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Children's Legal Centre

IMMIGRATION BILL 2015 – House of Commons, Committee Stage
Coram Children's Legal Centre's written evidence, 18 October 2015

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, works in the UK and globally 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 on child rights. CCLC's Legal Practice Unit specialises in child and family law, education law, community care law and immigration and asylum law. CCLC operates the Child Law Advice Service (CLAS), providing free advice on family and education law, and the Migrant Children's Project, a centre of specialist expertise on the rights of refugee and migrant children. CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

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Summary

1. The provisions in the Immigration Bill have serious implications for the welfare and safeguarding of children. The government has reiterated its commitment to giving due consideration to the UN Convention on the Rights of the Child when making new policy and legislation[1] yet **no assessment has been conducted of how this Bill will impact on children's rights or indeed how the Home Secretary's child welfare duty under section 55 of the Borders, Citizenship and Immigration Act 2009 has been taken into account.** The Bill undermines the UK's legal obligations to children and the Supreme Court's finding that children should not be blamed for the actions of their parents.[2] It is predicated on the incorrect assumption that Home Office decision making is satisfactory and that children's best interests are considered as a matter of course.

2. Coram Children's Legal Centre (CCLC) is particularly concerned that:
   - **Children in families in the asylum process will be made destitute** as a result of provisions to remove support from families whose claims have been refused, based on the premise that forced destitution is an acceptable policy measure to encourage people to leave the UK.
   - **Limits to appeal rights will put children at risk** of being separated from a parent or themselves being removed from the UK in breach of their rights because there will be no independent judicial oversight of decisions while they are in this country.
   - **Children and young people may be prevented from accessing education** due to changes to the status of those who have made an application to the Home Office, including asylum-seekers, and new conditions that can be imposed on them.

[1] http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/14405.htm#note15
[2] see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; H v Lord Advocate 2012 SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338; *ZH (Tanzania) v SSHD* [2011] UHSC 4; *EM (Lebanon) v SSHD* [2008] UKHL 64

Asylum support *(Clause 34 and Schedule 6)*

3. The Bill seeks to repeal section 4 of the Immigration and Asylum Act 1999 and replace this with a new section 95A of the Immigration and Asylum Act 1999, limited to providing support for failed asylum-seekers who can show that they are destitute and that there is a 'genuine obstacle' (undefined in legislation) to their return. Under Clause 34, section 95 support for asylum-seeking families with children will be stopped once their claim been refused and any appeal rejected. Previously families deliberately were kept on section 95 support – now after a period of time (undefined in legislation) their support will be withdrawn (unless they are making further submissions on refugee and humanitarian protection grounds) and they will have to demonstrate that they are eligible for section 95A if facing destitution.

No right of appeal against decision to refuse/withdraw support

4. There would be no right of appeal against decisions to refuse or discontinue support under section 95A, so the only (potential) remedy would be judicial review, which is neither quick, efficient nor cost-effective. Currently 65% of people appealing against a refusal of section 4 asylum support to the Asylum Support Tribunal have a successful outcome due to poor decision making in the first instance.[3] In light of this statistic, to introduce these provisions with no right of appeal would risk leaving a significant number of families and children destitute and homeless.

A failed policy

5. The withdrawal of support will not achieve the government's stated intention of 'ensuring the departure from the UK of refused asylum seekers with no lawful basis to remain in the UK'. The government tried to implement a similar change to asylum support provision through its Section 9 pilot ten years ago and the Home Office's own evaluation of this pilot, which compared the behaviour of the cohort of 116 families in the pilot against a control group of similar cases who did not have their support cut off, found only one case in the pilot in which a family was successfully removed, as compared to nine successful removals in the control group. Even when voluntary returns are taken into account, the total number of returns in the control group was nearly twice as high as in the pilot. The evaluation concluded that 'there was no significant increase in the number of voluntary returns or removals of unsuccessful asylum-seeking families' and that the measure 'did not influence behaviour in favour of co-operating with removal and… should not be seen as a universal tool to encourage departure'.[4]

