**Lambeth Law Centre**

**Strategic Legal Fund**

**The impact on families and children of insecure immigration status**

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1. *Introduction*

Lambeth Law Centre was awarded funding by the Strategic Legal Fund to carry out research exploring the impact of insecure immigration status on families children and young people, in particular those (without regular immigration status ) applying for residence cards under derivative rights of residence and those applying under the family and/or private life immigration rules and Article 8 ECHR.

The research came about because the Law Centre represents numerous clients with or who have had irregular immigration status, and who are children or young people and families. We have been and continue to take instructions from clients living in poverty, under extreme stress, and often living in inadequate housing. Surprisingly these clients are often supported by the local authority under s17 Children Act duties or children leaving care provisions. Many are living with friends, moving between addresses, with one remaining in an abusive and violent situation rather than become street homeless. Many clients, even those being supported by the local authority, are regularly going without food themselves in order to feed their children, they are unable to buy shoes or school uniforms, or essential clothing for their children. The grant of leave to remain or issue of a residence card does not result in an improvement; these vulnerable clients have been and continue to be at the receiving end of policy seeking to make a [deliberately hostile environment](http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment) for migrants.

We had also obtained a psychologist’s report for the purpose of judicial review proceedings in one case that referred to research about the detrimental impact on children’s wellbeing of having an insecure immigration status, or their parents having limited leave to remain, in terms of risk of mental health issues, performance at school and life chances in general. [[1]](#footnote-1)

The Law Centre obtained this funding to try and set up a strategic challenge to the grant of limited leave to remain as the norm. The funding was awarded for the pre-litigation research, and development of evidence and legal argument. The intention of the research was to record the information about as many cases as possible. We have instructed counsel to provide an advice following which we shall prepare an application for ILR from the outset, with a view to challenging the Home Office on the length of leave granted. The case studies will also form the basis of a witness statement in any challenge in due course. At the end of the case a note with information about arguments made will also be disseminated.

1. *Legal framework*

Briefly, the applications considered were those made for either a derivative residence card, or under the immigration rules on family and/or private life.

Derivative rights of residence

The 2006 EEA Regulations (Regulation 15A) as amended deal with derivative rights of residence. If an application under the Regulations as a primary carer is successful, a derivative residence card is issued for five years with the possibility of renewal if the British citizen child/EEA national child remains in the UK and/or in education.

Since 8 November 2012, as a result of changes in regulations governing access to housing and means tested benefits, those with a derivative right of residence can no longer qualify for benefits.

The Court of Appeal in [*Sanneh & Ors v Secretary of State for Work and Pensions and Others [2015] EWCA Civ 49*](http://www.bailii.org/ew/cases/EWCA/Civ/2015/49.html)ruled that the right to reside arises as soon as the requirements are met (i.e., as soon as the parent becomes the primary carer). However in terms of support, the court concluded that whilst member states are under an obligation to pay *Zambrano* carers in need and unable to work an amount that is sufficient to enable them to support themselves and their EU citizen child/children within the EU, section 17 of the Children Act 1989 fulfils that obligation, and such entitlement does not extend to social assistance paid at the same level as that paid to EU citizens lawfully here.

Home Office policy is that there is no right to permanent residence for persons claiming to have a derivative right of residence[[2]](#footnote-2).

It may be possible to argue that a derivative right of residence is lawful residence in the UK for the purposes of the immigration rules on long residence (There is a concession in the Immigration Directorate Instructions for applicants residing under the EEA Regulations although this is not in the immigration rules. The concession however does not explicitly deal with those lawfully here on derivative rights grounds.) The Upper Tribunal in *Bee and Another (Permanent/Derived Rights of Residence)* [2013] UK UT 00083 (IAC) considered this, noting that there was no human rights application before the UT stating, *If their children are granted permanent residence and still require the presence of their parents to give effect of their rights of residence, this might well justify the grant of permanent residence or indefinite leave to remain under national law*.

