

Refugee & Migrant Children's Consortium

Legal aid and care leavers with immigration cases August 2019

Background

Even after they leave care, separated young people with immigration issues continue to face difficulties in accessing state benefits, education and employment, and this problem is particularly acute for those whose status is uncertain or temporary. Some may face removal from a country they have grown up in - the only home they know. The Keep on Caring strategy was published in 2016 and set out two main aims, the second of which was aimed at embedding a culture of corporate parenting across all central government departments and local authorities as well as the whole of society; *'making the past, present and future of care leavers everybody's business'*¹

Within the strategy document, the foreword by the Children's Minister asks local and central government *"to up their game as corporate parents, using the level of support that we expect a reasonable parent to provide for their child as the benchmark for how they should approach their role."*

During the discussions of the consultative group on the Statutory Instrument to implement the policy change to reinstate legal aid for separated and unaccompanied children in all their non-asylum immigration matters², it was agreed that the government will look at legal aid provision for care leavers with immigration matters. The government agreed to amend Exceptional Case Funding guidance to create a presumption of funding for this cohort with a view to collect better data as part of Legal Aid strategy. The government will then look to reconsider in full this cohort commensurately broader legal aid work strands. This will be subject to the conclusions of the Post Implementation Review of LASPO and Ministerial approval³.

To inform this work, NGOs from the Refugee and Migrant Children's Consortium have drawn together information and case studies to highlight the particular needs, vulnerabilities and circumstances of care leavers who need legal aid to access advice and representation with their immigration issues.

How many young people are affected?

In order to estimate of the number of undocumented and European national young people supported by 152 local authorities in England, CCLC circulated Freedom of Information (FOI) requests in 2016 and 2017 asking for:

¹ <https://www.gov.uk/government/speeches/supporting-care-leavers-to-thrive-everyones-business>

² The group met between August and December 2018 and included representatives from The Children's Society, Coram Children's Legal Centre, Islington Law Centre, Just for Kids Law, Public Law Project and the Immigration Law Practitioners' Association as well as representatives from the Ministry of Justice and Legal Aid Agency.

³ This was set out in the December 2018 policy document.

- Numbers of young people aged 18-25 'from outside the EU cared for or supported by the local authority who are subject to immigration control but have not claimed asylum' (responses received from 147 local authorities, of which only 77 provided some or all of the information requested).
- Numbers of European national young people aged 18-25 supported by the local authority (responses received from all authorities - 111 responded with full or partial data. 39 said they were unable to do so, 18 of which because they did not collect the data).

From the information received we found that:

- The 81 local authorities in England who were able to provide information were supporting between 336 and 367 care-leavers aged 18-25 with unresolved immigration issues.⁴ ***If this sample was taken as an average, it would suggest a figure of between 663 and 724 care-leavers with unresolved non-asylum immigration issues in local authority care in England.***⁵
- The 111 authorities in England who were able to provide data were supporting between 476 and 538 European national care leavers between 18 and 25 years of age. ***If this sample was taken as an average, it would suggest a figure of between 652 and 736 European national care-leavers in local authority care in England.***⁶

However, these estimates should be treated with caution. What was clear from the information received was that many local authorities' information management systems did not record data on children or young people in a way that was conducive to finding out about immigration status and nationality. There was also a level of confusion as to how to distinguish between young people in the asylum system and young people with non-asylum immigration issues. Significant discrepancies between neighbouring local authorities suggest that some of the responses were underestimates.

More recently the government has estimated that there are 4,000 care leavers in local authorities in England who will need to secure their status through the EU Settlement Scheme or secure citizenship⁷. In addition, this does not tell us anything about how many care leavers may be family members of European nationals and may also have rights derived from EU law.

Types of cases

Section 10 (3)(a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 allows civil legal services other than those described in Part 1 of Schedule 1 to the Act to be made available where it is necessary to do so because the failure to provide such funding would be a breach of:

⁴ Range given to take into consideration FOI responses that highlighted '<5' young people in a local authority.

