationality and immigration status at the time of birth. Whether or not a parent is married at the time of birth or subsequently also has an impact on the nationality of their child.

A child born on or after 1 January 1983 is British if they are born in the UK, and either one or both of their parents is British or settled at the time of birth. Having Indefinite Leave to Remain (ILR) or Permanent Residence (PR) as an EEA national is currently considered as being settled. PR (considered in more detail below) is a declaratory right, meaning that a child may be a British citizen even where one or both of their parents do not obtain a permanent residence card. In these cases, the Passport Office will need to be satisfied that a child is British, and so sufficient proof of the parent's permanent residence will need to be provided.

Where a child was born before 1 July 2006, the father's British citizenship or settled status is only considered for nationality purposes if the parents were married at the time of the child's birth, or if they are subsequently married.[20] However, a child born before 1 July 2006 to unmarried parents whose father has British nationality can now apply for registration by entitlement (see section 2d below); the Home Office must register the child as a British citizen as long as the child meets the good character requirement. This application is made on Form UKF and there is no fee for the registration.[21]

For children born on or after 1 July 2006, the father is someone who is married to the mother, treated as the father under fertilisation and surrogacy laws, or can otherwise provide proof of paternity.

A first application for a passport may be made by either parent, and anyone with parental responsibility may sign the application form. However, the Passport Office may reject applications which do not provide sufficient evidence of entitlement. For example, if the entitlement to nationality passes through an estranged father who has not provided information relating to his status then the Passport Office will likely reject the application.

Proof of nationality

If someone is unsure about whether they have British citizenship, or require proof for the Passport Office that they cannot otherwise obtain, then it is possible to apply to the Home Office for confirmation of status. This will usually suffice where the parents or young person are unable to provide proof of the British or settled parent's status, for example where the British parent is estranged. This application is made via form NS and currently requires a fee of £234.

However, where the parent is British by birth, rather than having been through an application or naturalisation process, then the Home Office will be unable to confirm the parent's nationality. The British parent will need to provide evidence of their nationality.

Proof of paternity

Inclusion of the father's details on the birth certificate where the parents are unmarried is not necessarily sufficient proof of the child's nationality. For births registered before 15 September 2015, the father is the person who is included on a birth certificate issued within the first year of the child's birth.[22] Where the birth certificate is issued (or re-issued to include the father's details) after the first year, the person claiming to be the father must provide further evidence to 'satisfy the Secretary of State' that he is in fact the father.[23] For children whose birth is registered after 10 September 2015, the father must provide evidence that he is the 'natural' father.[24] In making a decision based on paternity, the Secretary of State may have regard to evidence that she

20 British Nationality Act 1981, section 47(1)
21 See https://www.gov.uk/register-british-citizen/born-before-2006-british-father
22 British Nationality (Proof of Paternity) Regulations 2006, regulation 2(a)
23 British Nationality (Proof of Paternity) Regulations 2006, regulation 2(b)
24 British Nationality (Proof of Paternity) (Amendment) Regulations 2015, regulation 3.

considers relevant, such as DNA test reports, court orders, birth certificates etc. This is potentially a more flexible regulation, allowing estranged parents to produce alternative evidence to establish a child's paternity.

2b. British citizenship through a parent

A child who is born in the UK, to parents who are not British or settled, is entitled to register as a British citizen if one of their parents subsequently becomes settled, a member of the armed forces (for a child born after 13 January 2010),[25] or gains citizenship before the child turns 18.[26] This registration is by entitlement but is still subject to the good character requirement.[27] This right to register by entitlement is lost once the child becomes an adult. This application is made on form MN1 and requires payment of a fee (£973 at time of publication) but as noted above, is usually increased annually.

British citizenship by adoption

A child who is adopted by a British citizen will also become a British citizen if the adoption is authorised by a court in the UK, and one of the adoptive parents is a British citizen. A child will also become a British citizen through a Hague Convention adoption after 1 June 2003, where at least one adoptive parent is British and either the sole or joint adoptive parents are habitually resident in the UK.[28] A parental order made after 6 April 2010 in cases of surrogacy will establish a child's citizenship. Other forms of family court order, including special guardianship, or care orders, will not affect a child's nationality.

British citizenship by descent

A child who is born abroad to a British citizen will generally be entitled to citizenship. However, a child who is born abroad to a parent who was also born abroad will not be automatically entitled to citizenship, as citizenship by descent can only be passed on for one generation. There are exceptions which are found in the British Nationality Act 1981 for those who are the second generation to be born abroad as a result of military service or diplomatic mission.

2c. British citizenship as a stateless child

A child who is born in the UK without an entitlement to citizenship in any country may register as a stateless child.[29] In order to do so, they will need to demonstrate that they had spent five years prior to the application in the UK, that they are not entitled to any other nationality, and that they are under 22 years of age. There is a similar power to register children born in overseas territories who are stateless. Considerable evidence will need to be gathered of attempts to gain any other nationality to which the child may be entitled.

A statelessness application cannot be made unless a child cannot qualify for any other nationality; preference is not sufficient to demonstrate that a child requires British nationality.

2d. British citizenship through entitlement

A child is born in the UK on or after 1 January 1983 who remains here for the first ten years of their life, without an absence of more than 90 days each year, has a right to register as a British citizen by entitlement.[30] The parents' immigration status is irrelevant to this application. The Home Office Nationality Instructions state that absences of over 90 days and under 180 days per year will normally be discounted, provided the total period absent does not exceed 900 days in the ten year period. This right is not extinguished at the age of majority – an individual over the age of 18 will still be able to apply under this rule.

The application will need to be accompanied by evidence which proves the child has been in the UK for ten years. The first five years can be evidenced through the birth certificate, red-book, medical records and letters from doctors or clinics, letters from friends or relatives or a travel document. After the age of compulsory schooling, copies of the school records can be provided.[31] The evidence required by the Home Office includes details of two referees for the applicant who have known the child for at least three years.

This right is subject to the good character requirement (see below). Where a child meets the criteria and can evidence this, and does not fall to be excluded on the basis of character, then the Home Office must register them. However, there is still an application fee, which is currently £973.

25 British Nationality Act 1980 s1(3A)
26 British Nationality Act 1980 s1(3).
27 Nationality Instructions, chapter 8.1.1.1
28 British Nationality Act 1981 s1(5)
29 British Nationality Act 1981, Schedule 2, paragraph 3
30 British Nationality Act 1981 s1(4)
31 Nationality Instructions chapter 8.3.6

2e. British citizenship through discretion

While a child is under the age of 18, the Secretary of State may register him or her by discretion.[32] Although this discretion exists in statute as an unlimited discretion, the Nationality Instructions provide non-exhaustive guidance on how, depending on the circumstances, the Secretary of State should exercise her discretion.[33] The application fee is currently £973. Children who do not meet particular categories will normally need as a minimum to demonstrate that their future belongs in the UK in order for the Secretary of State to use her discretion to allow them to register.