Immigration Rules

The immigration rules provide for an application for leave to remain to be made by:

* A child under 18 who has lived continuously in the UK for at least seven years and can also show that it would not be reasonable to expect her/him to leave the UK,
* A person aged 18 or above and under 25, who has spent at least half of her/his life living continuously in the UK,
* A person aged 18 or above, who has lived continuously in the UK for less than 20 years but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK,
* The parent of either a British citizen child, or a child who has lived in the UK continuously for at least seven years and it would not be reasonable to expect the child to leave the UK.

Applications made under the immigration rules on long residence were not considered in this study.

A successful application will lead to the grant of 30 months leave to remain on a 10 year path to settlement and with a no recourse to public funds condition attached, to comply with the stated approach of the government which is that those seeking to live in the UK must do so on a basis that “prevents burdens on the taxpayer and promotes integration”.

The most recent Home Office policy on the type of leave to be granted states that leave will be granted subject to a condition of no recourse to public funds, unless:

1. the applicant has provided satisfactory evidence that they are destitute; or
2. the applicant has provided satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child on account of the child’s parent’s very low income;
3. the decision maker exercises discretion not to impose, or to lift, the no recourse to public funds condition code because the applicant has established exceptional circumstances in their case relating to their financial circumstances which, in the view of the decision maker, require the no recourse to public funds condition code not to be imposed or to be lifted.

NB. The NRPF condition has been dealt with more fully in other research and is only part of this study in terms of impact on clients.

Home Office policy on the amount of leave to remain to be granted has also been amended on numerous occasions; it is clear that the onus is on the applicant to establish why a longer grant of leave or ILR is appropriate.

The case-law to date accepts that the Secretary of State is entitled in principle to adopt a staged approach to settlement, even where children are the applicants and that the onus is on the applicant to set out why ILR is appropriate.The Court of Appeal *in R on the Application of Alladin v The Secretary of State for the Home Department* [2014] EW CA CIV I334 states, *"it follows that an applicant who wishes to persuade the Secretary of State to grant her leave for a period longer than that provided for by the staged settlement policy has to do more than point to the fact that she is a child."*

*Best interests of the child*

The UN Convention on the Rights of the Child (UNCRC)

The UNCRC at Article 3(1) provides *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

Section 55 of the Borders, Citizenship and Immigration Act 2009 (“2009 Act”) provides:

*Duty regarding the welfare of children*

*(1) The Secretary of State must make arrangements for ensuring that—*

* *(a)  the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are  in the United Kingdom, and*
* *(b)  any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*

The courts have considered the issue of the best interests of the child in numerous decisions since ZH Tanzania and it is possible to show a more narrow definition of the best interests duty in immigration cases. In *EV Philippines & Ors* in the Court of Appeal[2014] EWCA Civ 874the issue was how in a case involving the best interests of the children, Tribunals should approach proportionality. The decision maker should be looking at the best interests of children as a primary consideration, asking whether the force of any other considerations should outweigh it. They were clear that the best interests of the child is not the primary consideration and that they must take into account any factors which point the other way i.e. is it reasonable to expect that child to live in another country.

The onus is on the applicant to show how the best interests of a child would be met by a grant of ILR, to the civil standard of balance of probabilities. [[3]](#footnote-3)

*Article 8*

Immigration Act 2014

Section 117B(6) of the 2002 Act, as amended by the 2014 Immigration Act states: *"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*

*(a) the person has a genuine and subsisting parental relationship with a qualifying child; and*

*(b) it would not be reasonable to expect the child to leave the United Kingdom".*

Legal aid

On 1 April 2013, as a result of the Legal Aid Sentencing and Punishment of Offenders Act 2012, Legal Aid for immigration non-asylum cases was cut from scope.

The Law Centre clients in the study were eligible for legal aid as they had been signed up prior to April 2013.

The Law Centre has sought exceptional case funding in 2 cases in 2015, both concerning families. One was successful, the other was rejected twice, on the first occasion the reasons given included that she could represent herself adequately at appeal despite being a victim of domestic violence. We did not have time to prepare and seek a review of the decision due to an upcoming hearing date in the case, but later made a further application for exceptional case funding as the FTT adjourned the hearing. The application it was rejected again; we had carried out pro bono preparation work in the meantime, and the decision maker concluded that the client could represent herself as we had already carried out the work. A review has been sought.