Risk of families going missing

6. Furthermore, the Section 9 pilot found that the rate of absconding was 39% for those in the cohort - nearly double the amount of those in the control group (21%), who remained supported. 35 families disappeared, losing all contact with services and leaving themselves and their children acutely vulnerable. A rise in the number of families going missing would not only

[3] In 2014-15, the Asylum Support Appeals Project represented 509 appeals related to section 4 – 332 of these cases had a successful outcome

[4] Home Office, *Family Asylum Policy – The Section 9 Implementation Project,* 2004 at http://webarchive.nationalarchives.gov.uk/20140110181512/http:/www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf

contradict the objective of increased returns, but also raise significant safeguarding concerns regarding the children in those families. As the Centre for Social Justice highlighted in 2008, '…making refused asylum seekers homeless and penniless is hugely counterproductive: it makes it much more difficult to work with them to encourage voluntary return or to ensure timely removal, and in driving them underground makes it harder to keep track of them'. In the report's foreword, Ian Duncan Smith MP stated that: 'It appears that a British government is using forced destitution as a means of encouraging people to leave voluntarily. It is a failed policy...still driven by the thesis, clearly falsified, that we can encourage people to leave by being nasty'.[5]

The need to improve Home Office decision making and the returns process

7. The Bill's provisions are predicated on the idea that families will return, or the Home Office can remove them. This could only result from improvements to Home Office decision in the first instance and greater support for the current Assisted Voluntary Returns process (for which funding is being reduced) and the Family Returns Process scheme. Of the 1,193 families that the Home Office considered to have no right to remain in UK between 2012 and 2014, for example, 242 families could not actually be returned and needed to be granted leave.[6] From April 2012 to March 2014, 1193 cases entered the family returns process, with 407 returned. The Home Office impact assessment on changes to asylum support states that, as at 31 March 2015, around 2,900 families whose asylum claims had been refused were receiving support.[7] It estimated that in the future there would be 3,600-11,200 new claims for section 95 and 600-5,600 new claims to section 4 support. The numbers of Appeal Rights Exhausted families would greatly outweigh the current Home Office's current capacity for working with them to return. The Independent Chief Inspector of Borders and Immigration has highlighted the need for 'considerable improvements in the Home Office's capability to monitor, progress, and prioritise the immigration enforcement caseload'.[8]

Impact on local authorities

8. Local authorities are responsible for preventing the most vulnerable from falling into destitution and homelessness. The changes set out in Schedule 6 are likely to significantly increase the numbers of destitute families and homeless children. Local authorities have a responsibility to safeguard and promote the welfare of children 'in need' under section 17 of the Children Act 1989.[9] Even if their parents are excluded from support under schedule 3 of the Nationality,

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[5] Centre for Social Justice (2008) 'Asylum Matters: Restoring Trust in the UK Asylum System': http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20Exec%20summaries/AsylumMatters.pdf

[6] Independent Family Returns Panel Annual Report, 2012-14, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360431/Independent_Family_Returns_report_2012_to_2014.pdf. The Panel questioned 'the quality of Home Office initial decision making'

[7] https://www.gov.uk/government/publications/reforming-support-for-failed-asylum-seekers-and-other-illegal-migrants-impact-assessment

[8] Independent Chief Inspector of Borders and Immigration, An Inspection of Overstayers:
How the Home Office handles the cases of individuals with no right to stay in the UK, May – June 2014, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387908/Overstayers_Report_FINAL__web_.pdf

[9] A child is 'in need' if unlikely to achieve or maintain a reasonable standard of health or physical, intellectual, emotional, social or behavioural development, or is disabled.

Immigration and Asylum Act 2002, a local authority could not refuse section 17 support if this would breach their rights under the European Convention on Human Rights (ECHR).

