

Paul Hamlyn Foundation

Routes to regularisation for people without legal status in the UK

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ROUTES TO REGULARISATION FOR PEOPLE WITHOUT LEGAL STATUS IN THE UK

INTRODUCTION

Irregular migration is by definition not recorded by the authorities. However, the most up to date estimates suggest a population of irregular migrants of between 417,000 and 863,000 at the end of 2007.¹

Best estimates are that approximately 120-140,000 children and young people are living in Britain without the legal right to reside under current immigration laws.² Of these, around 65,000 young people were born in Britain, have been educated here and speak English. Research suggests that many are living in conditions of severe poverty.³

This paper gives an overview of possible routes to regularisation for irregular migrants living in the UK, both within and outside the Immigration Rules in the wake of the recent amendments to the Rules. It also considers the barriers which have been created which may impede access to these routes, and discusses possible strategies to surmount them.

The paper was written in late 2012, and was commissioned by the Paul Hamlyn Foundation as part of the Supported Options Initiative⁴, which aims to improve the lives of children and young people with irregular immigration status. It does not purport to be a comprehensive review of all the law in this area and any reader should take into account that the Immigration Rules continue to be amended on a very regular basis. In addition, further cases in the Upper Tribunal (Immigration and Asylum Chamber), the High Court, the Court of Appeal and the Supreme Court are also likely to impact on an individual migrant's entitlement to leave to remain here.

¹ See: <http://www.migrationobservatory.ox.ac.uk/briefings/irregular-migration-uk-definitions-pathways-and-scale> and Gordon I., K. Scanlon, T. Travers, and C. Whitehead. "Economic Impact on London and the UK of an Earned Regularisation of Irregular Migrants in the UK." GLA Economics, Greater London Authority, London, 2009

² 'No Way Out, No Way In: Irregular migrant children and families in the UK', Prof. Nando Sigona, University of Oxford, May 2012
http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf

³ Ibid. Citing research by Amnesty International and the Children's Society.

⁴ See: <http://www.phf.org.uk/page.asp?id=884>

EXECUTIVE SUMMARY

This paper examines the various routes to obtaining leave to remain in the United Kingdom available to irregular migrant children or their family members.

Some of the routes to obtaining leave in the United Kingdom, which used to exist, have been closed by the Secretary of State for the Home Department's amendments to the Immigration Rules in the period between July and December 2012.

One of the major challenges now facing irregular migrant children and their families are the eligibility and suitability criteria introduced in relation to obtaining leave on the basis of long residence and the consequent potential breach to their right to continue to enjoy a private life here. There are also even more criteria which seek to exclude those with a history of criminal offences or criminal associations.

At the same time, the irregular migrant community is becoming more visible within the context of more general and ongoing austerity measures. Friends and family may no longer be able to support irregular migrants, and workplaces, which may be cutting staffing levels, may no longer be prepared to risk employing irregular migrants to undertake casual work.

This paper opens with a brief discussion of the background to these changes. A number of documents lay out the UKBA's long-held view that irregular migrants and criminals exploit the protection provided by the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998 in order to obtain leave to remain, which other potential migrants, who do not breach the Immigration Rules, are not entitled to. This is followed by an examination of the legal status of the Immigration Rules, which do not have the status of an Act of Parliament or even a statutory instrument; they are statements of policy, which give rise to a right of appeal to the First-Tier and Upper Tribunal of the Immigration and Asylum Chamber.

It is within this political and legal context that the remainder of the paper examines the various routes to regularisation open to irregular migrant children under the British Nationality Act 1981, various pieces of statute relating to immigration and asylum law, and the amended Immigration Rules. It then considers the various barriers that have been created which may prevent irregular migrant children from accessing these routes, before discussing possible strategies to ensure that these children do obtain the leave which will protect their human rights.

Possible routes to regularisation covered include:

- a) Obtaining British Citizenship - presently UKBA fee of £631 for an adult and £551 for a child
- b) Citizenship through a parent whilst still a child (fee currently £551)
- c) Discretionary registration of a migrant child (fee currently £551)
- d) Adoption by a British Citizen in the United Kingdom (cost varies)
- e) Refugee status or Humanitarian Protection (no application fee)
- f) Protection as a victim of human trafficking (no application fee)
- g) Leave as a result of policy – as a child in care, who is unlikely to be removed (no application fee payable by local authority)
- h) Leave under the immigration rules – long residence (the application fee for further leave to remain for the main applicant is £561, plus £281 for each dependent. The fee for applying for ILR is £991 for main applicant, plus each dependent is £496.)
- i) The seven year rule (usual application fees of £561⁵ for an application for limited leave to remain and £991⁶ for indefinite leave to remain will apply unless the child is accommodated by a local authority when the fee will usually be waived.)
- j) Leave to remain: as a young person; on the basis of no ties; as a parent; as a partner (application fees range between £561 & £991)

The paper discusses possibilities for fee waivers.

⁵ £578 from 6th April 2013

⁶ £1,051 from 6th April 2013

1. The opportunities for an irregular migrant child or young person and/or his or her family members to obtain leave to remain in the United Kingdom under the Immigration Rules have changed significantly since the Statement of Changes in Immigration Rules HC 194 came into force on 9th July 2012. A further Statement of Changes in Immigration Rules HC 194 came into force on 13th December 2012. Applications previously made under Part 8 of the Rules, in relation to family migration, are now subject to the provisions of Appendix FM to the Rules, if the application was made on or after 9th July 2012. In addition, where Article 8 is raised in the context of a deportation, the claim under Article 8 will only succeed under the Rules where the new requirements are met, regardless of when the notice of intention to deport or the deportation order was served. The Government has also now issued a third Statement of Changes to the Immigration Rules, which means that even if a person applied under the Rules before 13th December 2012, the new amendments to the family related Rules in HC 194 will be considered in any application decided after that date. This will impact on applications under the Seven Year Rule.
2. Nevertheless, the new amended Immigration Rules have created specific routes to regularisation in order to protect private life which some irregular migrant children and/or adults may have established in the United Kingdom. They also respect the right to private and family life of most children who are or who become British citizens. But at the same time, pre-conditions have been imposed on many of these rights, which fall into two main categories; “suitability” and “eligibility”, which restrict these rights to the “deserving” irregular migrant.
3. Criminality or suspected criminality also becomes a much wider bar to regularisation and also widens liability to deportation. This may be of particular significance when a young person or a parent has been charged and convicted of a criminal offence and has had little, if any, access to appropriate legal advice about his or her immigration status whilst in custody or subsequently in immigration detention. There are also a growing number of joint operations between the Immigration Service and the transport or local police targeting irregular migrants.
4. The irregular migrant community has historically been generally invisible because members of this community were concerned about vulnerability to

removal as illegal entrants or overstayers, if they contacted any statutory services. However, current austerity measures being applied by the Government are likely to make this community more visible, as relatives and friends may no longer be able to afford to accommodate and support irregular migrants. In addition, employers may be cutting staffing levels and using family members to run their businesses and may no longer be prepared to risk giving casual work to irregular migrants, because of existing financial penalties if they are caught doing so. However, there will continue to be irregular migrants whose presence will be largely hidden. In particular, this is likely to occur when an individual has been trafficked into the United Kingdom for the purposes of exploitation or has been placed in a private fostering arrangement, which may or may not be exploitative.