For a child born in the UK to non-British parents, the guidance states that:[34]

> *We should normally expect that:*
>
> - *at least one parent is a British citizen or*
> - *one of the parents has applied to be registered or naturalised as a British citizen and the application is going to be granted (if the parent's application is to be refused, we should normally refuse the minor's application as well); and*
> - *the other parent is either settled in the United Kingdom (see Annex F to Chapter 6); or*
> - *whilst not settled, is unlikely in the short or medium term to be returnable to his or her country of origin (eg s/he has been granted Discretionary Leave), and there is otherwise no reason to think that the child's future does not lie in the United Kingdom.*

The Nationality Instructions further state that it will '*rarely be right to register a child neither of whose parents is or is about to become a British citizen*'. However, this guidance cannot bind the discretion of the Secretary of State, and applications may be made by children whose parents do not have status. Those applications most likely to succeed are:

- An older teenager who has spent most of their life in the UK
- A minor who requires citizenship for a particular career path
- Where the child's future clearly lies in the UK (such as a younger child who is subject to a care order)
- Where the person making the application on their behalf is about to become a British citizen.

Applications are made by the child, the parent(s) or the child's guardian. Where a child is a looked-after child, the local authority may make the application. Where the application is made by one parent, then the Secretary of State will expect that the other parent will have consented to the application, although this is not a requirement, where, for example, one parent cannot be traced.

The Nationality Instructions also set out that a child is expected to have leave with no conditions (indefinite leave to remain/ settlement) when making an application for citizenship and that they will have lived in the UK for a particular period of time, depending on their age. The child is also subject to the good character requirement (see below). However, the Secretary of State cannot require that this criteria is fulfilled, and will need to give consideration to all the circumstances of the application.

The application does not have a right of appeal. The only remedy is through applying for an internal review, and a judicial review if the review is unsuccessful.

2f. Good Character requirement

All applications for citizenship through entitlement or discretion (sections 2.d and 2.e above) made by anyone over the age of ten must meet the 'good character' requirement. There is no definition of good character in the British Nationality Act 1981, and as a result the Nationality Instructions contain a non-exhaustive list of factors to be considered by the Home Office. The Home Office will consider whether an applicant is of good character on 'the balance of probabilities': whether it is more likely than not that someone is of good character. When applying, it is the responsibility of the applicant to note any significant event of relevance to good character, such as a criminal conviction or pending prosecution. Negative factors include:

- those who are convicted of a criminal offence
- involvement in war crimes, or crimes against humanity
- where there are reasonable grounds to suspect involvement in a crime
- someone whose financial affairs are not in an appropriate order (for example where they have not paid tax owing)

32 British Nationality Act 1981 s3(1)
33 Nationality Instructions, chapter 9
34 Nationality Instructions chapter 9.17.9

- those who have evaded immigration control or failed to comply with conditions
- someone who has been deliberately dishonest or deceptive in their dealings with the UK government
- anyone who may be considered notorious by virtue of their behaviour within their local area or networks

The Nationality Instructions do not distinguish between child and adult applicants for citizenship. This means that children will normally be refused citizenship if they have criminal convictions or cautions. They are also likely to be refused on the basis of 'soft information', such as police records noting associations with gangs or warnings. The length and date of any sentence, caution, reprimand or any other form of conviction is important. The rehabilitation periods in the Rehabilitation of Offenders Act 1974 do not apply to applications for citizenship, which means that convictions will need to be declared whether or not they are spent. Someone who has been sentenced to a period of imprisonment of four years or more will not usually be eligible for citizenship.[35]

35 The relevant periods before a sentence will not prevent someone from being granted citizenship are found in the Nationality Instructions, Chapter 18, Annex D at http://bit.ly/2jDXJbv

3. Indefinite leave to remain (ILR)

Whilst indefinite leave to remain does not offer children and young people the same level of security and permanence in the UK as citizenship, having ILR does give them considerable protection and the right, in most circumstances, to be treated in the same way as a British national. ILR can be lost if someone leaves the UK and intends to make their permanent home elsewhere, or if they stay away from the UK for two years or more. The Secretary of State has the power to revoke ILR where it is gained by deception,[36] if the individual is liable for deportation[37] or if someone with ILR following recognition of refugee status has done something that would no longer make them a refugee (see the section on refugees below).[38] The Secretary of State may also revoke a child's ILR where their parent's status has been revoked because they are liable for deportation. However, this must be subject to consideration of the child's welfare and best interests under section 55 of the Borders Citizenship and Immigration Act 2009.

3a. ILR by application

A child or adult may apply for ILR where they meet the Immigration Rules. These rules will vary depending on the category of leave a child holds at the point of application.

Where a child's parents are eligible for settlement, a child may be eligible for ILR in the UK in any event, where they meet all of the following requirements under Immigration Rule 298:

- They are seeking to remain with a parent, parents or relative where both parents are settled in the UK, or one is settled and has sole responsibility for their upbringing or there are serious and compelling considerations which make the exclusion of the child undesirable and
- The child is under 18; and
    - Has limited leave to remain, or was admitted under family reunion or for the purposes of settlement
    - Is not leading an independent life and has not formed an independent family unit
    - Can and will be adequately maintained and accommodated by the parent without recourse to public funds
    - Does not fall for refusal under the general grounds for refusal (see section 7 below for these).

However, a child in a two parent family with only one parent who is eligible for settlement will not automatically become eligible themselves. In some circumstances, a child may be able to apply for ILR earlier, for example when entering for the purposes of settlement (Immigration Rule 297) or where they are the child of a parent who has experienced domestic abuse and is entitled to apply for ILR on this basis under the domestic violence rule.[39]

There are frequently difficulties where children join parents during the currency of their leave and are then unable to continue to meet the requirements of the Immigration Rules if a parent's status changes. A child whose leave is dependant on an adult (generally a parent) may lose that leave if there are changes to the leave held by the adult. A child who becomes an adult during this period may also face difficulties in continuing to secure their status (see below). For children who have had to switch or vary leave, Immigration Rule 276C provides for ILR to be granted to someone who has had 10 years lawful residence in the UK. There must also be no reasons in the public interest why leave should not be granted. This will include considering the applicant's:

- age
- strength of connections in the United Kingdom
- personal history, including character, conduct, associations and employment record
- domestic circumstances
- compassionate circumstances
- any representations received on the person's behalf

For the ten year lawful leave, periods spent as an EEA national or family member can be considered alongside leave under

36 Nationality, Immigration and Asylum Act 2002, s76(2)
37 Nationality, Immigration and Asylum Act 2002, s76(1)
38 Nationality, Immigration and Asylum Act 2002, s76(3)
39 Found in Part 8, paragraph 289A for those who applied as a spouse or partner before 9 July 2012, or in Appendix FM, DV-ILR for those who applied after this date at https://www.gov.uk/guidance/immigration-rules

the Immigration Rules. An application for ILR costs £2,297. The applicant must not fall for refusal under the general grounds of refusal (see Section 7 below) and where the young person is over 18, they must have passed the knowledge of language and life in the UK test (KOLL).

3b. ILR by discretion

Where the Home Office receives an immigration application from a child and they are considering granting leave, they must also consider what type of leave should be given. This is part of the statutory obligation under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the wellbeing of children (see section 1 above).

The case of *SM & Ors* [2013] EWHC 1144 involved five children aged between six and ten who were all born in the UK to parents who did not have leave to remain. They had eventually been granted discretionary leave to remain for three years (under pre-2012 rules) on the basis of Article 8 of the European Convention on Human Rights (ECHR).

The initial Home Office decision was challenged on the basis that the policy which existed at the time did not allow decision makers sufficient discretion to consider the wellbeing of children under section 55 of the Borders, Citizenship and Immigration Act 2009 and the children should have been granted indefinite leave to remain, in line with their best interests. The court noted that short periods of leave could be detrimental to a child's welfare.