⁵ Figures based on average per authority multiplied by number of authorities with children's services departments in England (152).

⁶ Figures based on average per authority multiplied by number of authorities with children's services departments in England (152).

⁷ This information was provided to The Children's Society by the Department for Education, 18th April 2019.

- (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or;
- (ii) any rights of the individual to the provision of legal services that are enforceable EU rights.

Here are some examples of how care leavers engage those rights. However, this is by no means an exhaustive list and further examples can be provided. The types of cases are likely to include many of the same types of cases set out in the Cut Off From Justice research⁸.

Care leavers with non-asylum immigration issues

Many of the children and young people supported by members of the Refugee and Migrant Children's Consortium have cases to remain in the UK on grounds of long residence and the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). When making an immigration application that relies on family or private life, an individual must demonstrate that they reach the criteria within the Immigration Rules and/or outside of the rules (if relying on Article 8). To support a claim based on Article 8 it may be necessary to gather extensive evidence demonstrating the extent to which an individual has developed a personal life and connections within the UK, as well as information on the family circumstances in both the UK and the country of origin. Expert evidence, for example from psychologists, is often required, as might be evidence from a young person's carer, teachers, therapists or medical professionals, mentors and friends. It is vital not only to understand and obtain evidence but also to present this appropriately, and this requires guidance from legal professionals to ensure that all relevant matters are addressed. Small errors will lead to applications being returned or refused. Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained and applied to the law.

In addition, evidence gathering often costs money. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators and expert reports, such as an independent social worker report or a country expert report, that are frequently a key part of the evidence in an immigration case raising human rights concerns. The complexity of the law in this field means that people frequently do not have an adequate understanding of the substance of the law, how it applies to their case and how to articulate their arguments in writing or before a tribunal or court. This can be exacerbated by language barriers and difficulties with literacy and comprehension. The procedures, as well as the law, are complex. For example, there are a number of different forms used for Article 8 applications, each fulfilling a range of different purposes that are not obvious unless the applicant understands from the Immigration Rules which route to settlement they would be applying under. An application on the incorrect form is likely to be rejected and there is no right of appeal from an invalid form.

⁸ See Table 2.1: Categories and Circumstances of Separated and Unaccompanied Children Out of Scope:
https://www.childrenssociety.org.uk/sites/default/files/full-research-report_cut-off-from-justice.pdf

A number of care leavers will need advice on nationality cases and/or their eligibility for the EU settlement scheme. Some may need to go to court to appeal a removal decision, especially if no action has been taken by the local authority to address their immigration issues before they turn 18.

The European Court of Human Rights has found that the right to access to a court contained in Article 6 (1) of the ECHR encompasses the right to free legal assistance in civil matters when such assistance proved indispensable for effective access to the courts and a fair hearing (in particular for ensuring the equality of arms).⁹ Human rights protections under Article 6 have been further elaborated on in the Court of Appeal in this country in the context of legal aid for civil litigation. The court specified that these include practical and effective rights of access to the courts, the ability to 'present the case properly and satisfactorily' before the court of tribunal, and equality of arms such that each side can present their case 'under conditions that do not place them at a substantial disadvantage vis-a-vis their opponent'.¹⁰

Case study 1: Sam

Coram Children's Legal Centre (CCLC) advised Sam, a 19-year old care leaver from Jamaica, who came to the UK when he was seven with his parents. After a relationship breakdown, he was taken into care aged 15, and his leave to remain expired a year later. His social worker was aware of his immigration status, but did not do anything to help him resolve it before he turned 18. Aged 19 the young person's personal advisor called the Migrant Children's Project advice line to ask for help. At this point he was undocumented and had no right to work or claim benefits, and had no contact with his birth family.

Sam would be eligible for leave to remain under the Immigration Rules on the basis of his length of residence in the UK (a long residence route on the basis of his right to respect for his family and private life under Article 8 of the ECHR). Sam may also need advice on his nationality – it is unclear where he was born and the nationality of his parents. He would also have to meet certain requirements around suitability – if he had committed any criminal offences this may impact his application. He also needs to gather evidence showing he has lived in the UK for half his life – this may be difficult, particularly for the period before he was taken into care. He would need to pay a legal adviser as legal aid is not available for this type of application. Given his precarious position and the fact that he is liable to detention and removal at any time, he is in a very vulnerable position.