BACKGROUND TO THE CHANGES

5. Advisers should read the *Statement of Intent: Family Migration*⁷ and the *Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the European Convention on Human Rights*⁸ and be aware of the content of the Statements of Changes in the Immigration Rules referred to above. These represent an overt exposition of a view long expressed in policy documents and public statements by the UK Border Agency and Home Office ministers that irregular migrants and criminals have sought to exploit the European Convention on Human Rights (“ECHR”) in order to obtain leave to remain, which is denied to other migrants, who abide by the Immigration Rules.
6. In addition, the threshold for the level of criminality which may give rise to liability to deportation or the refusal of leave to remain under the Immigration Rules is now significantly lower. Since 2007 anyone convicted and sentenced to 12 or more months in prison has been liable to automatic deportation⁹. This is of particular relevance to irregular migrants as such sentences may arise as the consequence of the use of false documents to obtain entry to the United Kingdom. A person may also be liable to deportation on the basis that his or her removal is conducive to the public good¹⁰ on account of a series of

⁷ Home Office, June 2012

⁸ Home Office Statement, 13th June 2012

⁹ Section 32 of the UK Borders Act 2007

¹⁰ Section 5(1)(a) of the Immigration Act 1971

less serious offences, or associations with “gangs” or those perceived to be criminals.

7. However, advisers should also make themselves aware of the wealth of domestic and international jurisprudence which protects the rights of irregular migrants and especially those of children. These rights are preserved by the Human Rights Act 1998 and the fact that in a common law system, the judiciary develops the law incrementally case by case drawing on all sources of law and not merely on the Immigration Rules. There are also certain rights which are said to be inherent in public law, such as the right to a fair hearing and an opportunity to meet the case being brought, or the right to have certain fundamental human rights respected.

THE STATUS OF THE IMMIGRATION RULES

8. The Immigration Rules do not have the force of an Act of Parliament or even a statutory instrument. Instead, they are detailed statements by the Secretary of State for the Home Department describing how she intends to exercise her powers to control immigration¹¹. As they are statements of policy, any failure by the Secretary of State for the Home Department to comply with her own published Rules will be unlawful. This could form the basis of a successful claim for judicial review in the High Court or a successful ground of appeal¹² to the First-Tier or Upper Tribunal of the Immigration and Asylum Tribunal.
9. Both the Secretary of State and the Tribunal also have a duty arising from Section 6 of the Human Rights Act 1998 not to make a decision which conflicts with an irregular migrant’s rights under the ECHR. Judges in the Tribunal and the higher appeal courts¹³ are also obliged by Section 2 of that same Act to take account of the jurisprudence of the European Court of Human Rights when deciding any appeal in which ECHR rights are relevant and can allow an appeal brought on the basis that these rights would be breached¹⁴.

¹¹ Odelola v Secretary of State for the Home Department [2009] UKHL 25

¹² Section 84(1)(a) of the Nationality, Immigration and Asylum Act 2002

¹³ Court of Appeal and Supreme Court

¹⁴ Sub-sections 84(1)(c) and (g) of the Nationality, Immigration and Asylum Act 2002 and Section 33(2)(a) of the UK Borders Act 2007

10. This was confirmed by the Upper Tribunal in *MF (Article 8 – new rules) Nigeria*¹⁵ where it held that even if a decision to refuse an Article 8 claim under the new rules is found to be correct, judges must still consider whether the decision is in compliance with a person's human rights under section 6 of the Human Rights Act¹⁶ and in automatic deportation cases, whether removal would breach a person's ECHR rights¹⁷.

THE UK BORDER AGENCY'S VIEW

11. As explained in the documents referred to in paragraph 5 above, it is the Secretary of State for the Home Department's view that the new Immigration Rules reflect the qualified¹⁸ nature of Article 8, setting requirements which properly balance an individual's right to respect for his or her private or family life with the wider public interest in safeguarding the economic well-being of the UK by controlling immigration and protecting the public from foreign criminals. The Explanatory Memorandum to the Statement of Changes states that the Rules now fully reflect the factors which can weigh for or against an Article 8 claim. It also states that they will set proportionate requirements that reflect the Government's and Parliament's view of how Article 8(2) should be applied.
12. However, it is very important to note that this is just the Secretary of State's view and that the Rules were not debated in both houses of Parliament. Instead she chose to initiate a very limited debate in the House of Commons¹⁹ which did not give the changes parliamentary approval. Therefore, it is quite possible for an appeal to be dismissed under the amended Immigration Rules but allowed under the ECHR or other sources of law.

¹⁵ [2012] UKUT 000393 (IAC)

¹⁶ See also *Pankina* [2010] EWCA Civ 719 where it was held that there was no obstacle in principle to the contention that in applying the Immigration Rules the Home Secretary must respect ECHR rights whether or not the rules explicitly introduce them.

¹⁷ Section 33(2)(a) of the UK Borders Act 2007

¹⁸ The right to enjoy a family or private life under Article 8(1) of the ECHR is not an absolute right and the Secretary of State for the Home Department can lawfully breach an individual's rights if she complies with the requirements contained in Article 8(2)

¹⁹ 19th June 2012

REGULARISATION

13. Therefore, advisers need to take the widest possible view of their client's entitlement to regularise his or her immigration status in the United Kingdom and develop a checklist of possible entitlement under nationality, international and domestic law and the evidence needed to prove such an entitlement. This could assist non-legal professionals who are assisting irregular migrants and the migrants themselves to do pre-litigation research and information gathering post 1st April 2013 when (in England and Wales) they will have to fund any legal challenge or appeal on a private basis. However, advisers should make it clear that they are providing information and not legal advice, if they are not accredited by the Bar Council, the Law Society or the OISC to provide such advice.
14. It is also arguable that it is the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which will pose the greatest challenge to irregular migrants wishing to regularise their status and has to be a factor in any strategies for regularisation. On 1st April 2013 the vast majority of immigration cases will "go out of scope" and there will no longer be any entitlement to free legal advice and representation in any immigration related case, apart from claims for asylum and protection under Article 3 of the ECHR, asylum support which includes accommodation, challenges to immigration detention, including bail applications, and the representation of those recognised as victims of trafficking under the National Referral Mechanism or those entitled to indefinite leave to remain as the victims of domestic violence.
15. After 1st April 2013 advisers should keep themselves informed about any remaining or emerging avenues to legal assistance with regularisation. These may include savings schemes to build up a fund to pay for a solicitor or a public access accredited barrister, involvement in a test case, being assisted to apply for leave to remain as an individual and represent him or herself at any appeal, or arguing for exceptional funding from the Legal Services Commission.
16. Advisers should also be alert to all possible routes to regularisation.