3 Research

Lambeth Law Centre identified and prepared the case studies of 19 clients from the Law Centre’s caseload. Case studies were also obtained from two other agencies, Newcastle Law Centre and Coram Children’s Legal Centre, so we looked at 25 in total. (We unfortunately received few responses to our requests for case studies from other organisations, partly due to lack of capacity, and also to the fact that these organisations were no longer carrying out Legal Aid work, or any immigration work at all.) The bulk of the case studies are therefore from the Law Centre case load. However we believe, from anecdotal evidence provided by the Children’s Society, that they are representative of many clients in other parts of the country.

The study recorded the following information:

1. The type of immigration application made
2. The decision of the Home Office
3. Whether access to public funds was granted on initial application (if made under the Rules) and
4. Where the information was available, the impact, on wellbeing and practicalities, e.g. gaining employment, children attending further or higher education[[4]](#footnote-4) , any health issues.

Six of the case study clients had applied for a derivative residence card as the primary carer of a British citizen child, or parent of a child in education. The remainder of the clients in the case studies had all sought leave to remain under the immigration rules.

We noted that most clients had lived in the UK for many years before they were granted leave to remain or a derivative residence card was issued, (eleven of the clients had resided in the UK for 10 years or more), and that many had had some form of leave to remain or a residence card during the period of their residence. The clients receiving support from Social Services had been doing so for varying periods of time, between 1 and 5 years.

Derivative residence

Of the 6 clients who had applied for a derivative residence card, only one received a positive first instance decision from the Secretary of State. The remainder were all successful on appeal.

The First Tier Tribunal decisions were not consistent; they allowed three of the appeals on Article 8 as well on derivative rights grounds. (One of these cases proceeded to the Upper Tribunal which also allowed the case on EEA and Article 8 grounds; in fact the Home Office conceded the case at the hearing). In the other two cases, there were no explicit findings relating to Article 8, although the First Tier Tribunal judge did find in both cases that it would be unreasonable to expect the British citizen child to relocate to the country of origin of the mother. There was also an inconsistent approach by the Tribunal in relation to applications for permission to appeal to the Upper Tribunal on the grounds that the Tribunal should have made findings on Article 8; one was refused and the other granted permission but the case was stayed pending the outcome of another matter before the UT, in which the determination was only recently promulgated . [[5]](#footnote-5)

In relation to all the appealed cases, even in the ones with explicit Article 8 findings, the Secretary of State eventually issued a derivative residence card only.

We have challenged these decisions; the Secretary of State granted 30 months leave to remain with access to public funds within the course of judicial review proceedings in one case and following pre-action correspondence in two others. One client has mental health problems and one has cognitive difficulties. Another, who has learning difficulties, was refused permission to bring her judicial review and the permission hearing has been put adjourned pending the outcome of a similar case in which judgement is awaited.

Where clients made a subsequent application for leave to remain under the rules, they experienced delays in the Home Office processing the application. One application was initially returned as void, on the basis that the client had been granted a derivative residence card and the Home Office only agreed to consider the application after pre action correspondence. (Applications were also put on hold pending the Home Office review of the fee waiver policy).

Leave to remain

All applicants had sought leave to remain with access to public funds.

Eight of the nineteen cases were granted leave to remain by the Home Office on initial application, but all had a no recourse to public funds condition attached to the grant of leave. From the information available three clients were granted access to public funds on requesting a change of conditions. (Other clients were advised to make the application themselves, or with the help of a social worker, so their outcomes are not known).

Eleven clients were initially refused leave to remain with no right of appeal (all case studies pre-date April 2015). In the Lambeth Law centre cases we carried out pre-action work as children were involved in all refusals, and issued judicial review proceedings (in 2 cases), which resulted in the Secretary of State agreeing to reconsider the applications. Of those reconsiderations, two were granted leave to remain with no recourse to public funds, two were refused with an in-country right of appeal, and only one was granted leave to remain with access to public funds.

