

Coram Children's Legal Centre submission to the Joint Committee on Human Rights inquiry 'Human Rights: attitudes to enforcement', February 2018

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, works in the UK and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information; research and policy work; law reform; training; and international consultancy. CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

1. Coram Children's Legal Centre (CCLC) welcomes the Joint Committee on Human Rights' inquiry into factors which may impede individuals from using the UK's human rights framework. As an organisation working to protect and promote the rights of children and young people, we see on a daily basis examples where, despite the existing legal framework, they are unable to enforce their rights.
2. This submission looks at the following three questions identified by the JCHR:
 - What effect has the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) had on the ability of individuals to access the courts as a means of enforcing their human rights?
 - Is there sufficient understanding (in Government, media and general public) of the role of the rule of law in ensuring that human rights are respected?
 - Is there a perception that there are some rights which are not given sufficient weight compared with others and does this affect willingness to attempt to enforce those rights?

The effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) on children's access to justice

3. Upholding rights, either by making an application or challenging a decision made by an authority, requires knowledge and understanding of the relevant legal system. This in turn requires access to legal advice – either in guidance, by phone or email or face-to-face advice. Access to legal advice is a key component of ensuring children's voices are heard. Article 12 of the UN Convention on the Rights of the Child (UNCRC) provides that they should have 'the opportunity to be heard in any judicial and administrative proceedings affecting [them], either directly or through a representative'. The UNCRC also states that the best interests of children should be the primary consideration in all decisions affecting them (Article 3 (1)). This duty is present in all cases where the best interests of a child are clearly engaged, for example, as the subject of proceedings in child access or contact arrangements.

4. Where children, parents or carers struggle to access legal advice, assistance or representation, it can impact the ability of decision-makers (administrative and judicial) to make decisions properly, in possession of all relevant evidence and information. The UN Committee on the Rights of the Child has stated that a child 'will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies'.¹
5. The legal aid system, introduced in 1949, was designed to ensure that those who could not pay were not left without legal advice and representation. LASPO overhauled the legal aid system, with legal aid no longer available for employment, education (except for cases of special educational needs), non-asylum immigration, private family law, many debt and housing cases, and most welfare benefits cases. In these areas of law, individuals must either pay privately for their own legal advice and representation or go without and deal with matters themselves (and as a litigant in person, if there are court hearings).
6. Evidence from CCLC's legal advice provision in family, education and immigration law has highlighted that many children, young people and families quite simply lack the ability to negotiate legal processes effectively without the assistance of a lawyer.² Since LASPO's measures came into force in April 2013, at least 6,000 children each year have been left without access to free legal advice and representation in many areas of civil law – some estimates are as high as 15,000. However, this figure does not include the thousands of children in families affected: much of the impact of LASPO on children is felt in cases involving children, rather than the cases involving child claimants. The volume of calls to our Child Law Advice Service (CLAS) almost doubled in the year following changes to legal aid coming into effect, from 23,017 in 2012/13 to 40,192 in 2013/14. This number has continued to rise: between April 2016 and March 2017 the service was contacted by an average of 6,897 unique callers per month.
7. In the 2016-17 financial year CLAS answered 15,500 calls relating to private family law matters – analysis showed that around 73% of callers would have been eligible for legal aid prior to 2013. This area of law has seen a significant increase in litigants in person – people who represent themselves in court. However, litigants in person often struggle to understand court procedures, with cases subsequently taking longer to resolve. Improving public legal education is important to address this, as is the availability of additional face-to-face advice from a legal professional for those who need early and specialist legal intervention. Adults with learning disabilities, language barriers and/or mental health issues will all struggle to engage with the legal system without specialist support. If a parent cannot understand the evidence requirements in a case, cannot effectively navigate the procedures and processes required, and cannot represent themselves effectively in a hearing by presenting their argument and advocating their position, judges are more likely to lack the necessary information to ensure that the outcome of a case is in the best interests of the child.