OBTAINING BRITISH CITIZENSHIP

17. As a potential starting point, it is important to note that if a person acquires British citizenship by reason of his or her birth or has subsequently been registered or naturalised as a British citizen, he or she is not subject to immigration control and does not need leave to enter or remain in the United Kingdom. This is because a British citizen has a right of abode in the United Kingdom²⁰ and is free to live in and to come into and leave the United Kingdom at will²¹.
18. There are a number of different situations in which an irregular migrant may have the right to apply to register as a British citizen.

BRITISH CITIZENSHIP AFTER 10 YEARS

19. Section 1(4) of the British Nationality Act 1981 provides anyone²² who is born in the United Kingdom on or after 1st January 1983 and who lives here for the first ten years of his or her life with the right to register as a British citizen. The success of his or her application does not depend on him or her having had leave to remain for any part of this time but he or she will have to show that he or she was not absent from the United Kingdom for more than 90 days in any one of those first ten years and that he or she is of good character.
20. Applications should be made to the Nationality Directorate of the UK Border Agency in Liverpool on Application Form T; the application fee is presently £631 for an adult and £551 for a child. It will be necessary to submit a birth certificate and the Secretary of State for the Home Department will also expect to be provided with medical cards and records and letters from friends and professionals to show that the individual continued to be resident here until the age of five. She will also expect to be provided with school records to show that the person was resident here between the ages of five and ten²³. It will also be necessary to submit two references from adults who have known the applicant for at least three years²⁴. However, it is not necessary to obtain

²⁰ Section 2(1)(a) of the Immigration Act 1971

²¹ Section 1(1) of the Immigration Act 1971

²² Whether they are a child or an adult

²³ UK Border Agency's Nationality Instructions @ paragraph 8.3.6 of Chapter 8

²⁴ UK Border Agency's Nationality Instructions @ paragraph 8.3.8 of Chapter 8

the consent of the individual's parents²⁵, who may not be present here in the case of an unaccompanied or separated child, for example.

CITIZENSHIP THROUGH A PARENT WHILST STILL A CHILD

21. A child who is born in the United Kingdom only acquires British citizenship at the time of his or her birth if his or her mother or father²⁶ is a British citizen or settled²⁷ at the time of his or her birth²⁸. However, he or she will also be able to apply to register as a British citizen if his or her mother or father becomes a British citizen or settled in the United Kingdom at any time up until his or her eighteenth birthday²⁹. This can be an important provision for some irregular migrant children, where they have been separated from one parent, who has subsequently been granted indefinite leave to remain in the United Kingdom or naturalised as a British citizen. The Application should be made to the Nationality Directorate in Liverpool on Application Form MN1 and the application fee will be £551.

DISCRETIONARY REGISTRATION OF A MIGRANT CHILD

22. The Secretary of State for the Home Department also has a wide discretion to register any foreign child as a British citizen³⁰. This discretion is usually exercised when it is clear that the child's future lies in the United Kingdom and, therefore, an application would be appropriate if an unaccompanied or separated child is living with, or has been placed, with British citizens and it is likely that he or she will remain there for the foreseeable future or he or she is an older teenager who has lived here for most of his or her life³¹. The provision can also be used to register the illegitimate child of a British citizen father, who was born here before 1st July 2006 and, therefore, did not automatically acquire British citizenship³². Applications should be made to the Nationality Directorate in Liverpool on Application Form MN1 and the

²⁵ UK Border Agency's Nationality Instructions @ paragraph 8.6 of Chapter 8

²⁶ Since 1st July 2006, when the definition of a father under Section 50 (9A) of the British Nationality Act 1981 was extended to include an unmarried father

²⁷ Section 33(2A) of the Immigration Act 1971 states that a reference to a person being settled in the United Kingdom is a reference to him or her being ordinarily resident here without being subject under immigration law to any restriction on the period for which he or she can remain here

²⁸ Section 1(1) of the British Nationality Act 1981

²⁹ Section 1(3)(a) of the British Nationality Act 1981

³⁰ Section 3 of the British Nationality Act 1981.

³¹ UK Border Agency's Nationality Instructions @ paragraph 9.17.11 of Chapter 9

³² Under Section 1(1) of the British Nationality Act 1981

application fee is £551. A child, who is ten or over, will also have to show that he or she is of good character.³³

ADOPTION

23. Where an irregular migrant child has been separated from his or parents and it is reasonably believed that they are dead or that it would not be in his or her best interests to be returned to their care, adoption by a British citizen in the United Kingdom may also be a means of regularising the child's immigration status. This is because he or she would acquire British citizenship under Section 1(5)/1(5A) of the British Nationality Act 1981 as soon as the adoption order was made. (It would not be necessary to make an additional application to register or naturalise as a British citizen. The only other application, which would have to be made, would be one for a British passport to confirm his or her British citizenship for other purposes such as travel.)
24. The Adoption and Children Act 2002 does not require a child to be settled here, or even to have leave to remain here, before an application is made for him or her to be adopted. But one of the adoptive parents has to be domiciled here and both of them have to have been habitually resident here for not less than a year when the application is made to adopt the child³⁴. Furthermore, the Adoption (Intercountry Aspects) Act 1999 and the Adoptions with a Foreign Element Regulations 2005 and consequent restrictions³⁵ in the Adoption and Children Act 2002 only apply when a child has been brought into the United Kingdom for the purpose of adoption. They do not apply if a British citizen is adopting a foreign citizen child who is already here.
25. The paramount consideration for the family court considering the application for adoption will be the child's welfare throughout his or her life³⁶ and as long as an application for adoption is made before a child becomes 18 the actual order can be made when the child is between the ages of 18 and 19³⁷. The consent of the child's parents can be dispensed with if they are incapable of

³³ UK Border Agency's Nationality Instructions @ paragraph 9.1.1 of Chapter 9

³⁴ Section 49 of the Adoption and Children Act 2002

³⁵ To have a Home Study report and approval by the authorities as an adoptive parent before the child arrives in the United Kingdom

³⁶ Section 1(2) of the Adoption and Children Act 2002

³⁷ Section 47(9) of the Adoption and Children Act 2002

giving consent or the welfare of the child requires consent to be dispensed with³⁸.

26. In at least one location in England, unaccompanied or separated children have been adopted by their foster carers and have acquired British citizenship. There have been no similar outcomes in Scotland, where the Scottish Refugee Council has even found that it is difficult to obtain foster parents for these children and only 13% are in foster placements with the rest being in residential accommodation or supported accommodation.
27. A prospective adopter may have to ask children's services to undertake a home study report on their suitability to adopt the child. He or she will also have to pay a court fee to make an adoption order unless he or she is entitled to an exemption on the basis of being in receipt of certain benefits. It will also usually be necessary to pay for a solicitor and/or barrister to assist with the application. Therefore, this is a not a cheap option and may in some circumstances cost thousands of pounds.