9. Given the Home Office's poor record of decision making regarding asylum support (see paragraph 4), there is a risk that families who are unable to return but are not capable of demonstrating this within a limited 'grace period' will find themselves turning to the local authority when made destitute. Or, while there may be no obstacle to the family's return in the eyes of the Home Office, the local authority may find that there is a practical or a legal barrier to return because it would breach ECHR or EU law rights and it is therefore under a duty to provide support.

10. If the family could return to their country of origin but in practice does not and the child remains 'in need', the authority's section 17 duty is still likely to be engaged. A local authority may seek to fulfil this duty to a child by separating the family and providing accommodation for the child only, threatening to take children into care rather than support the family unit as a whole. However, not only is separating a child from their parent/s where no abuse or serious harm has taken place neither in their best interests nor in accordance with their rights under Article 8 of the ECHR and Article 9 of the UN Convention on the Rights of the Child, the cost of taking a child into care far outweighs the cost of supporting them to remain with their family.[10] Giving the existing pressures on the care system, it would be extremely harmful to *all* children to potentially increase the numbers going into care through a policy of forced destitution.

11. Local authorities will also incur significant costs simply in dealing with requests from destitute asylum seeking families for support and in conducting child in need assessments and human rights assessments. This may include the provision of emergency accommodation whilst the assessments are carried out. They may also face the considerable cost of litigation if the refusal of local authority support is challenged.

Amendments

12. CCLC does not support the proposed changes to section 95 support from families. At best, this will shift costs onto local authorities. At worst, vulnerable children will be left on the streets or separated from their parents. If the provisions remain in the Bill, it is <u>essential</u> that there be a right of appeal against any decision to refuse or discontinue support under section 95A and that families must be provided with a sufficiently long grace period before section 95 support is withdrawn – CCLC has recommended a period of 4 months based on figures from the Assisted Voluntary Return and Family Returns Processes.[11]

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[10] NPRF data shows that on average, accommodation and subsistence support costs approximately £11,000 per annum for a family. See http://www.nrpfnetwork.org.uk/policy/Documents/NRPF_national_picture_final.pdf National Audit Office figures show that the average annual spend on a foster place for a child is £29,000–
£33,000 and the annual spend on a residential place for a child rises to £131,000– £135,000.

[11] The process of assisted voluntary return for a family can take between two and five months (on average, about three months) – see Refugee Action, Choices – Frequently Asked Questions, at http://www.choices-avr.org.uk/about_choices/frequently_asked_questions. The evaluation of the Family Returns Process found that of the 188 families who had returned (for whom timescales are known), 72% took between one and six months to return. See M. Lane et al., Evaluation of the new family returns process, Home Office Research Report 78, December 2013, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264658/horr78.pdf

Appeal rights *(Part 4, Clause 31)*

13. Under the proposed provisions, the Secretary of State will have the power to certify the claim of someone appealing on human rights grounds against an immigration decision so that they can only bring an appeal against a wrong decision from outside of the UK, unless removal would breach their human rights and cause 'serious irreversible harm'. This extends the provisions that are already in force for the deportation cases of ex-foreign national offenders to *anyone* appealing an immigration decision relying on article 8 of the ECHR, the right to respect for private and family life, causing the separation of families, disruption to an established life in the UK and significant practical difficulties in appealing from abroad. CCLC research has highlighted the challenges facing families making immigration applications[12] and regularly represents families in case where Home Office decision is dismissed at appeal. Yet his Bill aims to ensure that those who are wrongly refused leave to remain and removed from the UK have no redress, with the inevitable and systemic violation of their human rights.

Provisions will not achieve the stated aim

14. One of the stated aims of the Bill is to 'clamp down on *illegal* immigration' and to 'make it easier to remove people who should not be in the UK', yet the Bill would extend the 'deport now, appeal later' certification powers to *all* immigration cases that raise human rights issues, including individuals and families who are lawfully in the UK, and always have been.[13] It would also affect British children whose parents are applying to extend or regularise their status in the UK.

