

The Home Affairs Committee inquiry to explore the capacity of the Home Office to meet Brexit challenge

Coram Children's Legal Centre submission, November 2017

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is an independent charity working 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 online and in guides; research and policy work; law reform; training; and international consultancy on child rights. The Migrant Children's Project at CCLC provides specialist advice and legal representation to migrant and refugee children and young people on issues such as access to support and services. 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) believes that the UK government should commit to developing an immigration system that respects the rights of all children, and ensures that no child is left without immigration status after Brexit. For over 12 years, CCLC has provided legal advice and representation to children, young people and families in the UK with immigration issues – including those seeking protection and those who have grown up in this country. Our experience is that the current immigration system is flawed in a number of ways, and negatively impacts on children. It is essential that the process that will be introduced for EU nationals to remain in the UK after Brexit does now allow children and families to 'slip through the gaps'. We are also concerned about the impact of substantial change to an immigration system that does not put the needs of children at the forefront.
2. This submission highlights concerns around the process for registering EU nationals and ensuring the needs and rights of children are considered; the need, and potential, for improving and streamlining the existing family migration system; and the need for the best interests of children¹ to be a principle underpinning a future immigration system.

The process for registering EU nationals already in the UK

3. In 2016, 679,000 European national children under the age of 18 resided in the UK.² A small additional number of non-European children also live in the UK under rights provided for by EU law. A significant proportion of these children live here long-term: around 258,000, or 38%, were born in this country.³ Children living in the UK under EU law are often well-integrated, attending school, making British friends and speaking English. Some children have no memories of life in another country, lack relationships with family or friends abroad, and/or have no meaningful

¹ Under Article 3 of the UN Convention on the Rights of the Child

² Migration Observatory analysis of *Labour Force Survey 2016, Quarter 1 (Jan-Mar)*, conducted May 2017, Numbers are rounded to nearest 1,000 prior to calculating percentage

³ Ibid and Migration Observatory, *Young People and migration in the UK: an overview*, December 2016
<http://www.migrationobservatory.ox.ac.uk/resources/reports/young-people-migration-uk-overview/>

connection with their 'home country'.

4. Under the government's current proposals, EU nationals (and their family members) who have lived in the UK for five years continuously prior to a set cut-off date will get settled status (indefinite leave to remain under the Immigration Act 1971). Those with less than five years' residence will get temporary residence status until they qualify for settled status. This 'settled status' will not be automatically conferred – all EU nationals, including those with permanent residence documents, will have to make an application.⁴ In the latest update on the comparison between the EU and UK agreed position on citizen's rights, all those who are exercising free movement rights under the directive will be eligible to remain, with more favourable national positions allowed under Article 37 TFEU. This means that those EU nationals who cannot show residence in accordance with the free movement directive (for example, stay-at-home parents without sickness insurance, or students without sickness insurance) can only rely on the statement from the government regarding their more favourable position.
5. The application and information required will differ depending on which position the UK government finally adopts, and at present, as advisers, we are not able to provide anxious EU citizens and their families with detailed legal advice. Citizens are unable to take steps to regularise their post-Brexit stay now. In the event that the cut-off date is set retrospectively, the government may need to process applications for the three million citizens in the UK very quickly.
6. Failure to make this application successfully could see an individual's right to be in the UK lapse, which would result in them becoming undocumented. Someone who is undocumented is unable to access welfare benefits, or housing. The right to rent restrictions would result in the eviction of European nationals who had failed to register successfully, and they would be unable to access healthcare, hold a current account or driving licence. For children and young people it would also prevent them accessing further and higher education.
7. We are concerned that the White Paper on the status of EU nationals did not propose that children could make their own applications. Given that children can be exercising their treaty rights while being in education, for example, they must have an independent right to the new 'settled' status where appropriate. Children's rights should not be made dependent on the rights of their parents.
8. Where a child is born to non-settled EU nationals, it is unclear what their status will be, or how they can exercise their own rights in order to gain any form of temporary or permanent status. The joint technical note on Citizens' Rights does not guarantee the rights of EU children born after withdrawal to join their parents as a family member, and they would only be entitled to