REFUGEE STATUS

28. It should always be remembered that an irregular migrant child or young person or his or her parent may be entitled to international protection under the Convention Relating to the Status of Refugees. This could arise when he or she has been poorly advised or represented in the past and, as a consequence, his or her application was refused and any subsequent appeal dismissed. In such circumstances, he or she could make a fresh application for asylum³⁹ if the basis of the application is significantly different to the previous application on the basis of the material or fear now being relied upon and there is now a realistic prospect of success. It may also be that subsequent case law indicates that an individual in a class into which an irregular migrant may fall is entitled to refugee status⁴⁰.
29. It may also be the case that an irregular migrant child has never previously had the opportunity to apply for international protection as a refugee in his or

³⁸ Section 52 of the Adoption and Children Act 2002

³⁹ Paragraph 353 of the Immigration Rules

⁴⁰ See for example *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 where the Supreme Court upheld an individual's right to be politically neutral as well as to not hide his or her political opinions

her own right. For example, a child may be at serious risk of persecution in his or her country of origin on account of forced marriage, female genital mutilation or enforced recruitment as a child soldier but no-one has considered this aspect of the family's case. If a child's application were to be successful, he or she would be granted leave to remain for an initial period of five years and could then apply for further leave.

30. Applicants for asylum do not have to pay an application fee.

HUMANITARIAN PROTECTION

31. An irregular migrant may also be entitled to Humanitarian Protection under the Immigration Rules⁴¹ on the basis that there is a serious risk of serious harm if he or she is removed from the United Kingdom. In particular, there may be a serious and individual threat to his or her life because of indiscriminate violence in a situation of international or internal armed conflict. Age and gender will be factors which will be taken into account when considering whether the acts to which he or she may be exposed would amount to serious harm⁴². Applicants in this category do not have to pay an application fee.

NUMBERS GRANTED REFUGEE STATUS OR HUMANITARIAN PROTECTION

32. Statistics published by the UK Border Agency indicate that very few unaccompanied or separated children are granted international protection. For example, in 2011, 959 decisions were made on applications for international protection by those who were still children. Only 186 of them were granted asylum and 6 others were granted Humanitarian Protection. (In addition, there were 374 young people/potential children who were age disputed.)
33. Anecdotal evidence suggests that the success rate for those in the Scottish Guardianship Pilot Project were far higher. 70% of the 93 children in the Pilot Project were granted international protection. Of these, 3 were granted Humanitarian Protection and the rest were granted refugee status.

⁴¹ Paragraph 339C

⁴² Paragraph 339J(iii) of the Immigration Rules

34. Statistics are not available for the number of children in migrant families who have been granted refugee status or Humanitarian Protection.

PROTECTION AS A VICTIM OF HUMAN TRAFFICKING

35. The United Kingdom ratified the Council of Europe Convention on Action Against Trafficking in Human Beings in December 2008 and it came into force here on 1st April 2009. Article 13 of the Convention requires Member States to provide an initial period of recovery and reflection if there are reasonable grounds to believe that he or she has been a victim of trafficking. The Secretary of State for the Home Department currently grants temporary admission for 45 days where an individual has been referred into the National Referral Mechanism and there are reasonable grounds to believe that he or she is a victim of human trafficking. She also uses this period of time to reach a conclusive decision as to whether the individual is a victim of human trafficking. If this is the case, the Secretary of State for the Home Department has a discretion to grant the victim a residence permit for an initial period of a year under Article 14 of the Convention. There are two different basis for such leave. The first is that he or she is co-operating in a police investigation into or prosecution of his or her trafficker. The second is that a residence permit is necessary due to his or her personal circumstances. This could include pregnancy, an illness, a course of medical or psychiatric treatment or the completion of an educational or training course. These residence permits are renewable and where the victim is a child, the initial and any subsequent permits should be issued in accordance with the child's best interests.
36. The EU Trafficking Directive will come into force in 2013 and Article 16.2 will oblige the Secretary of State for the Home Department to take necessary measures to find a durable solution for any child victim, which is in their best interests. Arguably this may often be achieved by granting them indefinite leave to remain here.
37. Victims of human trafficking do not have to pay an application fee to be referred into the National Referral Mechanism or benefit from the EU Trafficking Directive.

STATELESSNESS

38. The fact that an irregular migrant was born here will not necessarily mean that they are stateless. Many constitutions of foreign states and/or their nationality acts will contain provisions to enable children and young people to acquire citizenship, if their mother or father was or is a citizen of that state. His or her birth may have to be registered at the appropriate diplomatic mission in London and his or her right to citizenship of that foreign state will depend on proving to that mission that he or she has or had a parent who is or was a national, as claimed.
39. However, there may be children and young people who were abandoned here at a young age without any identity papers and who cannot prove their nationality. They may well be stateless. The United Kingdom has acceded to the Convention Relating to the Status of Stateless Persons and Article 1.1 of the Convention states that “for the purposes of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”.
40. However, the United Kingdom has not yet⁴³ established a statelessness determination procedure under this Convention and, therefore, there are no set procedures for asserting protection under this Convention. In addition, although the Convention obliges a State Party to provide a person who is not considered a national of any State rights to housing, education and access to the employment market subject to certain conditions, it does not explicitly provide a right to reside. However, there is a growing international acceptance that a right to reside is implicit in the obligation in international law to provide a stateless person with the right to live with dignity and security⁴⁴ and that this includes being provided with citizenship.
41. Article 7(1) of the Convention on the Rights of the Child also states that a child has the right from birth to acquire a nationality. Article 7(2) goes on to state that States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant

⁴³ The UK Border Agency was drafting amendments to the Immigration Rules in early 2013 in order to provide leave to remain for up to three years in the first instance to an individual recognised by the Secretary of State for the Home Department as a stateless person

⁴⁴ See Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons Geneva 6-7 December 2010 and the UNHCR Guidelines on Statelessness No. 2 Procedures for Determining whether an individual is a Stateless Person HCR/GS/12/02, 5th April 2012

international instruments in this field where the child would otherwise be stateless. Therefore, it is arguable that if an irregular migrant child is *de facto* stateless, the Secretary of State for the Home Department should register him or her as a British citizen using her powers under Section 3 of the British Nationality Act 1981.

THE CONVENTION ON THE RIGHTS OF THE CHILD

42. The United Nations Convention on the Rights of the Child contains the widest exposition of children's rights in human rights law and has been ratified by all member states of the United Nations except for Somalia, South Sudan and the United States of America. The United Kingdom ratified the CRC in December 1991 but initially entered a general reservation relating to the entry, stay in and departure from the United Kingdom of children subject to immigration control. This reservation was lifted in November 2008.
43. Article 3.1 of the CRC also contains a principle that dictates the manner in which all the other rights in the Convention should be applied as well as providing an overarching substantive right. It states that:

“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”.
44. In paragraph 23 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 Lady Hale recognised that Article 3 was a binding obligation in international law. She also found that the spirit, if not the precise language, of Article 3 had been translated into our national law by Section 11 of the Children Act 2004 and Section 55 of the Borders, Citizenship and Immigration Act 2009.
45. The Convention contains many rights which also exist in convention such as the Refugee Convention, the ECHR and the Trafficking Convention. However, it also contains a raft of other socio-economic rights, which arguably entitle irregular migrant children to additional protection and status if a return to their country of origin would expose them, for example, to destitution, famine, serious ill-health or deprive them of educational opportunities. The argument

would be similar to that being raised internationally in relation to the Statelessness Convention, which is that to give the Convention its true meaning, leave to remain should be provided even though the Convention does not explicitly provide for a grant of leave.