The guidance on grants of limited or discretionary leave state that where there is compelling evidence that justifies a longer period of leave or ILR in the best interests of a child, then this may be granted. However, a grant will be balanced against the need to have a fair and transparent immigration system, and the courts have drawn the best interests tests more narrowly in this context since SM, holding that an applicant will need to make representations in the application about the compelling circumstances.[40] It is therefore crucial that any ILR arguments are made at the point of application, rather than being raised on appeal. The arguments would need to be evidenced, and would need to highlight the particular circumstances which make a short period of leave undesirable and contrary to the best interests of the child.

3c. ILR by policy

Where a child is looked after by a local authority, published Home Office policy allows for the child to be granted four years limited leave to remain, followed by ILR.[41] This policy, first published in 2011, has not been withdrawn. The views of the local authority should be taken into consideration but are not determinative as to whether a child is granted leave. A decision-maker is required to make an individual assessment. If there is no possibility that a child will return to their country of origin, and attempts to return a child have been unsuccessful, then the policy allows the decision-maker to grant limited leave for four years.

40 For example in *R (Alladin) v SSHD* [2014] EWCA Civ 1334

41 See Section 8, Home Office, Immigration Directorate Instructions, Ch 8, Section 5A, Annex M: Children, July 2011 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263209/children_annex_m.pdf

4. Protection Status

When a child or young person fears returning to their country because of protection issues, they can be granted status in the UK on the basis that they would be at risk of persecution or harm in their home country.

4a. Refugee Status

A refugee is someone who cannot return to their country of origin owing to a well-founded fear of persecution on the basis of at least one of the reasons outlined in the 1951 Refugee Convention, which are:

- Race
- Religion
- Nationality
- Political opinion or imputed political opinion
- Membership of a particular social group

A particular social group is described either by reference to an immutable characteristic which may be innate or unalterable, or through identifying whether a group share a common characteristic.[42] Age, gender and sexual orientation have previously been found to form a particular social group in certain countries. Therefore a child may be at risk of persecution on the basis that they are a child.[43] Children have also been found to be a particular social group on the basis of risk of recruitment[44] or lack of protection for orphans,[45] and young adults.[46] Trafficking victims have also been found to be a particular social group in some circumstances. Girls or young women may form a particular social group, for example where the risk to them is female genital mutilation[47] or forced marriage.[48]

Children may make their own application for asylum, or may be dependants on an adult's application. Where children are recorded as entering the UK alone, they will be considered to be an unaccompanied asylum-seeking child.

Unaccompanied children, like adults, may apply for asylum in two ways: at ports of entry, such as airports, or ferry ports; or after entry. Applications made after entry are referred to as 'in-country', and should normally be made at an immigration centre where the child is based or at the asylum intake unit in Croydon. Some children may be arrested or detained before they claim asylum where they are identified as adults. There is no fee for making an asylum claim. [49]

Further information on the asylum process for unaccompanied asylum-seeking children can be found in *Seeking Support: a guide to the rights and entitlements of unaccompanied children*.[50]

Children who are with their families are likely to make an application as a dependant at the same time as the main applicant. However, it is important to note that a child living with their family may still make an asylum claim in their own right: there are child-specific forms of persecution and the risk of persecution may be to the child themselves, rather than their parents or carers.[51]

While the threshold for both adults and children is that there must be a real risk of serious harm, Home Office guidance makes clear that where there are concerns regarding a child's credibility, evidence from children will be treated with greater care. The Home Office must take into account the age of the child – the Home Office's own guidance states that: '*It is not appropriate to draw an adverse credibility inference from omissions in the child's knowledge or account if it is likely that their age or maturity is a factor or if their own ability to construct an account or other similar reasons lead to those omissions.*'[52]

Where an asylum application is refused, there is normally a right of appeal to the First-tier Tribunal. A claim can be

42 UNHCR, Guidelines on International Protection: "membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002
43 *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department*, [2008] UKAIT 00005
44 UN Security Council Resolution 1882 (2009) on children and armed conflict
45 *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305
46 *AA (Uganda) v SSHD* [2008] EWCA Civ 579
47 *AMM and Others v SSHD* [2011] UKUT 445 IAC
48 *TB (Women – Iran) v SSHD* [2005] UKIAT 00065
49 Home Office, Asylum Process Guidance, Processing Children's Asylum Claims, July 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537010/Processing-children_s-asylum-claims-v1.pdf
50 See Coram Children's Legal Centre Seeking Support, a guide to the rights and entitlements of separated children, March 2017, at www.coramchildrenslegalcentre.com/seeking-support
51 For example, see *JA (child - risk of persecution) Nigeria* [2016] UKUT 00560 (IAC) https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-560
52 Home Office, Processing children's asylum claims, 2016, p39

certified as clearly unfounded – in essence that an appeal is bound to fail - although the Home Office will rarely certify a child's case. The only way to challenge a certification is through judicial review. There is an appeal right against a refusal of an asylum claim even if the child is granted another form of leave (such as humanitarian protection or UASC leave – see below). This is sometimes referred to as an upgrade appeal.[53]

The child may have an appeal right beyond a negative decision of the First-tier Tribunal on a point of law. If there is no possible further appeal, they are said to be 'appeal rights exhausted'. An unaccompanied asylum-seeking child who is refused asylum will normally be granted UASC leave where there are no adequate or safe reception arrangements in their home country (see below).

For children in families, or young people over the age of 18, the Home Office manages a programme of voluntary return to encourage those who have been unsuccessful in their asylum application to return to their country of origin. Forced returns of families must be arranged through the family returns panel, and only a small number are carried out each year.

A child who seeks asylum in the UK and is granted refugee leave will be granted leave to remain as a refugee for five years. The child then may apply for ILR at the expiry of their five years leave to remain. The Home Office have recently made significant changes to their settlement policy for refugees – all those applying for ILR will be subject to a safe return review.[54] For someone with refugee leave, an application for settlement is free, and they do not have to pass the KOLL, but must not fall for refusal under the general grounds (see Section 7 below). At the point of application for settlement, someone's refugee or humanitarian protection status will be subject to review as to whether they would be safe to return.[55]

Fresh claims

A child or young person may make a fresh claim for protection at any point after becoming appeal rights exhausted. Circumstances in which a fresh claim can be made are not limited, but will require a change of circumstances, for example:

- Change in case-law or country guidance that relates to the applicant's situation
- Additional evidence comes to light
- The actions of the applicant following becoming appeal rights exhausted (e.g. political activities, conversion of religion)
- A change in the country of origin.

Evidence will be accepted as amounting to a fresh claim where it is significantly different from material considered before, and where the evidence, when taken together with the previously considered material, creates a realistic prospect of success.[56] A fresh claim is not a fresh start, and what someone said or produced evidence of in their previous claim will be considered.[57] If it was dismissed on the basis that the applicant was not credible, then this will be the starting point in examining a fresh claim. Evidence must also relate to the applicant's case.

In order to make a fresh claim, families and adults are required to make an appointment with the further submissions unit (FSU) in Liverpool, and to travel there in person.

53 Home Office, Processing children's asylum claims, 2016, p50
54 Home Office, Refugee Leave, March 2017, p11
55 Home Office, Asylum Policy Instruction, Settlement Protection, version 4.0, February 2016
56 Immigration Rules paragraph 353, https://www.gov.uk/guidance/immigration-rules
57 *Devaseelan v SSHD* [2002] UKIAT 000702 http://www.bailii.org/uk/cases/UKIAT/2002/00702.html

4b. Humanitarian protection

A child may be granted humanitarian protection where they face serious risk of harm if removed from the UK, but where they do not fall under the Refugee Convention. Figures indicate that very few people are granted humanitarian protection in-country.[58] This leave is granted for five years and children and young people can then apply for ILR at the end of this period (see the procedure for ILR after refugee leave above).