The impact on children's welfare

15. There is no reference in the Bill to the Secretary of State directly considering the harm caused by removal to any affected children, nor is this addressed in the Impact Assessment accompanying the Bill. This is a stark omission, given the provisions risk children being deprived of their parent/s, or forced to leave the country they grew up in, before any judicial scrutiny of the Home Office decision and without any consideration of the best interests of the child. Given the significant delay, currently in some cases of up to a year, in appeals being listed, this period of separation from family and/or home would have significant consequences for any child, potentially in breach of the UK's obligations under the UN Convention on the Rights of the Children,[14] and the statutory child welfare duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

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[12] Coram Children's Legal Centre, *Growing up in a hostile environment: The rights of undocumented migrant children in the UK,* 2013, at http://www.childrenslegalcentre.com/userfiles/Hostile_Environment_Full_Report_Final.pdf

[13] Immigration Bill 2015/16 – Factsheet – Overview of the Bill; Overarching Impact Assessment – Immigration Bill

[14] Article 9.1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities **subject to judicial review** determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

16. This Bill does not make explicit the need to consider children's best interests which should be a primary consideration in all cases involving children.[15] The recent case of *R (on the application of Kiarie) v Secretary of State for the Home Department; R (on the application of Byndloss) v Secretary of State for the Home Department* has made clear that 'the real risk of serious irreversible harm is not the overarching test'[16] and that consideration must be given to whether removal pending determination of an appeal might result in a breach of the person's rights under Article 8. Established law on children's best interests, which would be considered as part of the Article 8 consideration, makes clear that decision makers must first understand the best interests of the child and their weight, before going on to consider any other countervailing public interests factors.[17] CCLC's experience in relation to decision making involving best interests is that it is uniformly poor. The Home Office will usually include a statement in any decision letter stating that best interests have been taken into account but decisions routinely do not contain any/adequate reasons for the conclusions drawn.

Amendments

17. CCLC does not support the widening of the 'deport first, appeal later' provisions to all those with human rights claims (save those involving Article 3). If the provisions remain, the Bill must include clear reference to the need to undertake a comprehensive assessment of the child's individual circumstances and their best interests prior to certification, in line with established standards.

Immigration bail *(Clause 29 and Schedule 5)*

18. Clause 29 and Schedule 5 would replace temporary admission/release – which asylum-seekers and other applicants have currently while waiting for a decision on their case – with new 'immigration bail'. Under paragraph 2(1)(b) of Schedule 5, one of the conditions that could be put on this immigration bail is 'a condition restricting the person's work, occupation or studies in the United Kingdom'. At present, the relevant provision on temporary admission and release does not refer to restricting studying,[18] and CCLC is concerned that the new provision will open the way to asylum-seekers and others being blocked from accessing education in breach of their human rights[19] and also potentially being criminalised for studying. There is nothing on the face of the bill to say that the government will not use this power to prevent children studying.

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[15] Both Article 3 of the UNCRC and Charter of Fundamental Rights referred to in Article 6 of the Treaty on European Union make the child's best interests 'a primary consideration' in all actions concerning children. There is a distinct but related domestic statutory obligation imposed by section 55 of the Borders, Citizenship and Immigration Act 2009.

[16] [2015] EWCA Civ 1020, para 35

[17] see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; H v Lord Advocate 2012 SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338; *ZH (Tanzania) v SSHD* [2011] UHSC 4; *EM (Lebanon) v SSHD* [2008] UKHL 64.

[18] See paragraph 21, Part I, Schedule 2 of the Immigration Act 1971:
Temporary admission or release of persons of persons liable to detention
(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer.

[19] Under Article 2 of the First Protocol to the European Convention on Human Rights, in combination with Article 14 of the European Convention on Human Rights (non-discrimination).

Amendment

19. If changes to temporary admission and release are introduced, these must not allow for the restriction on any child or young person's access to education.

Appendix – Case Studies

Asylum support case studies

1. CCLC recently represented a mother with two children who had been subjected to domestic violence whilst living in the UK and who claimed asylum in Croydon. The Home Office refused her application for asylum support and claimed there was no right of appeal against this decision because the mother had allegedly withheld information. CCLC took the case to the Asylum Support Tribunal, where the judge found the mother completely credible. The Home Office was ordered to accommodate and support the family under section 95. The family were finally housed after seven months in unsafe accommodation.