⁴ Home Office, Prime Minister's Office, 10 Downing Street, UK Visas and Immigration, Department for Exiting the European Union, and Foreign & Commonwealth Office, "Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU", at <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>

hold rights as an individual if born in the UK to a parent with settled status.⁵

9. It is also critical that children in care are adequately considered. There are currently 72,670 looked after children in England⁶, but no information on how many are European nationals, because the data is not collected. These children currently face insecurity when they become adults. It is critical that they are given the stability they require. Local authorities caring for them need to provide them with clear information and legal assistance and young people living in limbo should not be penalised when the UK leaves the UK.
10. If a registration process is put in place, it must be as broad as possible and take into account that not all European nationals may be able to register, either because they do not engage with institutions, do not speak English or miss the registration window. We are concerned that historically the Home Office has made application processes progressively more cumbersome. For example, in 2012 Zambrano carers were required to send a letter to the Home Office setting out their right to remain in the UK as the sole carer of a British national carer. They are now required to complete an application form, DRF1, which is 74 pages long – this severely restricts access to confirmation of this right.
11. **We recommend that the application system be as simple as possible and the evidential threshold must be one that *all* children can meet. The costs of applying for settled status (currently £2297 for non-EU nationals) must be no higher than the current cost for permanent residence (currently £65) and there should be a right of appeal for all applications under this new scheme. The barriers to children registering as British citizens, including prohibitively high fees, should also be considered against the benefits to the individual and to the UK as a whole.**

The need and scope for streamlining existing immigration processes

12. Preparation for Brexit offers an opportunity not only to plan for the estimated three million European citizens moved to an immigration system run within UKVI and the Home Office but to ensure that the existing immigration system is functioning properly. Inevitably some European citizens who cannot register will find themselves forced to rely on their family and private life under Article 8, and so it is appropriate that parliament should review the family migration system, its sustainability and whether it offers a viable alternative for families to remain in the UK.
13. The Immigration rules were substantially amended in 2012, and following the family migration consultation, came into force in July that year. In those major rule changes, the Government aimed to set out how the balancing exercise should be carried out when deciding a claim to remain in the UK on Article 8 (the right to respect for private and family life) grounds. The accompanying statement of intent was that the rules would 'reflect the need to safeguard and

⁵ 28/9/2017 update on Comparison of EU/UK positions on Citizens' Rights.

⁶ Children Looked After in England to March 31 2017, Department for Education
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/647852/SFR50_2017-Children_looked_after_in_England.pdf

promote the welfare – or ‘best interests’ – of children in the UK’.⁷ In our experience, this has not been the case, and children struggle to regularise their status regardless of the length of time they have spent in the UK.

14. In 2012 it was estimated that there were 120,000 undocumented⁸ children in the UK, 65,000 of whom were born here.⁹ This estimate is now five years old, and we believe that the government should be able to provide a more up-to-date, accurate figure – we understand that the Immigration Minister has committed to looking at this. According to one study, two thirds of undocumented migrants have been in the UK for over five years.¹⁰ Many of these children and young people were born in the UK or have lived here for most of their lives. Many group up in the UK without realising that immigration is even an issue. Their lack of regular status may only become evident when they wish to work or access further or higher education and often the ‘visibility’ of an individual’s immigration status coincides with their transition to adulthood. For families, a crisis situation, for example domestic violence, relationship breakdown, an accident, deterioration of health, or the loss of a job, often precipitates action regarding their immigration status. In the intervening period, children and young people will usually have become fully integrated into society, built up support networks, settled in the education system, know no other life and speak no other language.¹¹
15. The data is fragmented but our recent research estimated that less than 15% of the number of those children who were estimated to have been undocumented in 2012 had managed to regularise, or left the country. That said, of course that figure will not remain static and the increasingly complex rules and challenges in making applications will push more people into undocumented status every year (if for example, their application is refused and/or their leave comes to an end).¹²
16. One significant obstacle to children and young people regularising is the complexity of the existing Immigration system. As one judge in the Court of Appeal has stated: ‘...the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present.’¹³ The Supreme Court has described UK immigration law as ‘an impenetrable jungle of intertwined statutory provisions and judicial decisions’.¹⁴ 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’. As such, an application not only needs to address the Immigration Rules but

⁷ Statement of Intent: Family Migration Rules, June 2012, §8

⁸ An undocumented migrant is broadly defined as someone without permission (leave) to enter or remain in the UK.

