

Children in care with immigration issues

This fact sheet provides information about legal issues relating to children in care whose immigration status is uncertain. For detailed information about unaccompanied children seeking asylum, please see our fact sheets relating to asylum, care, and age disputes, at www.coramchildrenslegalcentre.com/resources.

Children in care

A child with an immigration issue may end up in care for the same reasons as any other child, such as family breakdown or for child protection reasons. A child could also be abandoned by their parent(s) or carer(s)

When a separated child is taken into care, they will normally be accommodated under section 20 of the Children Act 1989, although there may be times when a care order under section 31 is more appropriate (e.g. in the cases of very young children, victims of trafficking or children with learning or capacity issues). [1] For more information about a local authority's general duties with regard to looked-after children, see our fact sheets on support for children and care leavers, at:

www.coramchildrenslegalcentre.com/resources.

Most children who are in care do not have anyone acting as a parent in any respect. Whilst a local authority may take on the 'corporate parenting' function with regard to accommodation, education and welfare, a child's immigration status is often ignored. This is particularly the case where a child does not seek asylum, or where a child has been in the UK for most or all of their lives.

Legal representation

If a child is looked-after and accommodated by the local authority, then the local authority will be expected to pay for any immigration advice required for the child. Unfortunately, immigration advice is largely no longer covered by legal aid. There are

provisions for looked-after children to be fee exempt for application fees, but a legal adviser will need to be paid for the advice and preparation of such an application.

It is crucial that children in care receive immigration advice as a matter of priority and that this is considered in any care plan, assessment or pathway plan as a matter of urgency. Obtaining this advice in time is vital to ensure that the child's best interests are met. If advice is not sought, this can have devastating consequences for the child and have a severe impact on their development in the future.

If a child is not assisted to obtain legal advice, the local authority will be in breach of its duties toward the child. A child will lose access to a number of arguments which could be made in relation to immigration status once they turn 18. In the past year, the failure of several local authorities to properly assist looked-after children to obtain legal advice in time has led to Ombudsman decisions against those authorities, with compensation paid to the young people affected. [2]

Immigration status

Just as there may be a number of reasons for a child being taken into care, the immigration status of that child will also be different depending on their circumstances. For example, the child may have come to UK as a visitor and is now an 'over-stayer'; they may be in the UK as a dependent on their parent's work or study visa, despite suffering family breakdown; or they may even have been born in the UK but have never had their immigration status or nationality addressed.

It is absolutely vital that the immigration status of the child and any consequent legal advice and action needs are considered at the very beginning of the local authority care planning process.

If a child is in care ('looked-after'), and is unlikely to be returned to the care of their parent(s) or carer(s),

then social services would be expected to plan to meet the child's needs in both the short and long term. For a child with an uncertain immigration status, it will be crucial to resolve any immigration issues as soon as possible. As the child gets older, immigration status problems will come to affect his or her rights and entitlements moving forward into independence. Opportunities for resolution of status also change and become more restricted once the child becomes an adult 'care leaver'.

Anyone in the UK without permission to stay in the UK is in theory liable to removal from the UK. However, both the Home Office and the local authority have a duty to safeguard children's welfare and they would have to be properly satisfied that there were fully adequate arrangements, such as functioning social services or real family support, in the child's home country, before considering returning a child to their country of origin. Every case will be different. If removal is being put forward as a real possibility, it is important that the child receives good quality legal advice so that they can make an informed choice based on their options.

It is also important to note that even in cases where a child has not sought or considered asylum, there may be asylum grounds that can be identified – for example the child may be at risk in their home country as a result of being a lone child in that country. The kind of immigration application that is made for a child will have an impact on their eligibility for legal aid funding, but high quality legal advice and representation should be sought in every case where it is required, and funded by the local authority if legal aid is not available.

Immigration applications

There are a number of arguments that a child in care may be able to make in support of an application for limited or indefinite leave to remain in the UK.