¹ The 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 (art. 3, para. 1)', para. 96, at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

² See Coram Children's Legal Centre, *Rights without remedies: legal aid and access to justice for children*, February 2018, at <http://www.childrenslegalcentre.com/rights-without-remedies/>

8. Many decisions that profoundly impact on children's lives are made through administrative proceedings with a right of review to a tribunal or specialist panel. This includes access to education, decisions on exclusion and special education needs and welfare benefits, etc. These are often legally and administratively complex, and children and their parents do not have access to legal advice and representation. In education law before 2013, legal aid was available for legal advice and assistance (but not for representation) in relation to school exclusion matters. Legal aid is now only available in Special Educational Needs (SEN) cases, for appeals to the First-tier Tribunal for Special Educational Needs and Disability against decisions of local authorities to, for example, refuse to conduct an education, health and care (EHC) needs assessment of a child or to issue an EHC plan. However, it does not cover representation or expert attendance at a SEN hearing unless very exceptional circumstances apply.
9. In 2015-16, 6,675 permanent exclusions were recorded: 0.07% of the school population. CCLC evidence suggests that these figures are just the tip of the iceberg, as unofficial or unlawful exclusions by schools are not recorded in that data. In the last 20 months, CLAS advised about school exclusions in 1,704 calls. In a quarter of the calls relating to primary school exclusions, the adviser concluded that the school may have acted unlawfully, either by not complying with procedures or because it did not adequately consider the child's special educational needs.
10. Much of the work of CCLC relates to immigration law, and many of the children and families with whom CCLC works have cases to remain in the UK on grounds of long residence and the right to respect for private and family life under Article 8 of the ECHR. The complexity of the law in this field means that people frequently do not have an adequate understanding of the substance of the law, how it applies to their case and how to articulate their arguments in writing or before a tribunal or court. This can be exacerbated by language barriers and difficulties with literacy and comprehension. The procedures, as well as the law, are complex and this prevents effective recourse to the rights set out in Article 8 ECHR, as well as the 'best interests' principle under Article 3 UN Convention on the Rights of the Child.
11. Families, children and young people are often expected to clearly articulate how their rights will be breached by their removal from the UK. The immigration rules do not contain a complete code of how these rights will be interpreted, and individuals need to cross-reference these against primary legislation as well as decision-makers guidance and case-law. The decision-makers guidance is where the factors taken into account for applications are set out, but this is not intended for use by the public. The complexity of immigration law has been described by judges as 'byzantine', and legal aid is not routinely available to assist children and families in navigating it.
12. Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained and applied to the law. In addition, evidence gathering often costs money. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators and expert reports, such as an independent social worker reports.

13. LASPO provides for the Legal Aid Agency (LAA) to grant legal aid funding for so-called 'exceptional cases' (ECF), where legal aid is deemed necessary to prevent a breach of human rights or an EU law right. However, as a 'safety net' the exceptional case funding scheme is woefully inadequate. Individuals are either expected to apply themselves, or a legal representative is expected to help them apply while running the risk that they may not get paid for the work. CCLC runs a grant-funded ECF pro bono project, and has made 100 ECF applications on behalf of families with immigration issues in the past 18 months. Each application takes three to six hours to complete, with the supervision of a qualified solicitor, and typically runs to 20 pages of representations. 31 applications were refused, and half of these refusals have been successfully challenged. Urgent cases are also not being dealt with adequately – for all of CCLC's applications marked urgent, the average waiting time for a decision has been 17 working days. The single fastest decision for any application in that time has been 11 working days – more than twice the five day deadline outlined in the LAA guidance. The ECF is inadequate as a mechanism for preventing breaches of human rights because it is insufficiently accessible for vulnerable groups and because cases cannot be dealt with on an urgent basis.
14. The government has suggested that the not-for-profit sector will step in to help ensure that vulnerable people can access the legal advice and support that they need. But there is growing evidence that the narrowing of the scope of legal aid has led to a reduction in the provision of services, as well as a loss in specialist and holistic advice. This, along with the increase in demand on providers, has made it more difficult for people to gain access to the legal advice and support that they need.
15. **Recommendations:**
- **As recommended by the UN Committee on the Rights of the Child, the government's review of civil legal aid should include a detailed assessment of the impact on children and young people.³**
 - **The government should reinstate legal aid in all cases where there is local authority involvement in private law children proceedings, and for all unaccompanied and separated migrant children in the care of local authorities.**
 - **The Legal Aid Agency should reform the exceptional case funding system. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. Where the applicant is a child, a presumption would operate so that a child or young person could expect to have their case for civil legal aid funding granted in line with children's rights standards. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children.**

Understanding of the role of the rule of law

16. Our work with central government, specifically the Home Office, for the last decade has highlighted that there is a significant lack of understanding of, or respect for, the rule of law.