46. At the moment the Immigration Rules do not provide for leave on this basis.

LEAVE AS A RESULT OF A POLICY

47. In addition, if an irregular migrant child is taken into care under Section 31 of the Children Act 1971 and a final care order is made in favour of a local authority with a care plan for the child to be placed here, it is the Secretary of State for the Home Department published policy to grant that child limited leave to remain in the United Kingdom⁴⁵. If there is a realistic possibility that the child will be returned to his or her parents or country of origin in the future, the child may be granted limited leave to remain for 12 months. Where there is no prospect of the child leaving the United Kingdom, the child is likely to be granted limited leave to remain for 4 years and then, if there is still no prospect of him or her being removed to his or her country of origin, indefinite leave to remain. The local authority will not be charged an application fee when it applied for such leave on behalf of a child.

LEAVE UNDER THE IMMIGRATION RULES

LONG RESIDENCE

48. Prior to 9th July 2012 an irregular migrant could apply for indefinite leave to remain in the United Kingdom under paragraphs 276B(i)(b) if he or she had been living in the United Kingdom for a continuous period of 14 years or more, even if he or she had not had leave to remain during all or part of that period of time. However, this provision was deleted from the Rules by paragraph 84 of the Statement of Changes in Immigration Rules HC 194.
49. Irregular migrants can now apply for limited leave to remain on the basis that they have established a private life in the United Kingdom under the new paragraph 276ADE(iii) of the Immigration Rules, introduced by HC 194. However, the conditions for obtained such leave are complex and demanding.

⁴⁵ Paragraph 8 of Annexe M to Chapter 8 of the Immigration Directorate Instructions , July 2012

The time period before even an application for limited leave can be made is increased from 14 to 20 years of continuous residence and any period of imprisonment will be not count towards this period of qualification.

50. The applicant will also have to meet a number of suitability criteria under S-LTR 1.3 to 1.5 of Appendix FM to the Immigration Rules and, therefore, will not be entitled to leave under this Rule if he or she is subject to a deportation order⁴⁶, has been convicted of an offence for which they have been sentenced to imprisonment for at least four years⁴⁷, has been convicted of an offence for which they have been sentenced to imprisonment for less than four years but at least twelve months⁴⁸, his or her offending has caused serious harm or he or she is a persistent offender who shows particular disregard for the law⁴⁹.
51. An applicant will also not be entitled to limited leave to remain under this Rule if any of Sections S-LTR 1.6 – 2.3 of Appendix FM apply and his or her presence is not conducive to the public good because of his or her conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, associations, or other reasons, which make it undesirable to allow him or her to remain in the United Kingdom⁵⁰. Limited leave will also be refused if the applicant has failed without reasonable excuse to attend an interview when required to do so, to provide specified information, including physical data, when required to do so or to undergo a medical examination, or provide a medical report, when required to do so⁵¹. In addition, leave will be refused if the applicant owes £1,000 or more to the NHS for charges made for hospital treatment to which he or she was not entitled as an irregular migrant⁵².
52. The applicant will also not be entitled to limited leave to remain if, whether or not to his or her knowledge, false information, representations or documents

⁴⁶ S-LTR.1.2 of Appendix FM to the Immigration Rules

⁴⁷ Paragraph S-LTR.1.3 of Appendix FM to the Immigration Rules

⁴⁸ Paragraph S-LTR.1.4 of Appendix FM to the Immigration Rules

⁴⁹ Paragraph S-LTR.1.5 of Appendix FM to the Immigration Rules

⁵⁰ Paragraph S-LTR.1.6 of Appendix FM of the Immigration Rules

⁵¹ Paragraph S-LTR.1.7 of Appendix FM of the Immigration Rules

⁵² Paragraph S-LTR.2.3 of Appendix FM of the Immigration Rules – if treatment took place in the past when an applicant was an asylum seeker, no charges should have been made for any hospital treatment – National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989/306) @ regulation 4(1)(c)

have been submitted or material facts have not been disclosed in relation to the private life application⁵³.

53. If he or she meets these stringent criteria, he or she will be granted limited leave to remain for up to 30 months. Indefinite leave to remain on the grounds of the need to protect an applicant's right to continue to enjoy his or her private life will only be granted if an individual has completed 10 years limited leave on the grounds of private life⁵⁴. The Secretary of State for the Home Department will disregard any periods of overstaying of less than 28 days between periods of limited leave to remain and any periods until further leave is granted once an application has been made⁵⁵.
54. If an irregular migrant meets all the above requirements, he or she will be granted limited leave to remain in the United Kingdom on the basis of his or her right to continue to enjoy a private life here⁵⁶. He or she will also have to show that he or she continues to be able to meet all of the criteria for being granted limited leave in this capacity⁵⁷. He or she will only become entitled to indefinite leave to remain if he or she continues to meet these requirements and is given limited leave to remain for a continuous period of ten years. He or she will also have to show that he or she has no unspent convictions and has sufficient knowledge of the English language and life in the United Kingdom, unless he or she is under 18 or over 64 and that there are no reasons why it would be undesirable to grant the applicant indefinite leave to remain based on his or her conduct, character or associations or because he or she represents a threat to national security⁵⁸.
55. If an applicant does have an unspent conviction and/or cannot show sufficient knowledge of the English language or Life in the United Kingdom but meets the other criteria for indefinite leave to remain, he or she may be granted limited leave to remain for a period up to 30 months on the grounds of private life, subject to any conditions which the Secretary of State for the Home Department may deem appropriate⁵⁹.

⁵³ Paragraph S-LTR.2.2 of Appendix FM to the Immigration Rules

⁵⁴ Paragraph 276DE(a) of the Immigration Rules

⁵⁵ Paragraph 276DE(a) of the Immigration Rules

⁵⁶ Paragraph 276BE of the Immigration Rules

⁵⁷ Paragraph 276DE(b) of the Immigration Rules

⁵⁸ Paragraph 276DE of the Immigration Rules

⁵⁹ Paragraph 276DG of the Immigration Rules

56. The application fee for the main applicant applying for further leave to remain by post is £561 and the fee for each of his or her dependents is £281. The application fee for the main applicant applying for indefinite leave to remain by post is £991 and the fee for each of his or her dependents is £496.

