

Refugee Children's Consortium

The Immigration, Asylum & Nationality Bill

House of Commons Committee Stage

18, 20 & 25 October 2005

Removal of rights of appeal for unaccompanied children

Members of the Refugee Children's Consortium are: The Asphaelia Project, The Association of London Somali Organisations, AVID (Association of Visitors to Immigration Detainees), Bail for Immigration Detainees, Barnardo's, BASW (British Association of Social Workers), British Associations for Adoption and Fostering (BAAF), Children's Legal Centre, Child Poverty Action Group, Children's Rights Alliance for England, The Children's Society, FSU (Family Service Units), The Immigration Law Practitioners' Association (ILPA), The Medical Foundation for the Care of Victims of Torture, NCB, NCH, NSPCC, Redbridge Refugee Forum, Refugee Council, Refugee Arrivals Project, Scottish Refugee Council, Save The Children UK and Voice for Child in Care (VCC). The British Red Cross, UNICEF UK and UNHCR all have observer status.

INTRODUCTION

The Refugee Children's Consortium is urging the Government to withdraw Clause 1 and 9 of the Immigration, Asylum and Nationality Bill. The clauses are interlinked and should be debated together.

The Refugee Children Consortium (RCC) shares the Immigration Law Practitioners Association's (ILPA) serious concerns at the impact of many aspects of this Bill. In particular clauses 1 and 9 regarding yet further denial of appeal rights, the withdrawal of welfare rights pending appeal and the automatic rendering unlawful of people who have previously been lawfully present in the UK and have followed established application procedures.

In addition to the concerns expressed by ILPA and others, the RCC considers that in respect of children and young people particularly these measures are ill conceived, punitive in nature and will have a hugely detrimental impact on an already highly vulnerable group. They will do nothing to improve the protection needs of children – contrary to the explicit duties placed upon public authorities to safeguard children by the Children Act 2004¹ and are being introduced despite repeated assurances from the Home Office that it treats the safeguarding of children and their protection and welfare needs seriously.

Contrary to the stated view of the Government that clause 1 is simply a streamlining of appeal rights², these measures are in reality a further erosion of children and young people's appeal rights, which undermine their protection and welfare needs.

CLAUSE 1 – REMOVAL OF THE RIGHT TO A VARIATION APPEAL

Clause 1 will deny the right of appeal against a refusal to extend leave and will have a very serious effect on a significant number of unaccompanied and former unaccompanied children for whom an appeal against the decision to extend their leave is currently their only opportunity to raise their asylum claim before the Asylum and Immigration Tribunal. In 2003, 98% of unaccompanied children were refused asylum and instead 73% of them were granted exceptional or discretionary leave for a limited period of time, the majority purely on the basis that they were children.

¹ Children Act 2004 ss 10 – 16 inclusive

² Letter from Andy Burnham MP to Rosie Cooper MP 9th August 2005

Some of these children do not presently have a right to appeal against this initial decision to refuse them asylum as Section 83 of the Nationality Immigration & Asylum Act 2002 precludes appeals from those granted a period of leave to remain of one year or less. This affects:

- Children who are refused asylum and granted discretionary leave after their 17th birthday who, although they can make an application for further leave to continue after their 18th birthday, are normally refused on the grounds that the original leave was only granted on the basis of age. As initial decisions take some time to process many 16 year old applicants are also denied this appeal right.
- Unaccompanied children from Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro (including Kosovo) and Sri Lanka who since 1st October 2004³, are now only offered at the most one year's discretionary leave in the first instance. They too are now deprived of a right to appeal against the initial decision to refuse them asylum.⁴⁵

In theory the two groups of unaccompanied minors identified above will have a right of appeal if they are subsequently granted further leave to remain, which results in an aggregate discretionary leave of more than 12 months. However it is not possible to see from Home Office statistics how many children have been granted an extension and thus have been able to appeal against their initial refusal of asylum by virtue of an 'aggregated' grant of leave of more than 12 months.

Therefore the first opportunity these young people have to appeal against a refusal to grant them asylum is within their subsequent variation appeals.

The failure to permit these groups of unaccompanied children a variation appeal will have very serious consequences. Recent research⁶ suggests that around 30% of unaccompanied children had their asylum appeals allowed. Neither the Home Office nor the Department of Constitutional Affairs collect statistics on the number of unaccompanied children who are still entitled to an appeal and who do exercise this right or the number of unaccompanied minors who do succeed in their appeals.

CLAUSE 9 – ENDING CONTINUING LEAVE TO REMAIN PENDING APPEAL

Clause 9 amends section 3C of the Immigration Act 1971 and takes away the existing continuing leave to remain provisions for those who appeal against refusal to extend their leave to remain. Leave would expire immediately if the Home Office refused the application.

Under the present law, a person who has leave to remain in the United Kingdom can apply for further leave to remain. If s/he does so, the leave is automatically extended and s/he remains lawfully present. Under section 3C Immigration Act 1971, the extension lasts until a decision is made on the application and, if refused, until the appeal has been decided by the Asylum & Immigration Tribunal (or, on a further appeal, the Court of Appeal).⁷ Clause 9(2) of the Bill would amend section 3C Immigration Act 1971 by ending continuation of leave upon the Home Office deciding to refuse the application to extend leave.

EFFECT OF CLAUSE 9 – WELFARE SUPPORT

This change will have a serious impact on unaccompanied asylum seeking minors reaching 18 years old who have not been recognised as a Convention refugee, but have been granted discretionary limited leave to remain until their 18th birthday.⁸ Children normally make an application for an extension of that

³ as a result of Asylum Policy Unit Notice 5/2004

⁴ Where a further period of Discretionary Leave is granted as a result of an 'in-time' application to extend their original 12 months leave an appeal under section 83 is triggered against the original refusal of asylum. Further leave is only granted where return is not possible at the end of the 12 month grant of leave.