³ See UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, June 2016, para 30 (b)

17. The UN Committee on the Rights of the Child, in its 2016 concluding observations, recommended that the UK ensure that the rights of the child to have his or her best interests taken as a primary consideration 'is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children'. CCLC has repeatedly highlighted concerns about the consideration of best interests in decision making in children's immigration and asylum claims, and has also expressed concern about the significant gap in time between key judicial decisions and their reflection in guidance. For example, the Supreme Court judgments *ZH Tanzania* and *Zoumbas*, in 2011 and 2013 respectively⁴, gave detailed guidance on the weight to be given to best interests in children's decision making. In 2015, the Home Office's Asylum Instruction still did not reflect the importance and weight which the Courts had attached to the primacy of best interests under Article 3 of the UNCRC. We cannot expect caseworkers to make the right decisions in these cases if the guidance provided by central government is not legally accurate and not promptly revised following significant legal judgments.
18. Earlier this year, the Independent Chief Inspector of Borders and Immigration published the findings of its inspection into the Home Office's mechanisms for managing litigation claims, and capturing the learning from litigation in order to improve decision-making and the way claims are handled. While recognising that ultimately the actions of claimants and the Courts are not within its control, the report highlighted that if the Home Office is to have greater influence over the costs and other consequences of litigation 'it needs to make a more deliberate and determined organisational effort to learn lessons from the claims it receives, and to apply these systematically'.⁵
19. **Recommendation:**
- **Government policy should be updated and amended in a timely manner to ensure that it reflects recent Court judgments and developments in case law.**

The weight given to children's rights under the UN Convention on the Rights of the Child and the rights to respect for private and family life under Article 8 of the European Convention on Human Rights

20. Domestic legislation does not offer a comprehensive framework for children's human rights in the UK. The Government review of the Charter of Fundamental Rights⁶ demonstrated the piecemeal approach taken to ensuring that children's rights are protected and respected. In

⁴ *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4 and *Zoumbas v Secretary of State for the Home Department*, [2013] UKSC 74

⁵ Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office's mechanisms for learning from immigration litigation, April – July 2017, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677560/An_inspection_of_the_Home_Office_s_mechanisms_for_learning_from_litigation.pdf

⁶ Charter of Fundamental Rights by the EU Right by Right Analysis, 5 December 2017, page 45

Wales, public authorities must have due regard to the UNCRC, whereas in England there is a requirement to promote a child's welfare only in certain situations set out in section 11 of the Children Act 2004 and Children Act 1989, and in decisions made in relation to immigration and nationality set out in section 55 of the Borders, Citizenship and Immigration Act 2009. The Children and Social Work Act 2017 applies only in England, and although it uses the terminology of best interests, makes no reference to the UNCRC and the recognised best interests assessments and determinations.

21. Applying Article 8 of the European Convention on Human Rights (ECHR) has allowed the Courts to interpret domestic legislation in line with the children's best interests principle) in migration,⁷ extradition,⁸ and criminal justice. However, the reach of the UN Convention on the Rights of the Child remains limited in areas that do not explicitly engage Article 8, for example, in relation to benefits⁹ and access to legal aid.
22. There is also limited awareness and understanding of children's rights amongst both the general public and policy-makers. UN Committee on the Rights of the Child has recommended making 'children's rights education mandatory'.¹⁰ The Department of Education has started to develop training for civil servants on children's rights and child rights impact assessments, but a statutory obligation to systematically consider children's rights when developing law and policy would help ensure they were understood and respected by all government departments.
23. The negative portrayal of Article 8 has been widely seen in public discourse.¹¹ In terms of the practical application of the law though, what is more concerning is the government's approach to Article 8 as reflected in the Immigration Rules.
24. As Lord Neuberger outlined:

*'One access aspect of the rule of law which is sometimes overlooked is access to the law itself, in other words access to statutes, secondary legislation and case law. It is of course a fundamental requirement of the rule of law that laws are clearly expressed and easily accessible. To put the point simply, people should know, or at least be able to find out, what the law is.'*¹²

With 11 immigration acts in the past 50 years and regular changes to Immigration Rules with little parliamentary scrutiny or public consultation, immigration law is far from clearly expressed and easily accessible. As a result children, young people and families are frequently unable to uphold their right to respect for private and family life under Article 8 of the European Convention on Human Rights.

⁷ See *ZH (Tanzania)* [2011] UKSC 4

⁸ See *HH v Republic of Genoa* [2012] UKSC 24

⁹ See *R (SG) v Secretary of State for Work & Pensions* [2015] UKSC 16

¹⁰ Para 72 (g)

¹¹ See, for example, BBC News, 'Theresa May under fire over deportation cat claim', 4 October 2011 at <http://www.bbc.co.uk/news/uk-politics-15160326>

¹² Lord Neuberger, Speech to the Australian Bar Association, July 2017, at <https://www.supremecourt.uk/docs/speech-170703.pdf>

25. CCLC has long highlighted the impact this has on children and young people who have grown up in the UK and are undocumented but have strong claims to remain in the country.¹³ Changes to the Immigration Rules since 2012 have made it harder and more onerous for children and young people who have lived in the UK for many years to regularise their status on the basis of long residence, Article 8, and on the grounds that it would be in their best interests to remain in the UK.

26. As one judge in the Court of Appeal stated:

*'I fully recognise that the Immigration Rules, which have to deal with a wide variety of circumstances and may have as regards some issues to make very detailed provision, will never be "easy, plain and short" (to use the language of the law reformers of the Commonwealth period); and it is no doubt unrealistic to hope that every provision will be understandable by lay-people, let alone would-be immigrants. But the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present.'*¹⁴

27. This is not an unusual assessment. The Supreme Court has described UK immigration law as 'an impenetrable jungle of intertwined statutory provisions and judicial decisions'.¹⁵ It has also made clear that the Immigration Rules are not a complete code: the Rules do not permit consideration of the best interests of children in all cases and 'family life is not to be defined by the application of a series of rules'.¹⁶ As such, an application not only needs to address the Immigration Rules but must also make clear arguments regarding the applicant's rights under Article 8 and the situation of any children involved. The interplay between the Immigration Rules and Article 8 'outside the rules' has been subject to a significant amount of litigation.

28. Recommendations:

- **The Law Commission has now been asked by the Secretary of State to "redraft the Rules to make them simpler and more accessible to the user". This is welcome, but not enough. CCLC also recommend a shift in approach to how any changes are made to the immigration system, with only the minimum necessary changes made, and all changes subject to proper consultation and scrutiny, including a child rights impact assessment.**
- **To allow for adequate accountability and respect for children's rights, the government should introduce a requirement for Ministers to have due regard to the UNCRC and for child rights impact assessments to be undertaken prior to the introduction of any primary or secondary legislation affecting children.**

**For more information, please contact Kamena Dorling, Group Head of Policy & Public Affairs,
kamena.dorling@coramclc.org.uk**

¹³ See, for example, Coram Children's Legal Centre, *'This is my home': securing permanent status for long-term resident children and young people in the UK*, June 2017, at <http://www.childrenslegalcentre.com/this-is-my-home/>

¹⁴ *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74

¹⁵ *Patel and others (Appellants) v Secretary of State for the Home Department* [2013] UKSC 72

¹⁶ *Ali -v- SSHD* [2016] UKSC 60, para 147. Paragraph 17 also states that 'the Rules are not law (although they are treated as if they were law for the purposes of section 86(3)(a) of the 2002 Act: see para 8 above), but a statement of the Secretary of State's administrative practice.'