SEVEN YEAR RULE

57. The “Seven Year Concession” has also been brought within the Immigration Rules⁶⁰. Therefore, an applicant who is under 18 and has lived in the United Kingdom for a continuous period of at least 7 years (discounting any period of imprisonment) may be entitled to limited leave to remain in the United Kingdom. However, he or she will have to meet the suitability requirements referred to in paragraphs 47 to 49 above. In addition, from 13th December 2012⁶¹ he or she will also have to show that it would not be reasonable to expect him or her to leave the United Kingdom.
58. The UK Border Agency has provided guidance⁶² to its caseworkers in relation to the test to be applied with regard to whether it would be reasonable to expect the child to return to his or her country of origin. The factors they are advised to take into account include:
- any significant risk to the child’s health, for example, where a child is undergoing a course of treatment for a life threatening or serious illness and treatment would not be available in a country to which he or she would be returning;
 - whether it would be reasonable for the child to return with his or her parents;
 - any wider family ties in the United Kingdom;
 - whether he or she is a citizen of the country he or she may return to;
 - whether he or she has previously visited or lived in that country;
 - any family and friendship networks there;
 - any relevant cultural ties there and whether the child understands that culture having been part of a diaspora here;
 - his or her ability to speak, read and write a language spoken there;
 - whether he or she ever attended school in that country.

⁶⁰ Paragraph 276ADE(iv) of the Immigration Rules

⁶¹ As a result of the Statement of Changes in Immigration HC 760

⁶² Guidance on application of EX1 – consideration of child’s best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do not apply

59. However, this guidance is not determinative and advisers should also refer to current Article 8 case law. This has found that the best interests of the child is a broad notion and its assessment requires the weighing up of diverse factors. In the immigration context the best interests of the child has been identified by the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department*⁶³, the Court of Appeal in *AJ (India)*⁶⁴ and by the Upper Tribunal in *EA (Article 8 – best interests of child) Nigeria*⁶⁵ as a primary consideration.
60. In addition, whilst consideration of the best interests of the child is an integral part of the Article 8 balancing exercise and not something apart from it, *ZH (Tanzania)* makes clear that it is a matter which has to be addressed first as a distinct inquiry. Factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration.
61. In addition, what is required in order to consider the best interests of the child is an “overall assessment” and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment. Consideration of the best interests of the child cannot be reduced to a mere yes or no answer to the question of whether removal of the child and/or relevant parent is or is not in the child’s best interests. Factors pointing for and against the best interests of the child being allowed to stay or go must not be overlooked.
62. In *EA (Article 8 (best interests of the child) Nigeria*⁶⁶ the Upper Tribunal held that the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, the child’s removal with his parents does not involve any separation of family life. However, absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed,

⁶³ [2011] UKSC 4

⁶⁴ [2011] EWCA Civ 1191

⁶⁵ [2011] UKUT 00315 (IAC)

⁶⁶ 2011] UKUT 000315

friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.

63. The Tribunal went on to explain that during a child's very early years, he or she will be primarily focused on self and those caring for him or her. Long residence, once the child is likely to have formed ties outside the family, is likely to have greater impact on his or her well being.
64. If the child does meet the requirements in the Immigration Rules he or she will be entitled to limited leave to remain for up to 30 months in the first instance and then to indefinite leave to remain after ten years, as explained in paragraphs 53 – 54 above. The usual application fees of £561⁶⁷ for an application for limited leave to remain and £991⁶⁸ for indefinite leave to remain will apply unless the child is accommodated by a local authority when the fee will usually be waived.

LEAVE TO REMAIN AS A YOUNG PERSON

65. An applicant who is between the ages of 18 and 25 and who has spent at least half of his or her life living continuously in the United Kingdom, discounting any periods of imprisonment, is also potentially entitled to limited leave to remain here on the basis of his or her private life⁶⁹. But he or she will still have to meet the suitability criteria outlined above in paragraphs 50 – 52.
66. If he or she does meet the criteria he or she will be entitled to up to 30 months leave to remain in the first instance. Paragraph 276BE and 276DE do not explain how a young person who no longer falls within the age range of 18 to 25 after his or her initial period of limited leave can apply for further limited leave to remain and eventually qualify for indefinite leave to remain. It must be presumed that this is a lacuna in the Rules, as it would not be reasonable to assert that someone of 26 or over who had spent more than half of his or her life in the United Kingdom would have any less a right to remain on private life grounds than someone of 25.

⁶⁷ £578 from 6th April 2013

⁶⁸ £1,051 from 6th April 2013

⁶⁹ Paragraph 276ADE(v) of the Immigration Rules

67. Until this is resolved advisers should apply for further leave under the Immigration Rules but also make full representations based on Article 8 case law.
68. The young person will have to pay an application fee of £561⁷⁰ when applying for limited leave to remain and £991⁷¹ when applying for indefinite leave to remain.

LEAVE TO REMAIN ON THE BASIS OF NO TIES

69. An adult who has lived in the United Kingdom for a continuous period of less than 20 years (discounting any period of time spent in prison) is also potentially entitled to limited leave to remain in the United Kingdom, if he or she has no social, cultural, family or other ties with the country to which he or she would have to go if he or she was required to leave the United Kingdom.
70. Again, he or she will also have to meet the suitability criteria described in paragraphs 50 – 52 above. Advisers should also ensure that sufficient evidence is submitted to show that the adult does not have remaining ties with his or her country of origin. This may necessitate the provision of death certificates for family members who were living there or copies of passports and visas showing that they are now living elsewhere.
71. As can be seen from the advice given to caseworkers in relation to whether it is reasonable to return a child to a country of origin, which is referred to in paragraph 58 above, the UK Border Agency will also take into account where an applicant had been living whilst in the United Kingdom. Therefore, it will be more difficult to establish that an adult has no ties when he or she lives within a diaspora community here, speaking a language used in his or her country of origin, attending the same kind of place of worship and maintaining similar cultural and social ties.
72. If the criteria can be met, the adult will be entitled to up to 30 months leave in the first instance and then indefinite leave to remain after 10 years, as explained in paragraphs 53 – 54 above. He or she will have to pay an application fee of £561⁷² for any application for limited leave to remain and his

⁷⁰ £578 from 6th April 2013

⁷¹ £1,051 from 6th April 2013

⁷² £578 from 6th April 2013

or her dependents will have to pay application fees of £281⁷³ each. He or she will then have to pay £991⁷⁴ to apply for indefinite leave to remain and his or her dependents will have to pay £496⁷⁵ each.

LEAVE TO REMAIN AS A PARENT

73. If the minor child of a migrant family is a British citizen or has been granted indefinite leave to remain and is, therefore, settled here, a parent with irregular migration status may be entitled to leave to remain here if he or she has sole responsibility for that child⁷⁶. He or she may also be entitled to leave to remain if the child is living with a parent or carer who is a British citizen or who is settled here, and that adult is not the applicant's partner and the applicant would not be entitled to leave to remain as a partner under Appendix FM⁷⁷. If the child is living with someone else the applicant parent will have to show that he or she has access rights to the child and that he or she is taking and intends to continue to take an active role in that child's upbringing⁷⁸. The Secretary of State for the Home Department has used the term "access" but the family court now uses the term "contact". Therefore, an irregular migrant parent should provide evidence to establish that he or she has been granted a contact order by the family court or that the other parent has reached an agreement about contact or that contact is provided for in a care plan if the child is placed with a foster carer under a final care order. The contact will also need to be direct contact, as indirect contact by letter or telephone could be maintained even if the parent were to be removed from the United Kingdom. It is also unlikely that an application would succeed if contact was only to take place once or twice a year, as the parent may be expected to visit the United Kingdom for such contact.
74. However, a parent is not entitled to such leave⁷⁹ if he or she is in the United Kingdom as a visitor, has only been granted leave for six months or less or is on temporary admission⁸⁰. He or she will also not be entitled to leave under