4c. Unaccompanied asylum-seeking child leave ('UASC leave')

Where a child is not accompanied by an adult family member or carer in the UK when making a claim for asylum, then they are considered to be unaccompanied asylum-seeking child. Where a child's asylum claim is rejected but they cannot be returned to their country of origin because there are no safe and adequate reception facilities available to them, then they should be granted UASC leave until age 17 ½ or for 30 months, depending on which is the shorter period.[59] 'Adequate reception facilities' means reception arrangements that are safe, adequate and sustainable.[60] However, there is no requirement that a child is returned to their family, and they may be returned to the care of social services in their country of origin. UASC leave is renewable, but once a child turns 18 they cannot be granted this form of leave to remain as they will no longer meet the central requirement – that they are a child. It is also unlikely that the Home Office will grant a young person further leave to remain after they have reached their majority, as it is unlikely that they will have met the requirements for leave on the basis of family or private life or any other reason under the Immigration Rules (see below for information on these other types of leave). However, some young people may meet the requirements or make an application outside of the rules, and some may be able to make a fresh claim for asylum (or both).

As noted above, a grant of UASC leave is a refusal of a child's asylum and humanitarian protection claims. A child must get advice on appealing this decision at the time they receive it. It is also crucial that a child has legal advice prior to turning 18 (for example to apply for further leave to remain or to make a fresh claim for asylum if their appeal was rejected), as they will otherwise be at high risk of losing access to support services as care leavers if they do not have leave or a pending application at 18. They may also lose arguments they would have been able to make as a child once they turn 18, including the need to safeguard and promote their welfare under section 55 of the Borders, Citizenship and Immigration Act 2009. There are further implications for care leavers arising from provisions within the Immigration Act 2016 and once those provisions are in force care leavers with no status, or those who are making a further immigration application, may not be eligible for leaving care support.

5. Stateless applications

There is also a route to regularisation for children and young people through stateless procedures. For stateless children born in the UK, see the section on nationality and statelessness above. Where a child or young person is unable to avail themselves of any nationality, they may be stateless – effectively that they are not considered a national by any state.[61] 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. In other cases someone is stateless due to their family's migration or a lack of documentation or paperwork. 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.[62] Prior to this there was no dedicated route for stateless people to make an application.

A stateless application will be considered by a special Home Office team based in Liverpool. There is no fee for this type of application. However, legal aid is not available to get legal assistance with this type of application.[63]

58 Home Office Official Statistics, Asylum, updated 23 February 2017 showed only 211 grants of Humanitarian Protection to main applicants and dependants in 2016
59 See Immigration Rules paragraph 352ZC-F
60 See Home Office, Processing an asylum claim from a child, v1.0, July 2016, p49
61 Article 1.1, Convention Relating to the Status of Stateless Persons
62 The rules on statelessness applications are contained in the Immigration Rules at paragraphs 124 to 139
63 Liverpool Law Clinic launched a free legal representation service in 2016 for those who are stateless. The Clinic aims to provide free representation for individuals to make an application for leave to remain as a stateless person. For further information or to refer a child or young person follow this link: https://www.liverpool.ac.uk/law/liverpool-law-clinic/statelessness/

6. Discretionary Leave

Discretionary leave is only now granted in limited circumstances relating to human trafficking, leave on medical grounds, cases where return would breach someone's human rights, and other exceptional circumstances. Discretionary leave is not granted if there is another form of leave which can be granted instead.[64]

Discretionary leave will not normally be granted for periods longer than thirty months, although cases involving children require consideration of the child's best interests and therefore longer periods of leave should be considered, where a child requires stability and their future is in the UK, for example. Leave may be granted for non-standard periods which are shorter as well as longer. Discretionary leave is granted with recourse to public funds.

Leave on medical grounds

Where a child or their family cannot leave the UK on the basis of medical treatment, then they may make an application based on the potential human rights breach in removal. This may engage Articles 2, 3 and 8 of the ECHR. However the threshold for an application to be considered under Article 3 – the prohibition on torture, or inhuman and degrading treatment, is extremely high. Article 3 will generally only be engaged where someone is at risk of imminent death, and that as a direct result of standard of care available in their country of origin, return to that country and that care system would lead to a situation of inhuman or degrading treatment.[65]

However, there are certainly cases, particularly those which involve children, where Article 8 – the right to private and family life – is engaged, resulting in a grant of leave to remain on the basis of their medical condition. Article 8 is a qualified right, and so the need to remain in the UK for medical care must be balanced against the legitimate aim of ensuring the economic well-being of the UK, and maintaining immigration control.[66] In recent years, case-law has swung heavily in favour of the latter position. Leave to remain on medical grounds is granted in the form of discretionary leave to remain, and is generally granted for a period of thirty months. Someone is eligible to be granted ILR after ten years. Dependents can be granted leave in line.

Protection as a victim of human trafficking

This is leave under the Council of Convention on Action Against Trafficking in Human Beings (ratified by the UK in 2008) and the EU Directive on human trafficking 2011/36/EU which requires member states to provide a renewable residence permit to victims of human trafficking who have been identified through a national referral mechanism process and meet specific criteria (see below).

The National Referral Mechanism (NRM) recognises someone as a victim of human trafficking if they meet the definition set out in the Palermo Protocol:

> *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*

This definition breaks down into three elements: the act, the means and the purpose. Where a child is a victim of trafficking, it is not necessary to demonstrate the means, as children are not capable of giving consent to exploitation. In the UK, the National Referral Mechanism can also identify victims of modern slavery. Modern slavery is defined for these purposes as encompassing human trafficking, and also slavery, servitude, and forced or compulsory labour.[67]

The designated first responder[68] will identify a victim of trafficking and will complete a referral form to refer them into the NRM. This referral form contains information relating to trafficking, including a narrative of the potential victim's experience. This is sent to a competent authority which, for British or EEA nationals, will be the Modern Slavery Human Trafficking Unit (MSHTU), or for those with immigration issues, will be UK Visas and Immigration (UKVI). The competent authority should make a reasonable grounds decision within five days. The standard of proof

64 Home Office, Discretionary Leave, version 7.0, paragraph 3.1
65 See *N v UK [2008]* ECHR 453.
66 Home Office, Human Rights claims on medical grounds v6.0, May 2014
67 See Home Office, Victims of Modern Slavery – Competent Authority guidance v3.0, 21 March 2016, p29
68 See Human Trafficking Centre for a list of designated first responders http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism

for a reasonable grounds decision is 'I suspect but cannot prove'. Following this, the competent authority should request and consider additional evidence, including an interview if required, and should make a conclusive grounds decision. The competent authority should first look at whether someone meets the definition of human trafficking, and if not, should decide whether the applicant is a victim of slavery, servitude, forced or compulsory labour.[69]

In practice, conclusive grounds decisions often take considerably longer than 45 days. During this time, a victim will be housed in either a specialist safe-house, or if under 18, in local authority care. There is accommodation available for families - research by the Anti-Trafficking Monitoring Group suggests that families have been trafficked into the UK.[70] The only challenge to a negative decision of the first responder at either stage is through administrative review and then judicial review.

