Immigration Bill 2015
Briefing on Part 4 Clause 31: Appeals – Certification of Human Rights Claims

Amendment No. 208
Page 34, line 3, leave out clause 31

Introduction
Clause 31 gives the Secretary of State the power to extend the current provisions under Section 94B of the Nationality, Immigration and Asylum Act 2002 to all human rights cases if removal pending appeal would not cause "serious irreversible harm", or otherwise breach human rights. The Government has confirmed in its Policy Equality Statement that this provision would apply to children and families as well as unaccompanied children[1]. This provision presents very grave obstacles to accessing justice particularly where children are concerned and is likely to lead to several devastating outcomes for children including forced separation of families and the removal of children from their home in the UK, even where children are British citizens. The measure would also apply to children who came to the UK as unaccompanied or separated migrant children and have grown up here and may have no lasting connections or support in their country of origin. Rather than tackling irregular migration, this provision would also affect those who are here lawfully including British nationals. We therefore oppose this clause altogether.

Access to justice
The Home Office already has the power to prevent repeated appeals by certifying claims as clearly unfounded – the changes proposed in the Bill will prevent people with arguable cases from accessing justice. Certifying a human rights claim for out-of-country appeal presents very grave obstacles to accessing justice. It is essential that judges have the opportunity to apply scrutiny at appeal and make sure a correct decision has been made. There will be huge practical barriers to children and families appealing their immigration decision from abroad. Children and families will be severely disadvantaged by not being able to meet with their lawyer in person if they are able to afford one and by not appearing in court. It will mean that children will be unable to effectively participate in crucial decisions about their lives, which is a key right for children under the UN Convention on the Rights of the Child. It will be extremely difficult for them to gather evidence from family and friends, and services such as NGOs, schools, social workers, expert witnesses, advocates and foster carers in the UK.

Separation from parents or removal from the UK
Even for those who are able to bring an appeal from abroad, children will be subjected to damaging and unnecessary disruption while this happens. They will either accompany their parent, be taken out of school and away from their friends or be separated from their parent for the duration of the appeal. Children of two parent families may have strong ties to another parent in the UK, and be in the appalling position of having to choose between their parents. It is extremely worrying that the Government has not protected unaccompanied children within this provision and it is unclear how they will be expected to appeal from abroad, given that even when they turn 18 they may be returned to a country where their welfare could be at risk, where they may be destitute, where they don't speak the language and have no lasting connections or support networks, particularly where they have grown up in the UK and consider this their home.

Legal aid, advice and representation
Young people and families are no longer eligible for legal aid in non-asylum immigration cases. This primarily affects those with human rights claims the majority of which are made on the basis of Article 8 which is also the target of Clause 30. Appellants who are unable to pay for solicitors

[1] Policy Equality Statement on Appeals published on 30 October 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472711/PES_-_appeals.pdf

themselves will not be eligible for legal aid for their appeal nor is it realistic to say that they will get exceptional funding. Our recent research on the impact of legal aid cuts to separated children's immigration cases shows clearly that lone children who are currently residing in this country are unable to get legal aid for advice and representation with their Article 8 immigration cases and other non-asylum issues. Since the cuts came into force in 2013, there has been a 30% decrease in the number of regulated immigration service providers across the country[2], with almost a 50% cut to free immigration services regulated to work on appeals[3]. The exceptional funding scheme, which has been found to be unlawful, is not providing a safety net. Practitioners and young people told us that without legal aid children's immigration claims are being avoided, or 'sat on', and remain unresolved. This often leads to a transitional crisis for the child as they turn 18. Some of the young people interviewed in our research were forced to raise thousands of pounds to pay for legal fees or prepare complex immigration cases on their own, without any support. Given how the odds are stacked against young people who are trying to resolve their immigration issues *in-country*, it is incorrect to think that young people and families will be able to get the legal support they need out-of-country.

Children's best interests are not systematically assessed

An important part of making sure that children's best interests are met is by considering children's views in decisions that affect them and giving these views due weight in accordance with their age and maturity. Children within the immigration system are often invisible to decision-makers. In ZH Tanzania (2010) Lady Hale noted that: "*while their interests may be the same as their parents' this should not be taken for granted in every case [and] immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so*." Despite this, the 2013 UNHCR audit[4] of Home Office procedures in family cases highlighted that there is **no systematic collection or recording of the information necessary and relevant to a quality best interests consideration in cases involving children**. This includes a **lack of any mechanism to obtain the views of the child** and give those views weight in line with age and maturity. The UK's highest courts have made clear that children's best interests, which would form part of the Article 8 consideration, must be considered first, before going on to consider any other countervailing public interests factors. In ZH Tanzania, Lady Hale held that "*in making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means they must be considered first"*[5]

Serious irreversible harm is the wrong test

The Bill states that human rights appeals cannot be certified so as to be out-of-country if this would be a breach of human rights or cause "serious irreversible harm". 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"*[6] 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. For children the consideration of Article 8 would also involve considerations of their welfare and best interests. The Court confirmed that "*Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she considers…that removal pending determination of any appeal would not be unlawful under section 6 of the Human Rights Act"*. The Court of Appeal also found that the guidance on section 94B is "*inaccurate and misleading in focusing as it does on the criterion of serious irreversible harm*". It is difficult to conceive of circumstances where a child's best interests would be best served by having to appeal out-of-country or being separated from their parents for the duration of the appeal.