⁷³ £437 from 6th April 2013

⁷⁴ £1,051 from 6th April 2013

⁷⁵ £788 from 6th April 2013

⁷⁶ Paragraph E-LTRPT.2.3(a) of Annexe FM to the Immigration Rules

⁷⁷ Paragraph E-LTRPT.2.3(b) of Annexe FM of the Immigration Rules

⁷⁸ Paragraph E-LTRPT.2.4 of Annexe FM to the Immigration Rules

⁷⁹ Paragraph E-LTRPT.3.1 of Annexe FM to the Immigration Rules

⁸⁰ Which may be the case if the parent is an asylum seeker or has had an application for asylum refused

this Rule if he or she is here in breach of the Immigration Rules, disregarding any period of overstaying for a period of 28 days or less⁸¹.

75. If the parent cannot meet the immigration status requirements referred to in paragraph 74 above, he or she will only be entitled to remain under the Immigration Rules if the child is in the United Kingdom and is a British citizen or has lived in the United Kingdom for a continuous period of seven years prior to the parent's application for leave and the parent can establish that he or she has a genuine and subsisting relationship with him or her⁸². He or she will also have to show that it would not be reasonable for the child to leave the United Kingdom⁸³, which may be fairly easy to establish if he or she is settled in the care of another parent.
76. The guidance to case workers referred to in paragraph 58 above will apply. As will the case law referred to in paragraphs 59 to 63 above. The test as to whether a parental relationship is genuine and subsisting derives from cases involving parents who have applied for contact with their children after being served with removal directions or deportation orders.
77. A parent will have to pay an application fee of £561⁸⁴ when applying for limited leave to remain and £991⁸⁵ when applying for indefinite leave to remain.

LEAVE TO REMAIN AS A PARTNER

78. A person who marries or enters into a civil partnership with a British citizen, a person who is settled here or someone who has been granted refugee status or Humanitarian Protection may be able to apply for leave to remain on this basis⁸⁶ if he or she meets the suitability criteria contained in paragraph S-LTR of Annex FM to the Immigration Rules, referred to in paragraphs 50 and 51 above. However, he or she will also have to show that he or she is not in the United Kingdom in breach of immigration law (disregarding any period of

⁸¹ Paragraph E-LTRPT.3.2 of Annex FM to the Immigration Rules

⁸² Section EX.1/(a)(i) of Annex FM to the Immigration Rules

⁸³ Section EX.1(a) (ii) of Annex FM to the Immigration Rules

⁸⁴ £578 from 6th April 2013

⁸⁵ £1,051 from 6th April 2013

⁸⁶ Paragraph E-LTRP.1.2 of the Immigration Rules

overstaying of 28 days or less) unless paragraph EX1 of Annexe FM of the Immigration Rules applies.⁸⁷.

79. Paragraph EX1 applies if the applicant has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen, is settled here or has been granted refugee status or Humanitarian Protection and there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom.
80. An applicant for limited leave to remain will have to pay an application fee of £561⁸⁸ and an applicant for indefinite leave will have to pay £991⁸⁹.

CRIMINALITY

81. Applications for leave under the Immigration Rules may also be adversely affected by the fact that the criminality of one member of the family has led to them being subject to a deportation order. The Explanatory Memorandum to the Statement of Changes HC 194 states that “the new Immigration Rules set clear criteria for how an applicant’s criminality will impact on the scope for them to be granted leave to remain in the United Kingdom on the basis of their family or private life”.
82. The Rules state that where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State must also make a deportation order in accordance with section 32 of the UK Borders Act 2007 where a person has been sentenced to at least 12 months in prison.
83. However, paragraph 397 of the Immigration Rules goes on to recognise that deportation cannot proceed if it would be a breach of the ECHR, or the Refugee Convention. But it also states that where no such breach would occur it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other considerations.
84. Where the deportee has been sentenced to at least 12 months but less than four years for a criminal offence in the past or if the Secretary of State for the

⁸⁷ Paragraph E.LTRP.2.2

⁸⁸ £578 from 6th April 2013

⁸⁹ £1,051 from 6th April 2013

Home Department views him or her as someone who has caused serious harm or who is a persistent offender who shows particular disregard for the law, one factor which may stop their deportation is the existence of a genuine and subsisting parental relationship with a child who is a British citizen or who had lived here continuously for 7 years or more prior to the relevant immigration decision. However, he or she will also have to establish that it would not be reasonable to expect that child to leave the United Kingdom and there is no other family member who is able to care for him or her here⁹⁰. There is no indication how the Secretary of State for the Home Department intends to apply the latter test without the assistance of a home study report by a social worker or findings by the family court. It will require a professional assessment of whether the child's welfare would be safeguarded and promoted by that alternative carer before Section 55 of the Borders, Citizenship and Immigration Act 2009 could be complied with.

85. Deportation may also not be proceeded with if the deportee has been sentenced to less than four years imprisonment, has caused serious harm or is not a persistent offender who has shown particular disregard for the law but has a genuine and subsisting relationship with a partner who is in the United Kingdom and who is a British citizen or settled here or has been granted refugee status or Humanitarian Protection. He or she will also have to establish that his or her partner has lived in the United Kingdom with valid leave continuously for at least 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and that there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom⁹¹.
86. Deportees who have been sentenced to more than 12 months or less than four years imprisonment, who have caused serious harm or have been persistent offenders who have shown particular disregard for the law, may also be permitted to remain. This may be where he or she has lived continuously in the United Kingdom for at least 20 years immediately preceding the immigration decision (discounting any period of imprisonment) and he or she has no social, cultural or family ties with the country to which he or she would be removed⁹². It may also be where the deportee is under the age of 25, has spent at least half of his or her life living continuously in the

⁹⁰ Paragraph 399(a) of the Immigration Rules

⁹¹ Paragraph 399(b) of the Immigration Rules

⁹² Paragraph 399A(a) of the Immigration Rules

United Kingdom immediately preceding the date of the immigration decision (disregarding any periods of imprisonment) and has no social, cultural or family ties in the country to which he or she will be removed⁹³.

87. If the potential deportee is permitted to stay he or she will be granted leave to remain for 30 months. He or she will then be able to apply for further limited leave if he or she still meets the criteria above⁹⁴. He or she will have to pay an application fee of £561⁹⁵ for each application.