For those in certain areas of the country[71], there is no longer any need for a designated first responder to make a referral to the competent authority. The competent authorities sit within the local authority rather than UKVI or the MSHTU. A referral to the competent authority is made by a Slavery Safeguarding Lead, and the first stage decision is taken by them. The conclusive grounds decision is made by a panel of experts convened by the competent authority. Currently these panels include representatives from the police, border force, UKVI, local authorities and NGOs.[72]

A child who is identified as a victim of trafficking through the NRM may be granted discretionary leave where they are assisting police with their inquiries, or their personal circumstances require this. Discretionary leave as a victim of trafficking is usually granted for a year, but may be longer if required. It is possible at the stage of grant to make representations that a child should be granted discretionary leave for longer period, if this is in their best interests, with reference to the Home Office's duty under section 55. This leave does not preclude an asylum claim, or an application for any other form of leave, and these applications should be made as soon as possible. It should be noted that a 'former victim of trafficking' or 'victim of trafficking' can be a particular social group under the Refugee Convention[73] (see asylum section above).

69 See Home Office, Victims of Modern Slavery – Competent Authority guidance v3.0

70 ATMG, Time to deliver: considering pregnancy and parenthood in the UK's response to human trafficking, February 2016, http://www.antislavery.org/includes/documents/cm_docs/2016/a/atmg_time_to_deliver_report_for_web_final.pdf

71 For further information on the pilot to evaluate reforms to the NRM, see the gov.uk website https://www.gov.uk/government/publications/review-of-the-national-referral-mechanism-for-victims-of-human-trafficking

72 Home Office, National Referral Mechanism Pilots: Multi-Disciplinary Panel Guidance, version 2, June 2016, page 9

73 *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 & *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC)

7. Family or private life within and outside of the Immigration Rules

The right to a family and private life is a qualified human right under article 8 of the European Convention on Human Rights. A qualified right is one which must be balanced against legitimate prevailing factors, such as the UK's need to secure economic well-being and maintain good immigration control. Any interference in someone's right to family or private life must be proportionate and must meet one of these lawful objectives.

Immigration Rules

The Immigration Rules are the way in which the UK sets out the government's interpretation of the UK's human rights obligations. The rules are required to specify what an applicant will need to demonstrate; as a result of this all of the requirements for leave to enter or remain are set out within the rules. However, the rules are extremely complex and they change frequently. Leave under the rules refers to leave on the basis of family or private life, and the rules are found in appendix FM (applications post-2012) or in part 8 (pre-2012). Private life rules are found in Part 7.

Any applicant will have a private life - this includes someone's work, health, and social circle. Those who have a recognised family life under the Immigration Rules include partners, spouses and children of the family, including step-children or adopted children. Children of the family through de facto adoptions or custom are not usually considered under the rules and will need to rely on the discretion of the Home Office. Children can also establish their own claims as an individual, particularly under the seven year rule (set out below).

Applications

An application on the basis of article 8 will attract a fee (currently £993) and the Immigration Health Surcharge will need to be paid up front (see section 1 above). An applicant is required to send a valid national passport or travel document with their application unless there are reasons beyond their control why these documents are not available.[74] For some people who have never had a passport or identity document, and for children in particular, obtaining this can be an arduous process.

A successful application under the Immigration Rules will need to have met certain eligibility and suitability requirements. These requirements cover issues such as criminal offences, character, associations and failure to disclose evidence in relation to an application.

An applicant must be refused under the rules where:[75]

- They are subject to a deportation order
- Their presence is not conducive to the public good because they have been convicted of an offence and sentenced to imprisonment for at least four years
- Their presence is not conducive to the public good because they have been convicted and sentenced to imprisonment of between 12 months and four years
- Their presence is not conducive to the public good because their offending has caused serious harm or they are a persistent offender
- Their presence is not conducive to the public good even without convictions because of their associations, character or other reasons.

In order to qualify 'under the rules', the applicant must not fall under any of the general 'suitability' grounds for refusal, and be 'eligible' meaning that the applicant must meet all the requirements of the specific rule. An application will also usually be refused where the applicant has NHS debts of over £500, or has failed to pay litigation costs to the Home Office. Where an applicant has made false representations or has failed to disclose information to the Home Office this will also usually lead to the application being rejected. The failure to disclose evidence does not need to be a deliberate or an intentional failure, and it may be a failure to disclose without the applicant's knowledge. This is particularly pertinent to children where an adult may make an application on their behalf. Any subsequent applications may also be refused if the applicant has ever failed to disclose information or has made false representations in making an application.

74 Home Office, Specified application forms and procedures, v18, March 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509284/Specified-application-forms-and-procedures-v18.pdf

75 Immigration Rules Appendix FM S-LTR.

Under the Immigration Act 2016, and as of 1 December 2016, a human rights appeal will be heard from outside the UK, unless the appellant's removal from the UK would result in serious, irreversible harm. The decision not to allow someone an in-country right of appeal can only be challenged through a judicial review. Home Office guidance states that this will apply where the individual did not have leave when they made their human rights claim and when they do not rely on a relationship with a British national family member. For further information on circumstances that mean an out of country appeal would apply and exceptions to the rule, please see the Home Office guidance.[76]

No recourse to public funds

Limited leave to remain for family and private life is normally granted with a condition of no recourse to public funds (NRPF). Public funds under the Immigration Rules are specifically for immigration legislative purposes and relate to welfare benefits that are paid as a result of being on a low income or unable to work. This includes housing benefit, tax credits, personal independent payment and child benefit. These are listed within the Immigration Rules.[77]

A family unable to access public funds will generally have to rely on their local authority for support under section 17 Children Act 1989, if they are unable to meet their needs.

Where an applicant is destitute or likely to become destitute, they can apply for a fee waiver when making an application and should also make representations to be granted leave without a NRPF condition. Where it was not done at the time of application, an applicant may request the removal of the condition by completing the change of circumstances form and supplying evidence of destitution. The NRPF condition will be lifted where the applicant demonstrates that:

- They are destitute
- There are compelling reasons relating to the welfare of a child on account of a parent's very low income
- There is evidence of other exceptional circumstances

When making a further application for leave to remain, the applicant will need to supply the information and evidence again otherwise the Home Office will reinstate the NRPF condition.[78]

7a. Appendix FM: 5 year route

There is a route for spouses, partners and children to join a family member who is a British citizen or has indefinite leave to remain in the UK. This is known as the five year route to settlement, and will apply where someone is able to meet the eligibility and suitability criteria under Appendix FM. The eligibility requirements largely relate to financial support, and the British or settled family member is expected to have an income of at least £18,600 per annum with an additional £2400 per annum for each child. Applications are expected to be made at first instance from outside the UK. Leave is granted for thirty months, with a renewal until the applicants reach five years lawfully in the UK.

It is also possible for other adult family members to apply to join their family in the UK under this route, although the rules are hard to meet in those cases. Adult relatives, such as grandparents, who are dependent on those in the UK are able to apply. Someone who applies under the ten year route because they are unable to meet the eligibility criteria under the five year route is able to swap to the five year route if they later meet the criteria (for example, the income threshold).

