Refugee Children’s Consortium

HOUSE OF LORDS – SECOND READING BRIEFING
Immigration Bill – December 2015

Key messages:
- The Immigration Bill has wide-ranging implications for the safety and welfare of thousands of children.
- The Bill will further limit appeal rights meaning that thousands of children and young people including victims of modern slavery and trafficking, will be subject to the ‘deport first appeal later’ provisions even though they will not have had the benefit of legal aid in making claims in the first place.
- The Bill introduces provisions that could leave thousands of children and families destitute and homeless and will limit vital services such as access to education, advice and counselling to care leavers who came to the UK as unaccompanied or trafficked children
- The UN Convention on the Rights of the Child (UNCRC), states that children should not be discriminated against on the basis of their race, nationality, status or their parents’ status (Article 2) and that their best interests should be a primary consideration in decisions made about them (Article 3).
- The Home Secretary has a duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children with respect to its immigration, asylum and enforcement functions.

Certification of human rights claims (Clause 34)
Under Clause 34, 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 appeal from outside of the UK, unless to do so would breach that person’s human rights. This provision risks children being forced to leave the country they grew up in or being separated from their parent/s, before any judicial scrutiny of the Home Office decision and without adequate consideration of the best interests of the child. It could also affect care leavers and see more cases involving unaccompanied children or young people over 18 who claimed asylum alone as children, and those who have lived here for many years and have built their lives in the UK, being certified for an out-of-country appeal.

Inadequate consideration of the best interests of the child
Established law on children’s best interests, which would be considered as part of an 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. The Government has emphasised that each case will be assessed “taking into account the impact of certification on family members, including children’ and that ‘the welfare of children will continue to be a primary consideration’ but the experience of, and research by, RCC members to date is that decision making involving best interests is uniformly poor. UNHCR research has highlighted there is no formal and systematic collection or recording of information that will be necessary and relevant to a quality best interests consideration within current Home

2 The Solicitor General (Robert Buckland) to the Public Bill Committee, Immigration Bill, Eleventh Sitting, Thursday 5 November 2015: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151103/pm/151103s01.htm
Office procedures. 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.4

No legal aid to present their cases
Poor decision making has been blamed on individual applicants for not putting forward the “fullest evidence and information about their situation at the earliest opportunity.”5 Yet, not only has the Government made tighter and more complex the means by which someone can make an application on human rights grounds, it has also removed all legal aid for immigration cases. In order to make an application under Article 8, for example, it is necessary to gather extensive evidence demonstrating the extent to which a child has developed a personal life and connections within the UK, including that from a child’s carer, teachers, therapists or medical professionals, mentors and friends. Recent research by The Children’s Society shows that separated children are unable to get legal aid or exceptional funding for advice and representation with their Article 8 immigration cases.6 Without this vital life line separated children are not able to resolve their immigration issues, often resulting in a crisis as they turn 18.

Risks for children’s welfare
Without an adequate 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 including to being left destitute or being at risk of (re)trafficking if they are forcibly returned.

Support for families (Clauses 37 and 38, Schedules 8 and 9)
Under Clauses 37 and 38, section 95 support for asylum-seeking families with children will be stopped once they have been refused and any appeal rejected. Previously families could stay on section 95 in recognition of the fact that they had children who needed support – now their support will be withdrawn (unless they are making further submissions on refugee and humanitarian protection grounds) and they will have only be eligible for section 95A if they can demonstrate there is a ‘genuine obstacle’ to their leaving the UK. There would be no right of appeal against decisions to refuse or discontinue support under this section, so the only (potential) remedy would be judicial review, which is neither quick, efficient nor cost-effective.

Following concerns raised about the potential for a ‘cost-shift’ to local authorities for supporting destitute families under existing Section 17 Children Act 1989 provisions, the Government introduced a new form of support – Section 10A (amending Schedule 3 of the Nationality, Immigration and Asylum Act 2002) - to enable local authorities to provide for accommodation and subsistence needs of destitute families without immigration status in certain circumstances. This effectively diverts the support for families away from the Children Act framework replacing it with immigration-led provisions, taking away the focus on safeguarding and promoting children’s welfare. Where a ‘child in need’ assessment under Section 17 would currently have to take into account children's broader needs to learn, grow and develop, the current provisions suggest that children and families will only be provided with the bare minimum such as accommodation and subsistence, and could in some circumstances – such as in an emergency - be left entirely without support and street homeless.

Forced destitution will not encourage families to leave
The Bill aims to “encourage those who are present in the UK illegally to depart” yet there is growing evidence that these provisions will not encourage families to leave the UK. In 2005, a Home Office

5 The Solicitor General (Robert Buckland) to the Public Bill Committee, Immigration Bill, Eleventh Sitting, Thursday 5 November 2015: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151103/pm/151103s01.htm
pilot of a similar policy under Section 9 of the Asylum and Immigration Act 2004, which sought to make families who had been refused asylum leave the UK, found that of the 116 families, including 219 children involved in the pilot, none of the families returned to their country of origin as a direct result of the implementation of Section 9. Instead, 35 families disappeared, losing all contact with services, and leaving children and parents acutely vulnerable7. The Home Office’s own evaluation of the Section 9 pilot found that “there was no significant increase in the number of voluntary returns or removals of unsuccessful asylum seeking families. It shows that in the form piloted section 9 did not influence behaviour in favour of co-operating with removal”8.