RESIDUAL RIGHTS UNDER THE ECHR

88. As stated above, even if an irregular migrant does not meet the criteria for leave to remain under the amended Immigration Rules, both the Secretary of State for the Home Department and the Tribunal will have to consider whether a failure to grant an irregular migrant leave to remain and/or their removal from the United Kingdom will give rise to a breach of the European Convention on Human Rights and, in particular, Article 8 of that Convention.
89. In doing so they will take into account some of the seminal cases in the European Court of Human Rights. These include *Boultif v Switzerland*⁹⁶. In this case the Court considered whether the applicant and his wife could live together in Algeria. The applicant's wife was a Swiss national. She could speak French and had contact by telephone with her mother-in-law in Algeria but she had never lived in Algeria and she had no other ties with that country and did not speak Arabic. The Court decided that she could not be expected to follow her husband, the applicant, to Algeria. The Court also held that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland.
90. In *Uner v Netherlands*⁹⁷ the Court repeated two criteria noted in *Boultif*, which it wished to make explicit. These were the need to take into account the best

⁹³ Paragraph 399A(b) of the Immigration Rules

⁹⁴ Paragraph 399C of the Immigration Rules

⁹⁵ £578 from 6th April 2013

⁹⁶ 54273/00 [2003] 33 EHRR 1170

⁹⁷ 46410/99 [2006] 3 FCR 229 GC ECHR

interests and well-being of the children⁹⁸ and the solidity of any social, cultural and family ties with the host country and with the country of destination.

91. At paragraph 74 it is also noted that although Article 8 provides no absolute protection against expulsion for any category of aliens, the Court had already found that regard was to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there.

92. There have also been a number of cases in the domestic courts which considered that proper approach to rights deriving from Article 8 of the ECHR. For example, in *Huang v Secretary of State for the Home Department*⁹⁹ the Court of Appeal held that:

“In an article 8 case the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test”.

93. In *VW (Uganda) v Secretary of State for the Home Department*¹⁰⁰ it was held that the enforced break-up of their family was not justified by the legitimate demand of immigration control. Consideration was owed to VW's daughter who was a British citizen and was likely to be the principal sufferer following her mother's removal. Furthermore, in *LD (Article 8 – best interests of child)*

⁹⁸See also *Sen v the Netherlands* no 31465/96 @ paragraph 40 and *Tuquabo-Tekle v the Netherlands* no 60665/00 @ paragraph 47

⁹⁹[2007] UKHL 11

¹⁰⁰[2009] EWCA Civ 5

*Zimbabwe*¹⁰¹ the Tribunal held that interests of minor children and their welfare were a primary consideration. A failure to treat them as such will violate Article 8(2).

THE RIGHT TO RESIDE UNDER EU LAW

94. Following the case of *Zambrano v Belgium*¹⁰² an irregular migrant parent is entitled to reside in the United Kingdom if he or she is the primary carer of a British citizen child and the child would be unable to reside in the United Kingdom or any other EEA State if the parent were required to leave¹⁰³. This right derives from the child's rights as an European Union citizen under Article 20(1) of the Treaty on the Functioning of the European Union.
95. However, this is not the same as being granted limited or indefinite leave to remain and the right to reside is dependent upon the British citizen child remaining in the United Kingdom (or the EEA) and the parent remaining his or her primary carer.
96. In *Pryce v London Borough of Southwark and Secretary of State for the Home Department (intervening)* [2012] EWCA Civ 1572 the Court of Appeal held that a migrant parent of a British citizen child was not a person subject to immigration control and, therefore, he or she was entitled to housing assistance under Section 185 of the Housing Act 1996. However, since then, the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006¹⁰⁴ have been amended from 8th November 2012 to exclude such parents from entitlement to housing. They have also been excluded from entitlement to income support, job seekers allowance, pension credit, housing benefit, council tax benefit and the educational support allowance by the Social Security (Habitual Residence) (Amendment) Regulations 2012¹⁰⁵. Therefore, although a migrant parent of a British child can reside and work here he or she will have to find housing in the private sector and will not be entitled to core welfare benefits.

¹⁰¹ [2010] UKUT 278

¹⁰² European Court of Justice c 34/09

¹⁰³ Regulation 15A of the Immigration (European Economic Area) Regulations 2006 brought into force on 8th November 2012

¹⁰⁴ SI 2012/2588

¹⁰⁵ SI 2012/2587

MAKING AN APPLICATION FOR REGULARISATION

97. Paragraph 400 of the Immigration Rules came into force on 9th July 2012. It states that where a person claims that his or her removal under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971, section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 would be contrary to the United Kingdom’s obligations under Article 8 of the European Convention on Human Rights, the Secretary of State for the Home Department may require an application under paragraph 276ADE (private life) or Appendix FM (family life) of these Rules. Where an application is not required, in assessing that claim the Secretary of State or an immigration officer will, subject to paragraph 353, consider that claim against the requirements to be met under paragraph 276ADE or Appendix FM and, if appropriate, the removal directions will be cancelled.
98. It is not clear when the Secretary of State will exercise her discretion and not require an application and, therefore, applicants should be advised to make a formal application under the Rules when they seek to rely on Article 8.

FEE WAIVERS

99. Section 51 of the Immigration, Asylum and Nationality Act 2006 provides the Secretary of State for the Home Department with the power to make an order to require an application to be accompanied by a fee. Article 3 of the Immigration and Nationality (Fees) Order 2007¹⁰⁶ states that an application must be accompanied by the appropriate fee. Regulation 30 of the Immigration and Nationality (Fees) Regulations 2010¹⁰⁷ states that where an application, which is required to be accompanied by a specified fee, is made without that fee, the application is not validly made.
100. Sub-section 51(3)(c) of the 2006 Act provides the Secretary of State with a discretion to waive any fee. The Secretary of State subsequently sought to limit her scope to do so to certain circumstances under the 2010 Regulations. However, in *Omar v Secretary of State for the Home Department*¹⁰⁸ Mr. Justice Beatson held that if a fee must be paid and there is no provision for a waiver and an application without a fee “is not validly made”, the 2010

¹⁰⁶ SI 2007 No. 807

¹⁰⁷ SI 2010 No. 778

¹⁰⁸ [2012] EWHC 3448 (Admin)

Regulations must be read subject to a qualification that the specified fee is not due where to require it to be paid would be incompatible with a person's rights under the European Convention on Human Rights and the person was destitute.

NADINE FINCH
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19th DECEMBER 2012

The Supported Options Initiative aims to provide support and advice to young people (up to 30 years of age) and children in the UK who do not have regular immigration status or are undocumented.

Undocumented migrants include those trafficked into the sex trade or for domestic servitude, visa overstayers, people whose asylum applications have been refused and others who have been subject to failures in the immigration system.

Many young people in this situation feel that they are unable, or for various reasons are unwilling, to approach organisations for help. There may also be only very limited options available through which they can seek to address their situation.

The Supported Options Special Initiative was established by the Paul Hamlyn Foundation Social Justice programme with support from US-based organisation Unbound Philanthropy, with the hope that, through innovative approaches, it may be able to help bring about the creation of trusted and reliable means through which these young people can seek help.

The Supported Options Initiative has been developed following research on young undocumented migrants. The PHF report, 'No Right to Dream', published in 2009, presents rare first-hand accounts from young undocumented migrants in England.

The initiative includes support to seven pilot projects being undertaken by community organisations, law centres, and national children's organisations.

More information can be found at phf.org.uk.

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