7b. Rule 276ADE: 7 year rule

Children who are in the UK either by themselves or with family members will both have a family life. As children get older and attend school and other activities, they also begin to build their own private lives based around these activities. Rule 276ADE provides that children under 18 years old are eligible for limited leave to remain where:

- They have spent seven years continuously in the UK (this time does not need to be lawful, but any time spent in prison will not count);
- It would not be reasonable to expect them to leave the UK[79]; and
- They meet the suitability and eligibility requirements[80]

What is reasonable will depend on the circumstances of the child and their family. The Home Office guidance to accompany the rules includes the following considerations as to whether it is reasonable for a child to leave the UK:

76 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584856/Certification-under-section-94B-v8.pdf
77 For a full list, see https://www.gov.uk/government/publications/public-funds--2/public-funds. See also Home Office, *Modernised Guidance, Public Funds*, April 2016
78 Section 13.5, Home Office Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes', at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421057/PP10b.pdf
79 Immigration Rules, paragraph 276ADE(1)(iv)
80 Immigration Rules, paragraph 276ADE(1)(i)

1. Whether there would be a significant risk to the child's health
2. Whether the child would be leaving the UK with their parents
3. The extent of wider family ties in the UK
4. Whether the child is likely to be able to reintegrate readily into life in another country:
   a. including whether they or their speak, read and write the language
   b. whether they or their parents have social or familial ties there
   c. if they are entitled to citizenship
   d. whether they have visited the country for more than a few weeks
   e. whether they have any cultural ties to the country of origin.[81]

When considering an application that concerns families with children, the Home Office must have regard to section 55 of the Borders, Citizenship and Immigration Act 2009 (see section 1 above).

Where a case meets the Immigration Rules, then leave will be granted for thirty months. Leave must then be renewed until the applicant has completed ten years in the UK on this route. The renewal application should be made in-time every time. From 24 November 2016, where there is a gap of up to 14 days between the deadline for application and the making of the application and someone has a good reason for the gap – such as being in hospital – then these periods can be overlooked.[82] Prior to this, there was a 28 day period between applications which the Home Office had the power to discount, regardless of the reason.

7c. Exception EX1

Someone who does not meet the eligibility requirements under the Immigration Rules Appendix FM may still be able to apply under the rules. For someone who is a partner of: a British citizen, someone settled in the UK or someone with refugee status, then they may rely on the exception if there are insurmountable obstacles to their relationship continuing outside the UK.[83]

An adult may apply to remain in the UK where they are caring for a child who is British or has been in the UK for seven years and, in either case, where it would be unreasonable for the child to leave.[84] Other siblings, who may not meet the seven year rule but who form part of the child's family, can also apply as dependants. Where someone is unable to meet the eligibility requirements to apply for leave under the Immigration Rules, then the exception will apply to them. In particular, someone who is in the UK without leave may apply using the exception. If an application is successful, then the Home Office will grant 30 months leave to remain on the ten year route to settlement. There is no freestanding route to leave to remain under EX1.

A child who becomes an adult during the period of limited leave to remain as a family member can continue to be included as a dependant under a family life route, provided that they are not living an independent life. This can be a complicated issue, and there is guidance issued by the Home Office on what consists of an independent life.[85]

7d. Rule 276ADE: half life

Where someone is aged between 18 and 25, then they may apply for leave to remain on the basis that they have lived in the UK continuously (either lawfully or unlawfully) for half their life. This is calculated in days, rather than years, so someone who is 18 years and six months will need to have been in the UK continuously for nine years and three months. Absences of up to six months are not considered to have broken continuous residence.[86] Periods of imprisonment are not included. Leave under this route leads to leave for 30 months, which must be renewed at the cost of a family life application plus the health surcharge, until someone has completed ten years in the UK and may apply for ILR. It is possible to move from this route into another immigration category which may have a shorter period for settlement.

7e. Rule 276ADE: long residence

For the purposes of rule 276ADE, long residence amounts to 20 years continuously in the UK. This can be unlawful residence, or a mixture of lawful and unlawful residence. Time spent in prison is discounted from the 20 years of continuous

81 Home Office, IDI Family Migration: Appendix FM Section 1.0b, August 2015, page 57
82 See statement of changes in the Immigration Rules, HC 667, 3 November 2016
83 Immigration Rules, paragraph EX.1(b)
84 Immigration Rules, paragraph EX1.2
85 See Home Office, Immigration Directorate Instruction, Family Migration: Appendix FM Section 3.2, children, July 2012 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263240/child_gen.pdf)
86 Immigration Rules paragraph 276A(a)

residence. Someone who wishes to apply under this route will need to provide considerable amounts of evidence about their time in the UK, and to demonstrate that they have not left the country for: periods of more than six months at a time, more than 18 months in the whole period, or with no reasonable expectation of being able to lawfully return.[87] Evidence could include medical records, school records and letters, travel documents, letters from friends, family and other professionals, photographs and other official documents. For individuals who have spent a considerable period of time living in the UK without permission, it may be difficult to demonstrate the length of stay and a decision maker would expect to see travel documents to cover the whole period.

Evidential requirements are likely to become harder to meet as the provisions in the Immigration Acts 2014 and 2016 take effect – there are new requirements around bank accounts; a prohibition on obtaining a driving licence for those without status; charging fees for healthcare and the requirement to prove a right to rent in the private rental sector. These are likely to have a significant impact on an individual's interactions with the state and make it more difficult to meet the evidential requirements, particularly in this category.

Leave is granted as set out for the other categories under rule 276ADE and applicants will be on a 10 year route to settlement.

7f. Rule 276ADE: very significant obstacles

There is a further route to leave to remain under private life for those who cannot meet the other categories or demonstrate 20 years continuous residence in the UK. Leave may be granted under the Immigration Rules where someone aged over 18 can show that there would be very significant obstacles to their re-integration in their country of origin. These obstacles must be considered on an individual basis and the impact of their cumulative effect should be assessed. Obstacles will relate to: length of time in the country of return, family, friends and social network and cultural background.[88] However, the guidance states that lack of social networks or poor employment prospects are unlikely to meet the test of 'very significant obstacles' and the courts have found that 'mere hardship' would also be insufficient.[89]

As with all applications under rule 276ADE, this application attracts a fee, together with the health surcharge, and leave is only granted for thirty months, renewable until someone as completed ten years lawful residence and can apply for settlement.

7g. Family and private life outside the rules

The current Immigration Rules are an expression of the how the government interprets 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.[90] Therefore the Home Office will need to look first at the Immigration Rules, and if a case does not meet the rules, will then need to give consideration to article 8 rights under case-law. Where an application is refused by the Home Office, the applicant could be successful at appeal on the basis of Article 8.

The courts and tribunals that hear appeals on the grounds of family and private life are obliged to consider the public interest in maintaining effective immigration control, whether applicants speak English, and whether appellants are economically independent, as the UK government believes that this is in the economic interests of the UK and aids integration.[91] The courts are also required to give 'little weight' to relationships formed when someone's immigration status is precarious, or if they are in the UK unlawfully. The courts have described any status short of citizenship to be precarious, including ILR where the person settled knows there is a risk it may be revoked.[92] However, little weight is to be interpreted flexibly, and in light of all of the circumstances.[93] The public interest does not require the removal of someone (who has not committed a criminal offence) who has a relationship with a qualifying child.[94] A qualifying child is either a British national child, or one has been in the UK for at least seven years.[95]

87 Home Office, IDI Family Migration: Appendix FM Section 1.0b, August 2015, 8.2.3.5
88 See Home Office, Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b, Family life (as a Partner or Parent) and Private life: 10 year routes, August 2015 p42
89 *Treebhawon v SSHD* [2017] UKUT 00013
90 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 & see footnote 8 for further case law in this matter
91 See s117A-D Nationality, Immigration and Asylum Act 2002, as inserted by the Immigration Act 2014, s9
92 *AM (S 117B) Malawi* [2015] UKUT 260 (IAC)
93 See *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803
94 See s117B(6) Nationality, Immigration and Asylum Act 2002, as inserted by the Immigration Act 2014, s9
95 See *Treebhawon v SSHD* [2017] UKUT 00013

8. EU law and derived rights

Following the vote to leave the European Union on 23 June 2016, the rights of EU citizens in the UK are set to change. However, until negotiations are completed and the exit takes place, EU law remains in force in the UK alongside free movement rights and judgments of the Court of Justice for the European Union (CJEU). This means that not only are EU citizens, including children, still able to come to the UK and to exercise their treaty rights, but also those who can derive rights not from the free movement directive but from EU treaties and subsequent interpretation in the CJEU. Free movement rights extend beyond those countries which are member states of the European Union, and includes Switzerland, Liechtenstein, Norway and Iceland – this broader membership is sometimes referred to as the European Economic Area (EEA), although Switzerland is not an EEA member.