⁹ N. Sigona and V. Hughes, *No way out, no way in: Irregular migrant children and families in the UK*, University of Oxford, 2012, at https://www.compas.ox.ac.uk/media/PR-2012-Undocumented_Migrant_Children.pdf

¹⁰ London School of Economics and Political Science has estimated that there are between 417,000 and 863,000 undocumented migrants in the UK, two thirds of whom have been present for at least five years. I. Gordon et al., *Economic impact on London and the UK economy of an earned regularisation of irregular migrants in the UK*, London School of Economics, 2009

¹¹ See Coram Children’s Legal Centre, *Growing up in a hostile environment: the rights of undocumented migrant children in the UK*, 2013, at www.coramchildrenslegalcentre.com/growing-hostile-environment/

¹² Coram Children’s Legal Centre, *This is My Home*, 2017, at <http://www.childrenslegalcentre.com/this-is-my-home/>

¹³ *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74

¹⁴ *Patel and others (Appellants) v Secretary of State for the Home Department* [2013] UKSC 72, available at: <https://www.supremecourt.uk/cases/docs/uksc-2012-0177-judgment.pdf>

must also make clear arguments regarding the applicant's rights under Article 8 and the situation of any children involved.

17. Case study 1

Esther, a 25 year old from Nigeria, has lived in the UK since she was 12 years old. She was brought to the UK by her father on a visit visa, valid for six months. She was then left in the care of her step-mother and half-siblings. No-one helped her address her immigration status while she was a child.

In 2015, Esther had a child with a British man, so the child was automatically British by birth. Esther was therefore eligible to make an application for leave to remain in the UK under the Immigration Rules, as she had sole parental responsibility for her son. However, she was not permitted to work and had no one supporting her, and so could not afford the Home Office application fees and immigration health surcharge (£1,311 in total). She needed to request that the Home Office waive those fees.

Despite the application being one of the more straightforward applications for leave to remain and Esther having no problem communicating in English, she still struggled. At the time, there were 89 different visa, immigration and citizenship application forms listed on the government website. The relevant forms for Esther's case were 'Application to extend stay in the UK: form FLR(FP)', and 'Application to extend stay in the UK: appendix 1 FLR(FP) FLR(O)' (to request a fee waiver). Esther was not able to select the correct forms and, on reviewing the forms once they were given to her, was not able to identify which parts to complete. For example, there are three sections in which details of dependants/ children should be entered, two of which must be completed by Esther and one which did not. There are also a number of pages which need to be completed if you are applying on the basis of your relationship with a partner, which was not relevant to her application.

Esther had been receiving ad-hoc financial support from a number of different people. Evidence from each of them, confirming that they could not assist her with the Home office application fee, had to be obtained in order to secure a fee waiver. She also had to provide comprehensive evidence demonstrating that she was her son's primary carer and that it would not be reasonable for him to leave the UK. She did not know what documents she could get which would prove this.

We advised her exactly what evidence to obtain, and assisted her to collate 53 items in support of her application. We also prepared a 21 page covering letter with detailed legal representations about how she met the requirements of the Immigration Rules and why she should be granted a fee waiver. This application was successful and she was granted 2½ years' leave.

Esther identifies as British – her formative years have been spent here and she has no connections to Nigeria. However, she will need to hold this leave for ten continuous years before she will be eligible to apply for indefinite leave to remain. This means she will need to make four further applications and will have been in the UK here for over 23 years before she will be 'settled'.

18. The case study above is illustrative of the level of complexity involved in immigration cases, for which there is no government funded legal advice. It is not unusual; many cases we take on are even more complicated. CCLC's Migrant Children's Project runs an outreach legal advice service

in the London Boroughs of Hackney and Haringey. Working in just these specific areas, and solely with vulnerable destitute families, we advised 313 clients on their immigration cases in 2016-17. Over 75% of these cases were highly complex.

19. Even where leave is granted, it is now for very short periods of time with very long routes to settlement. For example, a young person who has lived at least half their life in the UK will still only be granted an initial period of leave for 30 months and will not be entitled to indefinite leave to remain until they have accumulated ten continuous years of such leave, requiring a total of five applications to be made costing up to £8,269 at the current rates.¹⁵ This not only creates an extremely long route to settlement, but also needlessly increases the burden on Home Office administration.

20. Case study 2

Agnes is a 20 year old who has been in the UK since she was nine. She had lawful leave for around nine years, had gone through the education system and was making plans to attend university. But her family were unable to afford legal advice and representation at the time she turned 18 and needed to renew her visa. Her application was rejected and although her appeal was successful but by then she had a period of being undocumented. This meant that her previous nine years of lawful status counted for nothing and she would need to wait another ten years and make four applications before she got permanent status. She has an offer of a place to study biochemistry, but has been blocked from going to university because she can't access student finance.

21. In evidence to the Home Affairs Committee on 17 October, the Home Secretary highlighted that it is her 'personal mission' to make sure that the government simplifies the immigration system so that it is more 'user-friendly'.¹⁶ If serious about developing an immigration system that is efficient, fair and able to cope with demand, it is essential that the government introduce a simpler immigration system for those children and young people who have grown up in this country.