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[2] Immigration advice services are regulated by the Office of the Immigration Services Commissioner (OISC)
[3] Level 3 advisers are regulated to work on appeals. Further information on the OISC levels can be found online: https://www.gov.uk/find-an-immigration-adviser/what-advisers-can-do
[4] UNHCR (2013) Considering the Best Interests of a Child Within a Family Seeking Asylum, London: UNHCR
[5] *ZH (Tanzania) v SSHD* [2011] UHSC 4; *EM (Lebanon) v SSHD*[2008] UKHL 64.
[6] [2015] EWCA Civ 1020, para 35

Unaccompanied children

This provision could see more cases involving unaccompanied children or young people over 18 who claimed asylum alone as children, being certified for an out-of-country appeal. The guidance on Section 94B states that: "*Human rights claims from persons who are liable to be deported while they are children (under the age of 18) will not normally be suitable for section 94B certification. Nevertheless, children are not excluded from the scope of certification under section 94B and consideration must be given to all such cases on an individual basis and having regard to the children duty under section 55, as to whether it is appropriate to apply section 94B."* There has been a dramatic rise in the number of certified refusals in unaccompanied children's cases in the last two years going from only 1 certified refusal in 2011 to 85 in 2014. According to Home Office statistics, of the young people who applied for asylum as unaccompanied asylum-seeking children and received an initial decision in 2014, 85 young people were refused and their claim was certified. 67 of those were over 18 at the time of the decision while 18 were minors at the time of the decision. In the first two quarters of 2015, 74 young people who had claimed asylum as unaccompanied children had their refusal certified[7]. The vast majority of these young people were from Albania while others were from Bangladesh, China, Algeria, Nigeria, Vietnam and Sudan.

Clause 30 would mean that more children and young people would not be able to appeal their claim in the UK and face removal even to countries where there may be no effective child protection system in place to support them, such as in Albania. Without a multi-agency best interests determination process currently in place to assess the full impact on welfare, children could be returned to countries and circumstances where they may be at risk of serious harm including sexual abuse, neglect, homelessness, violence, forced marriage, forced recruitment as child soldiers and other child protection issues. As unaccompanied or separated young people they would be particularly vulnerable.

British and settled children

It is estimated that there are 120,000 undocumented migrant children living in the UK, the majority of who were born in the UK and many will have grown up here. Bail for Immigration Detainees (BID) investigated the cases of 102 parents who were separated from 219 children by immigration detention, deportation or removal from the UK. It found that over 80% of children for whom we were able to obtain these data were British citizens. 93% of the children for whom we have these data were born in the UK and their parents had typically lived in in the UK for long periods. We have worked with numerous families where the Home Office sought to remove parents despite the significant harm this would cause to their children including at least one case of a family where a child was British but where the mother and child were forcibly removed before they had the opportunity to prove this. We are concerned that the majority of the children facing removal from the UK for an out-of-country appeal or being separated from their parents will be children who were born in the UK and have grown up here, including British children[8]. Without proper safeguards, there is a risk that British children may be at risk of being forcibly removed.

Indeed the evidence suggests that many of those with Article 8 human rights claims, if given the opportunity, will have a valid right to remain in the UK. The recent report by COMPAS highlighted that of where families are supported by local authorities on the basis that they have 'no recourse to public funds', in the vast majority of cases families have pending Article 8 claims and significantly, most of them are eventually granted leave to remain in the UK[9].

More information

For more information, please contact Ilona Pinter (ilona.pinter@childrenssociety.org.uk / 07713 878 207) or Lucy Capron (lucy.capron@childrenssociety.org.uk / 020 7841 4494.

[7] Four of these were under 18s while 70 were over 18. Volume 3 Table 9q: https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/asylum#unaccompanied-asylum-seeking-children-uasc

[8] This is usually the case if a child is born in the UK to at least one British or settled parent.

[9] Price, J. and Spencer, S. (2015) 'Safeguarding children from destitution: Local authority responses to families with 'no recourse to public funds': https://www.compas.ox.ac.uk/media/PR-2015-No_Recourse_Public_Funds_LAs.pdf (pg 58)