As the aim of this document is to map out ways in which someone may move from undocumented to documented status, it does not attempt to outline the options for a family or separated child to remain in the UK as European nationals, as European nationals are unlikely to find themselves undocumented save in particularly complicated individual cases. However, rights derived through the UK's membership of the European Union can mean that a young person with a child, or the parents of a child, may move from undocumented to documented status.

Although this paper does not cover rights for EU nationals, there are rights which enable third country nationals to obtain a right to reside in the UK. These are derived from the interpretation of laws of the European Union, and apply only to specific groups of people. Rights that are derived from case-law interpretation do not lead to any form of settled status, including permanent residence. However, for some people, they may cheaper and easier to obtain than rights under the immigration rules.

8a. Zambrano carers[96]

Zambrano carers are non-EEA nationals caring for British citizens who have an entitlement under EEA law to remain in the UK.

Third country nationals may rely on Zambrano rights where they are the sole carers of a British citizen child, and requiring them to leave the UK would have the effect of depriving the British citizen child of the right to remain in the UK or in the EU. This right must be demonstrated by making an application for an EEA derivative residence card (DRF1) and providing information relating to the child's position. Unfortunately, although this route grants someone a right to remain in the UK, it does not lead to settlement. Zambrano carers are also excluded from accessing many welfare benefits; this includes child benefit even where a person's basis of stay in the UK is to care for a British child.[97] However, Zambrano carers do have a right to work in the UK.

8b. Ibrahim/Teixeira carers[98]

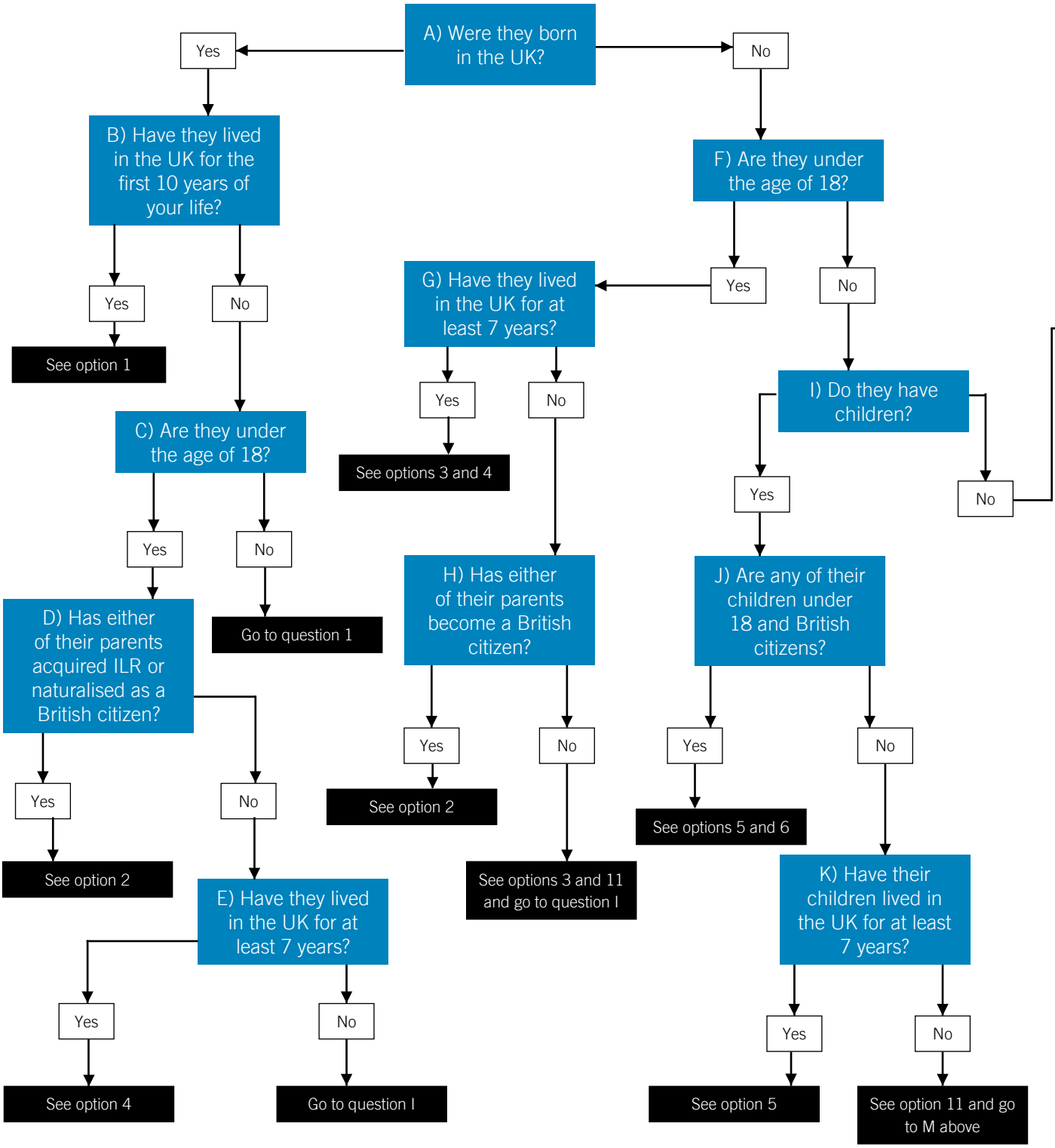
A child who is in education and is the child of a European national worker is entitled to stay in the UK to complete their education. This means that even if the European national parent leaves the UK, or stops working, the child may continue to stay here. A child's carer, and their siblings, may also remain in the UK. In order for this to apply, the European parent must have lived in the UK at the same time as the child, and must at some point have been a worker in the UK. A worker means that someone is employed, and that the employment was genuine and effective. The child must be in school education, nursery is not sufficient, and the leave to remain for the child, siblings and parents will only be secured for the period the child remains in education. The family will be able to access mainstream benefits.