- 22. We recommend that for those who make an application based on their long residence and it is recognised that they should be able to remain in the UK, there must cease to be such a prolonged period during which they are granted only temporary leave, with a high risk of falling out of the system again. Children and young people who are granted leave need a shorter route to permanence and citizenship, and both the Immigration Bill and the necessary upheaval to enable the system to process applications from European nationals represent an opportunity to reconsider the principles underlying the immigration system.**

¹⁵ This figure has been calculated using 2016 fee levels. However, fees tend to rise at the beginning of every financial year. Detailed information on current fee levels can be found on the gov.uk website, available at:

<https://www.gov.uk/government/publications/visa-regulations-revised-table>.

¹⁶ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/the-work-of-the-home-secretary/oral/71645.pdf>

What principles should underpin a future immigration system and to what extent does the existing system meet them?

23. Section 55 Borders, Citizenship and Immigration Act 2009, which requires an immigration decision to have regard to the need to safeguard and promote the welfare of any child in the UK. Where a child is outside the UK, the same principle must apply but it is not a statutory obligation. Our research, and that of other organisations working with children in the immigration system, has demonstrated that consideration of a child's best interests both within immigration decision making and within the development of law and policy is limited.¹⁷ For example, the courts have held in relation to an old policy that there are problems with the Home Office granting short periods of leave without considering a child's need for stability and their best interests,¹⁸ a practice which continues.¹⁹ The best interests of children were not considered when the current immigration system was altered in the past, with no children's impact assessment for the Immigration Acts 2014 and 2016, nor for the substantive changes to the Immigration Rules in 2012. In the 2016 concluding observations, the UN Committee on the Rights of the Child recommended that the Government assess the compatibility of the Immigration Act 2016 with the UN Convention on the Rights of the Child.²⁰
24. As set out above, the immigration system itself is complex, with over 70 forms to apply for leave to enter or remain in the UK, many of which exceed 80 pages. The system is difficult to understand for adults, and almost impossible for children and young people. Much information on the evidence to be provided, or how to address subjective issues is found within the decision-makers guidance, despite this not being designed for use by individual applicants.²¹ More thought must go in to making sure the users of the system are able to navigate it, and in recognising that children and young people may be making their own applications, frequently without lawyers. Without access to legal aid for the majority of immigration applications, it is even more important that the system is user-friendly.
25. **The current system remains inadequate in its consideration of the key principles of children's best interests, and we recommend that any future immigration system should address this deficit.** As present, children and young people who have grown up in the UK and could be working and contributing to society are prevented from doing so because they are trapped in a precarious legal position. **We recommend that the development of a more efficient immigration system include the development of shorter and more accessible routes to permanent status**

¹⁷ Coram Children's Legal Centre, *This is My Home*, 2017, p16 at <http://www.childrenslegalcentre.com/this-is-my-home/>
See also Greater Manchester Immigration Aid Unit, *Children's Best Interests: A Primary Consideration?*, 2013; Kent Law Clinic, *How children become 'failed asylum-seekers'*, 2014 at http://www.kent.ac.uk/law/clinic/how_children_become_failed_asylum-seekers.pdf; Law Centres Network, *Put yourself in our shoes*, 2015 at <http://www.lawcentres.org.uk/policy/news/news/keep-children-s-best-interests-at-heart-of-asylum-system-new-report>; ECPAT UK, *Lighting The Way*, 2017; The Children's Society, *Not Just a Temporary Fix: Durable solutions for separated migrant children*, 2015, at <https://www.childrensociety.org.uk/what-we-do/resources-and-publications/not-just-a-temporary-fix-durable-solutions-for-separated>

¹⁸ *SM & Others v Secretary of State for the Home Department* [2013] EWHC 1144

¹⁹ Coram Children's Legal Centre, *This is My Home*, 2017, p16 at <http://www.childrenslegalcentre.com/this-is-my-home/>

²⁰ UN Committee on the Rights of the Child, Concluding Observations on the fifth periodic report on the United Kingdom of Great Britain and Northern Ireland, June 2016, recommendation 76(g).

²¹ *R (on the application of Pavel Prodobreyev) v Secretary of State for the Home Department (On-line application: evidence)* IJR [2015] UKUT 699(IAC)

for those who have grown up here. It must also ensure that the most vulnerable groups of children, including those who are in care, are not negatively impacted by substantive changes to EU immigration and do not run the risk of becoming undocumented.

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