Undermining immigration control
Closing off support from families who have been refused asylum will undermine immigration controls as families will have little incentive to stay in touch with the authorities once support is withdrawn. For those who would otherwise wish to maintain contact with the Home Office, the practical barriers created by destitution will make this impossible. Conversely, continuing support to children and families would strengthen the integrity of the immigration system because the Home Office would maintain contact with those who are appeal rights exhausted and would be better able to participate in the family returns process which the Government has invested in. As well as being ineffective in achieving its objective, this policy is likely to lead to serious child protection issues by forcing children to become homeless and placing already struggling families at risk of exploitation. Several past serious case reviews serve to highlight how children are made extremely vulnerable when their families are left without any support.

Access to higher education for care leavers (Schedule 9 – Availability of local authority support)
Part of the aim of this Bill is to “ensure that only those who are legally resident in the UK can access employment and public services”9. Yet provisions in Schedule 9 will prevent local authorities from providing funding in order to facilitate access to higher education to a care leaver they are supporting who is here lawfully and has limited leave to remain (humanitarian protection, discretionary leave or leave under the Immigration Rules) or a pending asylum application. The Government’s revised impact assessment states that “instead, to obtain such support, the person will be required to qualify under the Student Support Regulations”10, despite the fact that most of these young people will not be eligible for either home fees or a student loan. Under the Student Support Regulations in force in England these young people would only qualify for such a loan if they have had leave to remain for a period of three years and, in many cases, if they have lived over half their life in the UK. Young people who are seeking asylum have no entitlement under the regulations at all, even if they have been orphaned and are unlikely to be able to return to their country of origin. This will effectively cut off access to higher education as an option for a significant proportion of young people, many of whom will continue to remain in the UK and build their lives here.

Support for care leavers (Schedule 9 – Availability of local authority support)
The Government’s changes to the Immigration Bill aim to limit support to care-leavers subject to immigration control. These provisions effectively override children and leaving care legislation and policy to prioritise immigration control over young people’s welfare considerations. It creates a two-tier system of support for care leavers based on their immigration status. The corporate parent duties of local authorities would be severely limited despite the ongoing needs of these young people. This is effectively a reversal of the Court of Appeal’s judgment in SO v Barking & Dagenham11 which held that local authorities could not look to the availability of asylum support to

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10 Ibid.
determine whether a continued leaving care duty applies. This provision will affect care leavers who came here as unaccompanied children and have not been granted refugee status or humanitarian protection but have been granted temporary leave ('UASC leave') on the basis of there being no adequate reception facilities in their country of origin. This leave is normally granted for 30 months or until the child turns 17.5 years old. It will include children who have been trafficked into the country for the purpose of exploitation and those who arrived as young children but are estranged from their families and have lived in the UK for most of their lives but were never helped to regularise their status. Upon turning 18 years old, these young people are likely to be left without status and most at risk of being caught by these provisions, despite continuing to need the additional support provided through leaving care provisions in recognition of the continuing vulnerabilities of these young people.\(^1\)

### Creation of a two-tiered system

If passed, these care leavers would no longer be able to stay in their foster placements, counteracting the ‘Staying Put’ provision\(^1\) recently introduced by the Government where care leavers can stay in foster placements until 21. They would also no longer have access to a personal adviser, therapeutic support, a pathway plan, maintaining contact, support with legal aid, support with training and education or any of the other services that care leavers are entitled to in light of the fact that they have no family responsible for them.

### Central and local government are corporate parents to all care leavers

Young migrants in care often face additional difficulties to British children: they are particularly likely to have faced trauma, they may experience language and cultural barriers and they are less likely to have contact with biological family members. Care leavers often need their personal advisor or advocate to help identify and even instruct their immigration lawyer and the local authority to pay for their representation or evidence (including subject access requests and doctor’s letters). The Government argues that these young people are simply ‘adult migrants’ and will not remain in the UK in the long run therefore should not receive additional help as a care leaver. Not only is this not the case for many of the young people affected by these provision but this argument ignores long-established law and policy making clear that those who have been in care need additional support on turning 18 in light of their vulnerabilities. Care leaving services are already limited to eligible and relevant children – i.e. those children aged 16 and 17 who have been looked after for at least 13 weeks since the age of 14. Central and local government have a unique relationship with children in care and care leavers as they are their ‘corporate parents’ and as such care leavers should expect the same level of care and support that other young people get from their parent.

### Questions to the Minister

- Will the Minister confirm how assessments of families will be conducted for S.10A support? Will these assessments be done by a qualified social worker to ensure they take into account the best interests of any child in the family?
- Could the Minister outline what would happen if an appeal rights exhausted care leaver needs additional support (for example to remain in a foster placement because of concerns they may self harm) – would the local authority have the power to support this vulnerable young person in these circumstances?

### For more information:

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\(^1\) Guidance on ‘Staying put: arrangements for care leavers aged 18 years and above’