This case clearly demonstrates both the difficulties families face in evidencing their situation and the need for a right of appeal against Home Office decisions.

2. Lisa, a victim of trafficking, had been in the UK for a number of years before claiming asylum and being referred into the National Referral Mechanism. She was told at screening that her caseworker would contact her with details of how to move onto section 95 support, but then received no contact from the Home Office for 1 ½ months. CCLC made the section 95 application for her pro bono. After receiving no response for over a month, CCLC chased up in writing and by telephone and discovered that the initial application had been lost by the Asylum Support team. Six weeks after the application was first submitted, the Home Office wrote directly to the client requesting information that had already been provided to them. Support was finally granted two months after the initial application was made.

This case demonstrates the weaknesses in the current support system, raising concerns about families being left without support for months on end if section 95 is withdrawn and they have to apply for section 95A

Appeals case studies

3. Kara, a Nigerian national, came to the UK on a student visa and formed a relationship with a man with whom she had a child. As the father had indefinite leave to remain, the child was born British. Before Kara's course came to an end, the man claimed that he was making a Home Office application for her and took her passport. He never did this, and when the relationship broke down due to domestic violence, Kara was forced to flee with her child. An application was made to the Home Office on the basis of her being the parent of a British child and on Article 8 grounds. As she had no documentary evidence to prove her child was British, her application was refused. Kara

appealed and detailed evidence was submitted demonstrating it would not be reasonable to expect Kara or the child to leave the UK. The Tribunal made directions that the Home Office establish whether the child's father had indefinite leave at the time of his birth. During the proceedings it was confirmed that the child was British. The appeal proceedings were vital to the successful presentation of the case and the removal of this British child prior to appeal would have been a clear violation of his human rights.

Under the Bill's appeals provisions, Kara's case could be certified, leaving her as a single mother unable to access legal advice in Nigeria to bring her appeal and resulting in the removal of a British citizen child to a country he does not know.

4. Sarah came to the UK 16 years ago to escape forced marriage. After an agent stole her documents, she lived under the radar and had three children, now aged 11, seven and two. She made an application for leave to remain on Article 8 grounds two years ago, which was refused, partly on the basis that the whole family could be returned together to the mother's country of origin. They appealed and had to wait over a year for the appeal to be heard (it was adjourned by six months shortly before it was due to be heard due to a 'shortage of judiciary'). The children only speak English and the elder two are doing very well at school, and well integrated into the borough where they have lived all their lives. The eldest child is eligible to register as British. CCLC has been helping with family with their appeal pro bono.

Under the Bill's appeals provisions, Sarah could have been removed from the UK while waiting for her appeal to be heard (which has taken well over a year). In this time, the children would have had to live in a small rural African village with their estranged maternal grandmother, with whom they do not have a common language. They would not have been able to attend school, as they do not speak the language. The youngest child would be potentially at risk of FGM, as the mother would not practically be able to relocate elsewhere. Their health would have been at risk, as it is well documented that clean drinking water is not widely available in the area, and there are no health services nearby. Their education and sense of security would have been seriously damaged, and this could not be remedied by returning them to the UK if their appeal is successful. Removal would also have prevented the eldest child from becoming eligible to register as British (the only country he's ever known), as it would have taken place shortly before his tenth birthday.

Immigration Bail case study

5. CCLC recently advised in the case of a young person, Sam, who, having studied in sixth form in the UK, had been accepted to university on a full scholarship to study mathematics. He had come to the UK with his family and claimed asylum but they had been waiting for two years for a decision on their asylum claim so he was still in the UK on 'temporary admission'.

Under the Immigration Bill's provisions, a condition could be imposed on him so that he would not be able to attend university despite his ability and dedication, the institution clearly wanting him as a student and his studies not imposing any burden on the taxpayer.