Introduction
Despite the government’s amendment (58) clarifying its continued commitment to its duty to promote children’s welfare, which has no bearing on decisions made by the courts, Clause 18 does not allow for proper consideration of the best interests of all children as required by international and domestic legislation. In particular, it does not allow for consideration of the rights of children who are not British citizens and who have not lived in the UK for seven years or more. This Clause must be amended to send a clear message to decision-makers and the courts that the best interests of all children affected by these decisions need to be taken into account as a primary consideration, and to recognise that children’s best interests are also in the public interest.

The law on children’s best interests
Decision-makers must establish the best interests of any child in accordance with the UN Convention on the Rights of the Child (UNCRC), its General Comments, the jurisprudence of the European Court of Human Rights and the UK Supreme Court. Any decision must ensure that a child’s best interests are a primary consideration in all actions affecting them. The RCC believes Clause 18 does not currently reflect established case law on children’s best interests as set out in the landmark Supreme Court judgments ZH (Tanzania) and HH and other domestic and Strasbourg jurisprudence. In particular, the Bill fails to highlight the importance that must be accorded to first understanding the best interests of the child and their weight, before going on to consider any other countervailing public interest factors. It also fails to recognise the point made by the Supreme Court that children should not be blamed for the actions of their parents.

The government has argued that the provisions in the Bill protect children by stopping parents from using their children as a means to remain in the UK. This is illogical - children cannot be protected by ignoring their best interests out of concern that parents might benefit from action to safeguard children. The courts must carefully consider what action is in each child’s best interests, even when their parent’s immigration history is poor. Any proper assessment would by necessity assess whether their parent had a genuine, caring relationship with the child.

Children’s interests are public interests
Clause 18 fails to recognise that promoting and protecting the rights of children is in itself a necessary and valuable benefit to society and an essential part of the public interest. In HH the Supreme Court held that “although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up”. The bill gives the impression that children’s interests amount to no more than private and personal interests of an individual and their family.

“Qualifying child”

1 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.
3 Immigration Bill Committee debate Tuesday 5 November 2013 (Afternoon)
The tests introduced for Article 8 create an extraordinarily narrow space whereby any child who is not a “qualifying child” - any non-citizen child who has not lived in the UK for a continuous period of seven years or more - does not even come into consideration. The Joint Committee on Human Rights has asked how confining the definition of “qualifying child” is compatible with the UK's obligations under the UNCRC, which makes clear that best interest considerations should be afforded to all children under 18 without discrimination (Article 2).

Unaccompanied children
Clause 18 assumes that considerations around Article 8 are only relevant to adults. However unaccompanied children can and often do make human rights claims under Article 8 in their own right. It is unclear from the Bill how these should be dealt with. There are 120,000 undocumented migrant children in the UK, some of whom are here without a parent or legal guardian. They may be sent here on a visa to live with relatives or in private fostering arrangements. They may also have been trafficked into the UK for exploitation or have been abandoned here by their families. In many cases these children may have no support networks or lasting connections to their country of origin. Particularly for those who have been estranged by their carers or whose families have been complicit in their exploitation, it will not be in their best interests to be returned ‘home’. Instead these children are likely to have built a life for themselves in the UK, developed friendships and made good progress in education. Their right to respect for private and family life can be a crucial element in resolving their immigration status, but is not provided for at Clause 18.

Current Home Office practice
UNHCR’s recent audit of Home Office procedures highlighted that there is no systematic collection or recording of the information necessary and relevant to a quality best interests consideration in family cases. 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 findings showed that, when performing their analysis, decision-makers do not always take into account all the information available to them about the child and relevant to their welfare, and that analysis of the safety of the child was rarely undertaken. Other research carried out by the Greater Manchester Immigration Aid Unit into unaccompanied children’s asylum cases found that in 24 of 34 cases analysed (70%), the Home Office failed to carry out any determination of the child best interests at all.

Far from resolving existing problems in decision-making, Clause 18 is likely to add further confusion including for Home Office decision-makers in how best interests are to be considered and will enable poor decision-making to go unchallenged. Effective judicial oversight is vital in ensuring that children’s best interests are taken into account in any case involving a child and these considerations need to be made clear on the face of the Bill.

Questions for the Minister:
1. How many children will be affected by the provisions in this Bill and specifically by Clause 18?
2. How many children will be separated from their parents by the provisions under Clause 18?
3. How many unaccompanied or separated children will be affected by Clause 18?
4. Will the government publish its assessment of how this Bill is taken into account its obligations towards children’s rights under the UN Convention on the Rights of the Child?

For more information: Ilona Pinter on 07713 878 207 / ilona.pinter@childrenssociety.org.uk or Anita Hurrell on 0207 713 2022 / Anita.Hurrell@coramclc.org.uk


Growing Up In A Hostile Environment: The rights of undocumented migrant children in the UK
8 Greater Manchester Immigration Unit: Children’s Best Interests: A primary Consideration? (2013)