One client was given a right of appeal and was eventually granted discretionary leave to remain for one year with access to public funds, following a conclusive grounds decision that she was a victim of trafficking. Judicial review proceedings were issued against the decision, permission was granted and just two weeks before the trial, the Home Office agreed to grant the client ILR. A significant amount of extremely compelling psychiatric evidence as to the need for ILR had been provided in this case.

The clients who were able to find work once they had leave to remain or a residence card were on low wages and in need of benefits to top up their incomes. One was working as a care assistant earning less than minimum wage as she was not being paid her travel time in between each job. Some of the more vulnerable clients were not working.

Children whose mothers had been diagnosed with mental health problems or learning difficulties had, in 2 cases, mental health problems of their own, and the psychological evidence we had linked their conditions to the vulnerability of their parents.

*4 Case study*

Ms N is a Ugandan national. She was orphaned as a child and had an abusive upbringing. She came to the UK as a fiancée of a British citizen. Her partner died before the wedding took place and Ms N became an overstayer. She had a casual relationship with a friend as a result of which she became pregnant. She stayed with a friend until she was made homeless and she and her then six month old baby, (who is a British citizen,) spent three nights sleeping on night buses, before the Red Cross found her a community care solicitor. After correspondence from the solicitor, social services agreed to provide mother and child with accommodation and extremely limited financial support under s17 of the Children Act. She was regularly going without food due to the low level of financial support.

Her son was diagnosed as severely autistic.

In 2011 an application was made for leave to remain under Article 8 with representations seeking a fee waiver; it was returned as invalid for failure to pay a fee. A subsequent application was made for a derivative residence card. This was refused after 2 years. During this period the amount of financial support provided by the local authority was so low that the client spent several weeks living on bread and tea alone, so she could feed her child, and she did not have money to buy nappies for her child. Social services had also refused to pay for a buggy and essential items of clothing for the child. A psychologist’s report obtained for the purpose of her immigration appeal preparation diagnosed the client as suffering from severe depression, severe anxiety and suicidal ideation, and found that she was very vulnerable as a result of her circumstances.

Her appeal was allowed by the FTT under the EEA Regulations, but no findings were made on the Article 8 grounds. The Judge found that there was a genuine and substantive parental relationship with the child, and that his removal from the United Kingdom would not be in his best interests, but did not make an explicit finding as to Article 8. Permission to appeal to the Upper Tribunal was granted, but the hearing was then stayed on the day pending the outcome of another case. We therefore made an (unfunded) application for indefinite leave to remain; she has just been granted 30 months leave to remain with access to public funds and we are considering whether we have sufficient evidence to seek to challenge the grant of limited rather than indefinite leave to remain.

1. *Conclusion*

The Law Centre clients applying under the two schemes are some of the most vulnerable members of society as are their children; being issued with a derivative residence card or leave to remain with no recourse to public funds does not improve their lives for the most part. Applications for a change in the no recourse condition counts as immigration work but it is unfunded and the public funds policy is complex with a large amount of evidence required. In addition the process is lengthy; it can easily take four months or more from an application seeking removal of a no recourse condition to the grant of access to public funds. Every stage of an application is, for this client group, complex and presents significant barriers to those without legal representation. This client group does not have great earning capacity, their immigration cases are no longer within scope for legal aid purposes so they will have to find legal fees as well as fees for the application and immigration health surcharge, or navigate lengthy application forms (the current form is 59 pages long), or seek a fee waiver under a complex policy( requiring a further 19 page form to be completed).

The grant of limited leave to remain with access to public funds brings about an undoubted improvement for many clients but they continue to feel insecure, as do their children. Whilst the academic research to date has been limited to refugees or the children of refugees granted limited leave to remain, it would appear that these findings can also be applied to other children, families or young people with insecure immigration status.

It is clear, that whether deliberately or not, the practice of the UKVI in dealing with these cases is to deny the basic necessities for clients to be able to exercise fundamental human rights and to secure the best interests of their children. There is no evidence that a fast track to settlement would be any sort of pull factor.