The child may make an application based on their private life in the UK – a human rights application. Although the Immigration Rules on leave as a result of a child's human right to a private life are quite difficult to meet (someone under the age of 18 would need to have lived in the UK for 7 years to meet the

rules), a child could still make an application 'outside of the rules'.

It should also be noted that there is specific instructions about children in care and leave to remain produced by the Home Office: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263209/children_annex_m.pdf. These instructions state that decisions about the future of children in the care should be left primarily in the hands of their social services department. It further states that if the social services advise that it would be appropriate for the child to remain in the UK, then they should consider granting leave. If there is no prospect of the child leaving, then a grant of 4 years would be appropriate, followed by a grant of indefinite leave to remain (ILR).

The Home Office is under a duty to ensure that the best interests of a child are taken into account when making any immigration decision [3] but the proper exposition of those interests is the task of a good legal adviser.

For further information on applications within and outside the Immigration Rules on the basis of a right to private life and long residence, please see our fact sheet, at: www.coramchildrenslegalcentre.com/resources.

Although a normal grant of leave to remain for private life is 2.5 years with a 10 year route to settlement, there is provision within Home Office policy for a child to make arguments for both a longer period of leave or ILR. [4] There is also case law that supports the granting of ILR to a child in certain circumstances. [5]

It is important that the child receives legal advice about their options and also that the legal representative makes representations in support of a longer period of leave to remain and/or indefinite leave to remain.

Nationality

It may also be in the child's best interests to make a nationality application for British citizenship. This is not a passport application; an individual would have to apply and be granted British citizenship before

they become eligible to get a British passport. A child with no or some form of immigration status in the UK will usually be a national either of the country of their birth or of their parents' country of origin. It is also possible that a child born in UK is stateless, or that they are British already but that this has not been formally acknowledged. For further information on different routes to British citizenship, please see our fact sheet on registering children as British citizens, at: www.coramchildrenslegalcentre.com/resources

There is detailed guidance on situations where it would be appropriate for a looked-after and accommodated child to make a nationality application. [6] The guidance includes information on what type of evidence is needed, local authority background reports and steps taken to waive the consent of parents where appropriate.

Citizenship is the most secure and beneficial form of status for a child in the UK. It is also important that the child understands the benefits of such an application, as well as the impact of the potential loss of their own nationality (for example if the child is a national of a country that does not allow dual-citizenship).

Planning

The child's immigration status should be dealt with in any assessment and care plan by the local authority. It is good practice for immigration status to have its own section in the needs assessment/care plan ensuring that this likely high risk/high need issue does not get subsumed in some other generalised category such as identity and family relationships.

It is important that double or triple planning is considered good practice – i.e. contingency planning to cover what may happen following particular outcomes. As an example, a child should be assisted to consider whether to accept a grant of limited leave to remain or appeal to try to get indefinite leave to remain, or ask to be supported to become a British citizen. There can be 'overlap' issues, for example with regard to the effect of a certain status on access to student finance, and therefore a young person's ability to pursue a university education. Usually the task for the social worker will be in identifying points

of worry or risk with the young person, and planning to get specialist legal advice on such matters.

A child's immigration status will not affect their rights to be cared for by the local authority, to access compulsory education or to access primary healthcare. However, immigration status will affect the child's access to student finance, mainstream benefits and right to work, so immigration status issues become more relevant and urgent as the child turns into a care leaver aged 18.

NOTES

[1] Section 31, Children Act 1989

[2] See the decisions in: www.lgo.org.uk/assets/.../13-019-106-Greenwich-RB-19.01.2016.pdf; <http://www.lgo.org.uk/decisions/children-s-care-services/looked-after-children/13-019-106>; and <http://www.lgo.org.uk/decisions/children-s-care-services/looked-after-children/15-015-327>

[3] Section 55, Borders, Citizenship & Immigration Act 2009

[4] Gov.uk website

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

[5] SM and TM and JD and Others v SSHD [2013] EWHC 1144 (Admin)

[6] Gov.uk website

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420396/chapter_9_changes_to_s65_150402.pdf

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line. Email mcpadvice@coramclc.org.uk or call 0207 636 8505.