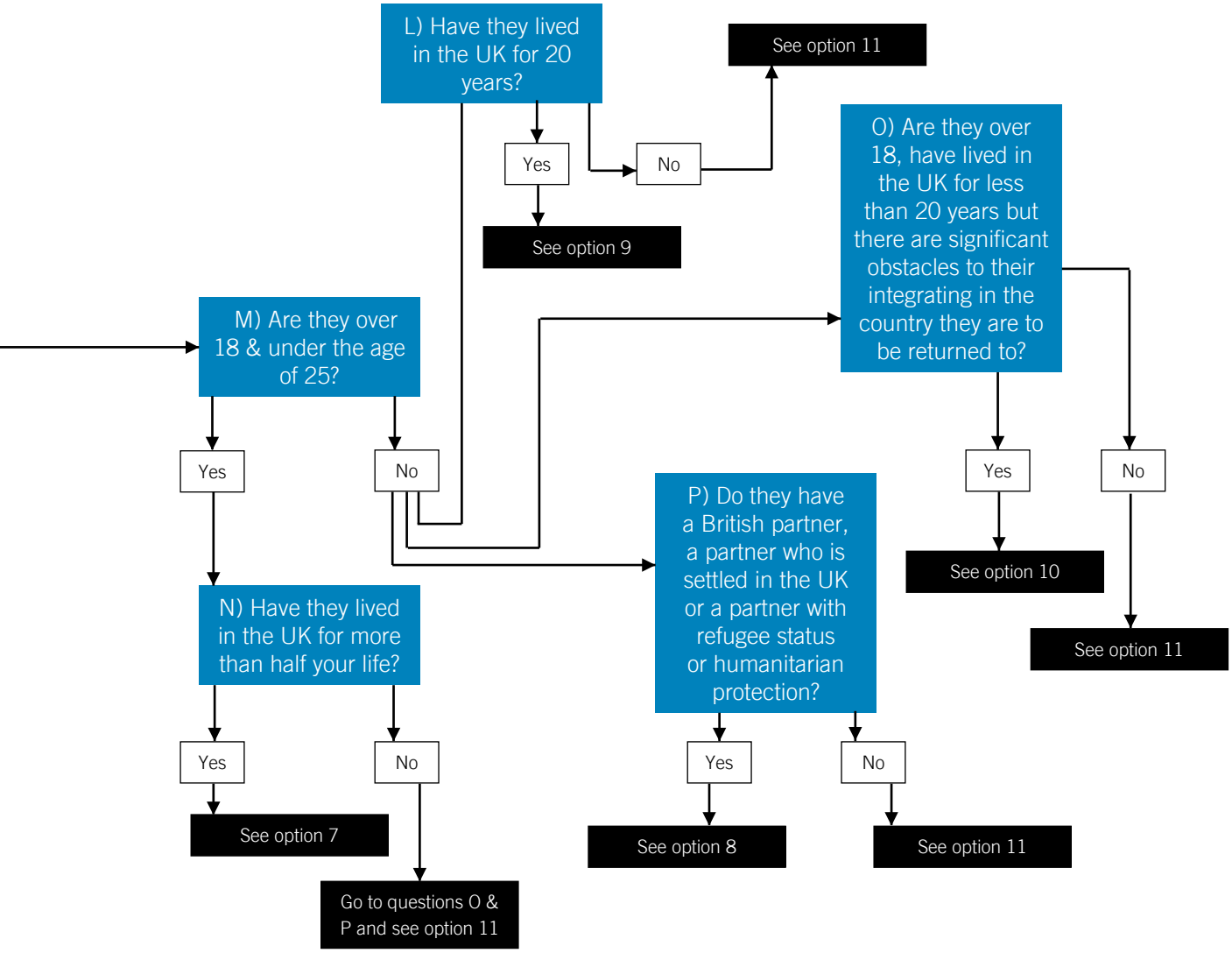
8c. Chen carers[99]

A self-sufficient European national child and their carer may stay in the UK for as long as the child remains self-sufficient and is under 18 years of age. Self-sufficiency requires a child to have the resources to support themselves and their carer so that they are not a burden on the state. This also requires both the child and carer to have comprehensive sickness insurance. Someone who does not have sickness insurance is unlikely to be removed, but is not considered lawfully in the UK.[100]

96 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0034
97 Child Benefit (General) Regulations 2003
98 http://ec.europa.eu/dgs/legal_service/arrets/08c310_en.pdf
99 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0200
100 See response to Baroness Lister's question on Free Movement, 27 March 2017, HL5917 http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-03-08/HL5917/

Possible applications for an individual with no leave to remain in the UK





The flowchart does not purport to cover every situation set out in this paper. It is useful to show the possible routes to regularisation open to those with no status who may have claims to remain in the UK based on long residence. It does not constitute legal advice and does not cover protection routes (4), stateless applications (5) some of the grants of discretionary leave (6) nor EU rights (8). This diagram only applies to those with no legal status in the UK: it is meant as a guideline only and cannot replace expert legal advice. We would always recommend that you seek independent legal advice from a professional.

Option 1:

They may be able to apply to register as a British citizen under s.1(4) of the British Nationality Act 1981.

See the Home Office section of the 'Gov' website: https://www.gov.uk/register-british-citizen/born-in-uk-after-1983

Option 2:

They may be able apply to register as a British citizen under s.1(3) of the British Nationality Act 1981.

See the Home Office section of the 'Gov' website: https://www.gov.uk/register-british-citizen/born-in-uk-after-1983

Option 3:

Depending on their personal circumstances, they *could* consider applying to register as a British citizen under s.3(1) of the British Nationality Act 1981.

See the Home Office section of the 'Gov' website: https://www.gov.uk/government/collections/nationality-instructions-volume-1

The Home Office say that registration in this category will be at their discretion. It is therefore very important that they seek advice before they make an application of this nature.

Option 4:

They/their child may be able to apply under paragraph 276ADE(iv) of the Immigration Rules:

'(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;'

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories

Option 5:

They may be able to apply under Appendix FM of the Immigration Rules:

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

*(ii) it would not be reasonable to expect the child to leave the UK;**

**Please note this is only an extract of the requirements for leave under this rule*

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members

Option 6:

They may consider applying for a derivative residence card on the basis of their being the parent of a British child. See the Home Office section of the 'Gov' website: https://www.gov.uk/derivative-right-residence/overview

Option 7:

They/their child may be able to apply under paragraph 276ADE(v) of the Immigration Rules:

*'(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment);'**

**Please note this is only an extract of the requirements for leave under this rule*

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories

Option 8:

They may be able to apply under Appendix FM of the Immigration Rules:

*'(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.'**

**Please note this is only an extract of the requirements for leave under this rule*

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members

Option 9:

They may be able to apply under paragraph 276ADE(iii) of the Immigration Rules:

'(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment);'

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories

Option 10:

They/their child may be able to apply under paragraph 276ADE(vi) of the Immigration Rules:

'(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'

**Please note this is only an extract of the requirements for leave under this rule*

See the Home Office section of the 'Gov' website: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-7-other-categories

Option 11:

If they cannot make a nationality application and you do not fall within any of the Immigration Rules, your options may be limited. They *could* consider making an application 'outside' of the rules relying on broader 'Article 8 European Convention on Human Rights' principles and case law. This is only likely to be advisable if they come close to meeting one of the immigration rules or if there are other compelling or compassionate circumstances. We would strongly advise that they seek legal advice in these circumstances.

Please note:

- All applications under the Immigration Rules will be subject to the suitability requirements set out within the rules.
- If they do not fall within any of the Immigration Rules and they cannot make a nationality application, they may consider making an application outside the Immigration Rules (see option 11 above).
- If they are a child or they have a child and there are strong reasons to show that they/their child's future lies in the UK, option 5 should be considered.
- Please note, there are specific rules in relation to nationality for children who have been adopted, children whose parents are in the armed forces, children and adults with British ancestry and those who are stateless. That information is not included in this diagram.