Finally, in light of the court’s rather narrow view to date of how children’s best interests are served in terms of the length of leave to be granted, it may be helpful to obtain additional case studies to support any litigation in the future.

Lambeth Law Centre

August 2015

Appendices

1. *Ruiz Zambrano* C-34/09 (findings)

The European Court of Justice in the case of *Ruiz Zambrano* C-34/09, the court regarded continued enjoyment of family life between EU children and third country parents as part of the enjoyment of the substance of EU law rights.

Paragraph 42 - the judgment stated that Article 20 TF EU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.

Paragraph 43 - a refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also refusal to grant such a person a work permit, has such an effect.

Paragraph 44 - it must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents.

1. The Immigration (European Economic Area) Regulations 2006 as amended, Regulation 15A

### Derivative right of residence

**15A.** (1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) P satisfies the criteria in this paragraph if—

(a)P is the primary carer of an EEA national (“the relevant EEA national”); and

(b)the relevant EEA national—

(i)is under the age of 18;

(ii)is residing in the United Kingdom as a self-sufficient person; and

(iii)would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—

(a)P is the child of an EEA national (“the EEA national parent”);

(b)P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c)P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a)P is the primary carer of a person meeting the criteria in paragraph (3) (“the relevant person”); and

(b)the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(4A) P satisfies the criteria in this paragraph if—

(a)P is the primary carer of a British citizen (“the relevant British citizen”);

(b)the relevant British citizen is residing in the United Kingdom; and

(c)the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(5) P satisfies the criteria in this paragraph if—

(a)P is under the age of 18;

(b)P’s primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c)P does not have leave to enter, or remain in, the United Kingdom; and

(d)requiring P to leave the United Kingdom would prevent P’s primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a)“education” excludes nursery education;

(b)“worker” does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and

(c)“an exempt person” is a person—

(i)who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;

(ii)who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;

(iii)to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

(iv)who has indefinite leave to enter or remain in the United Kingdom.

(7) P is to be regarded as a “primary carer” of another person if

(a)P is a direct relative or a legal guardian of that person; and

(b)P—

(i)is the person who has primary responsibility for that person’s care; or

(ii)shares equally the responsibility for that person’s care with one other person who is not an exempt person.

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.

(8) P will not be regarded as having responsibility for a person’s care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person’s care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

1. Immigration Directorate Instruction Family migration: Appendix FM section 1.0b. Family life as a partner or parent and private life: 10 year routes April 2015 (extracts) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421057/PP10b.pdf>

9.3. Decision to grant leave to remain outside the Immigration Rules on the basis of exceptional circumstances

Longer grants of leave

Settlement in the UK is a privilege, not an automatic entitlement. Unless there are truly exceptional reasons, the expectation is that applicants should serve a probationary period of limited leave before being eligible to apply for indefinite leave to remain (ILR) if they meet the requirements.

However, there may be rare cases in which a longer period of leave is considered appropriate, either because it is clearly in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional or compelling reasons to grant leave for a longer period (or ILR).

If the applicant specifically requests a longer period of leave than 30 months, or ILR, and provides reasons as to why they think a longer period of leave or ILR is appropriate in their case, the decision maker must consider this. See Section 11.3 of this guidance for information on how to make this decision if the applicant is a child or a parent.

In cases not involving children (as the main applicant or as dependants), there must be sufficient evidence to demonstrate the individual circumstances are not just unusual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of 30 months’ leave to remain.

In all cases the onus is on the applicant to provide evidence as to why they believe that a longer period of leave (or ILR) is necessary and justified on the basis of particularly exceptional or compelling reasons Where the decision maker considers that a longer period of leave may be justified the case must be referred to a senior caseworker for further consideration. If the decision maker decides that the case is not sufficiently exceptional or compelling, they should grant 30 months’ leave outside the Rules, and explain in the decision letter why this has been granted.

If the applicant does not make a request for a longer than standard period of leave, or if they make a request without providing any reasons for why a longer grant of leave is appropriate, the decision maker should grant 30 months’ leave outside the Rules.