⁵ (Unaccompanied minors from Bangladesh were initially affected too but as a result of the case of *R (on the application of Husan) v Secretary of State for the Home Department* [2005] EWHC 189 (Admin) this should not now be the case)

⁶ conducted in co-operation with the universities of Harvard and Sydney based on an analysis of all asylum appeals by unaccompanied minors between 1st October 2003 and 22nd November 2004

⁷ see section 3C Immigration Act 1971 and s104 Nationality, Immigration & Asylum Act 2002.

⁸ Where the minor is aged under 14, the period of leave is for 4 years, with the possibility of extension. In the case of nationals of some countries, leave to remain is granted 1 year at a time.

leave shortly before their 18th birthday. If Clause 9 is passed, the decision to refuse further leave will immediately render such young people 'overstayers' and thus 'unlawfully in the UK'. This will have the immediate effect of making them ineligible to work;⁹ receive mainstream benefits;¹⁰ or social services support under the leaving care provisions of the *Children Act* 1989 or any other adult social services¹¹ even though they may have a right to an appeal.

This means that the young person will have only one possibility of state support – 'hard cases' support, under section 4 of the Immigration & Asylum Act 1999, although forthcoming guidance may remove even this avenue of support to them¹². Current Home Office policy is to provide only full board support under section 4, and only in particular locations. It is rare for such support to be provided in the same place that the person is presently living. Most former unaccompanied minors are very unlikely to have established support networks with sufficient financial resources to maintain them during an appeal, however short. It is therefore very likely that they will be forced to seek this hard cases support, involving a disruptive move away from existing social and community support. Any education or training is likely to be brought to an abrupt end.

Foster carers who have been supporting unaccompanied children often after several years living with them will be placed in a particular dilemma. Social services support to the foster parents would need to cease as soon as the refusal decision was made (along with the young person's right to work or claim benefits). Foster parents would be in the position of bearing the complete financial burden of support while an appeal is pursued or seeing their children accommodated away from them under section 4 'hard cases' support. Many former unaccompanied minors who have been in long term foster care have won their variation appeals on the grounds of having established a private or family life with their foster carers. The proposed measures are likely to cause extreme distress both to fostered young people and their carers

A significant number of former unaccompanied minors succeed in their appeals to the Asylum & Immigration Tribunal. This change means that their lives will be seriously disrupted before this can be determined. If they do win, they may find it very hard to re-establish support arrangements in the place they were formerly living.

In *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 the Court of Appeal cast doubt on whether measures which in practice impede an appellant's ability to pursue a legitimate appeal are lawful.

It is the RCC's view that termination of welfare rights which coincides with the granting of a right of appeal could amount to such an unlawful impediment and give rise to inequality before the law in contrast to the Secretary of State's ability to prepare and present the Respondent's case at appeal. **If the proposed change comes into effect, and as soon as the Home Office decision is made, the unaccompanied minor will lose their right to work and to receive any social security or social services assistance. Because the person's asylum claim had already been finally determined, they are not eligible for asylum support under Part VI Immigration & Asylum Act 1999.**

**FOR MORE INFORMATION CONTACT:
PATRICIA DURR, PARLIAMENTARY ADVISER, THE CHILDREN'S SOCIETY
020 7841 4480, 07734072131, patricia.durr@childrenssociety.org.uk**

⁹ section 8 Immigration Act 1996

¹⁰ section 115 Immigration & Asylum Act 1999

¹¹ Schedule 3 to Nationality, Immigration & Asylum Act 2002

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TWO TYPICAL ILLUSTRATIONS

The following two summaries highlight the difficulties faced by children leaving care who have for a variety of reasons ended up destitute, vulnerable and disadvantaged by the present system. The cases reveal a variety of legal and administrative errors and misunderstandings by local authorities, Home Office or legal representatives but for present purposes these errors are not discussed. The purpose of the cases is to show the impact generally of the withdrawal of support from a child leaving care. It is RCC's view that the provisions in clause 9 would increase the numbers of young people placed in such a position.

Example 1

K, who is from Zimbabwe, was 18 on 3rd May 2005. He had had discretionary leave to remain in the UK for the previous three years. In March 2005 he applied for his discretionary leave to remain in the UK to be extended beyond his 18th birthday but had not even had his application acknowledged by the time he turned 18. He was due to sit his A levels in the week beginning 20th May 2005 and had been offered a place at Cambridge in the Autumn. His local authority terminated his accommodation on his 18th birthday on the basis that he was no longer lawfully present in the United Kingdom. His only possible source of support is the NASS Hard Cases Fund but this meant that he would be moved to Liverpool and could not sit his A levels. He lived rough in a park for two weeks but had no access to his computer or text books in order to revise. In desperation he accepted Hard Cases support and as NASS would not provide him with a train ticket to return to London he missed his exams. In September 2005, he was told that he had been granted discretionary leave to remain for a further three years. However, Cambridge University have said that they will not defer his offer of a place.

Example 2

S is seventeen. She was trafficked to the United Kingdom after being sold to her trafficker by her father. She managed to escape from her trafficker shortly after she arrived in the United Kingdom and claimed asylum. Her application was refused and she was granted discretionary leave for one year only. She applied to extend this leave but had no response from the Immigration and Nationality Directorate before her year's leave expired. Consequently she was evicted from her room and had to start sleeping rough. Last week she was spotted near a soup kitchen by one of the gang of traffickers from whom she had escaped and abducted once again. The Metropolitan Police believe that she has been trafficked on to Italy.