Where leave outside the Rules is being granted for Article 8 family or private life reasons, this grant of leave will be subject to a condition of no recourse to public funds, unless the applicant meets the policy on when such a condition should not be applied. That will generally only be where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income.

11.3.1. Decision to grant leave to remain outside the Immigration Rules on the basis of exceptional circumstances relating to a child’s best interests (extract)

The decision maker must also have regard to the best interests of the child as a primary consideration (but not the only or the paramount consideration) when deciding the period of leave to be granted.

Whilst the expectation is that a period of 30 months’ (2.5 years’) leave will generally be appropriate, there may be cases where evidence is provided demonstrating that a longer period of limited leave (or indefinite leave to remain (ILR)) is required in order to reflect the best interests of the individual child under consideration. A longer period of leave can be granted where the child meets the requirements of the rules (in which case they would be granted leave outside the rules for a longer period than 30 months) or where they fail to meet the requirements of the rules but there are exceptional circumstances in their case that warrant a grant of leave outside the Rules.

There is discretion to grant a longer period of leave where appropriate. There may be cases where a longer period of leave outside the Rules is considered appropriate, either because it is clearly in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional or compelling reasons to grant limited leave for a longer period, or to grant ILR. The onus is on the applicant to establish that the child’s best interests would not be met by a grant of 30 months’ leave to remain and that there are compelling reasons that require a different period of leave to be granted. This means that the decision maker should only consider whether to grant a longer period of leave or ILR if (a) the applicant has specifically asked for this, and (b) they have provided their reasons for why they think a longer period of leave or ILR is appropriate.

In considering the period of leave to be granted, factors such as the length of residence in the UK, whether the child was born in the UK and strong evidence to suggest that the child’s life would be adversely affected by a grant of limited leave rather than ILR are relevant. The conduct of the child’s parent(s) or primary carer and their immigration history, and the public interest in maintaining fair, consistent and coherent immigration controls, are all relevant considerations as to the length of leave granted.

1. UNCRC

Article 3(1) of the Convention on the Rights of the Child [UNCRC] provides as follows:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*.

Article 4 of the Convention on the Rights of the Child provides:

*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.*

General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1):

<http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf>

On 29 May 2013 the UN Committee on the Rights of the Child ( the Committee) issued General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. The Committee identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and implementing all the rights of the child and applies it as a dynamic concept that requires an assessment appropriate to the specific context.

The Committee underlines that the child's best interests is a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.
(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.

1. (see Ajdukovic, M., & Ajdukovic, D. (1993). Psychological well-being of refugee children. *Child Abuse and Neglect, 17,* 843–854.

Almqvist, K., & Broberg, A.G. (1999). Mental health and social adjustment in young refugee children 3½ years after their arrival in Sweden*. Journal of the American Academy of Child and Adolescent Psychiatry, 38,#*

Qouta, S., Punama¨ki, R.L., & Sarraj, E.E. (2005). Mother–child expression of psychological distress in

war trauma.*Clinical Child Psychology and Psychiatry, 10,* 135–156.

Silove et al. (1997). Anxiety, depression and PTSD in asylum-seekers: associations with pre-migration trauma and post-migration stressors*. British Journal of Psychiatry, 170,* 351-357.

Steel et al. (2006). Impact of immigration detention and temporary protection on the mental health of refugees*. British Journal of Psychiatry, 188,* 58-64 [↑](#footnote-ref-1)
2. This is in line with the ECJ in *Alarape v Secretary of State for the Home Department* [2013] EU ECJ C/529/11 [↑](#footnote-ref-2)
3. MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC) (15 April 2015) [↑](#footnote-ref-3)
4. R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57 found that the requirement to have ILR to be eligible for the student loan scheme was discriminatory but that the requirement to have lawful residence for 3 years was justifiable. [↑](#footnote-ref-4)
5. Badewa (ss 117A-D and EEA Regulations) [2015] UKUT 329 (IAC) [↑](#footnote-ref-5)