⁹ https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf

¹⁰ R (Gudanaviciene) v The Director of Legal Aid Casework [2014] EWCA Civ 162

Case study 2: David

David is a young person who came to the UK in 2006. He was taken into care in 2016, and then became a former relevant child, supported by children's services who provided him with accommodation and a personal advisor. In 2017, David received a Notice of Removal from the Home Office. He was supported by a solicitor to lodge an appeal against this decision and this was funded by the local authority. However, children's services refused to fund a legal representative to prepare his case or represent him at the hearing, and David was unable to represent himself. David and his keyworker from a charitable organisation came to an outreach session, where they met a Coram Children's Legal Centre solicitor.

Following an application for Exceptional Case Funding, representation was secured for David for his appeal hearing. It was argued that the removal directions should be stopped on the basis that he meets the long residence rules under the Immigration Rules. It is often difficult to secure an adjournment in these cases where appeals are ongoing – without legal aid he may well have been removed from the country in violation of his rights under Article 8 of the ECHR.

Case study 3: Luis

Luis is a Spanish 18 year old who was born in the UK and came into care when he was 16. His parents are not together; he is not in contact with his father and his mother is not well enough to care for him. Luis wants to remain in the UK in the long-term and wants to become British. He can apply for settled status under the EU settlement scheme but may have some difficulty providing evidence of residence for 5 years without assistance. In addition, he may be British by automatic acquisition if evidence of her father's status and work at the time of his birth can be acquired, or he may be able to make a nationality application under the 10 year route in the British Nationality Act 1981 – this will require detailed nationality advice from a suitably experienced solicitor lawyer.

Case study 4: Jason

Jason arrived in the UK at the age of 7 to join his father who was living in the UK and a recognised refugee. Jason's entry into the UK was arranged by adults including his father, but he does not think that this was lawful entry.

Jason's father was physically and emotionally abusive, and prevented Jason from having any contact with his family in his country of birth, so Jason lost contact with his mother and older sibling. In the UK, his father has several children with various different women and Jason lived with various siblings and step-mothers. His relationships with his siblings and some of his father's partners were good. However, they were unable to protect him from his father and at age 15 Jason was taken into local authority care because of the danger that his father posed to him. Neither

Jason's father nor the local authority made any attempt to obtain legal advice for Jason in relation to immigration matters and his status.

When Jason reached 21 the local authority informed him that they no longer had any duties towards him and he was made street homeless as he had no basis of stay in the UK, despite having lived here for more than half his life.

Jason's life was very difficult. He lived on the margins with no lawful source of income and no secure home. He was at risk physically and mentally. His health declined. He was a victim of a serious assault and nearly died. He also acquired criminal convictions for minor offences related to his street homelessness. During this time Jason was supported by close friends who are like family to him. He 'sofa-surfed' where he could, but his friends are of limited means and so could not provide him with a stable home.

When Jason was 23 he accessed legal advice from Islington Law Centre for the first time and was advised that he would have a right to apply for leave to remain under the Immigration Rules on the basis of his long residence in the UK, and the private and family life he had established here (as protected by Article 8 ECHR). His case is complicated by the fact that his minor criminal convictions may cause him to be considered 'unsuitable' under the Immigration Rules, and so the Article 8 aspects of his case are likely to be crucial to its success. In addition, the deterioration in Jason's physical and mental health as a result of 2 years of street homelessness is an obstacle to self-representation. Jason's mental health in particular fluctuates, and he is not always able to focus and remember. He is a vulnerable young person and requires representation to put his case adequately. However, without legal aid and as a care leaver he is unable to access the advice and support that he desperately needs to present his case fairly.

Case study 5: Mahesh

Mahesh is now 21 and is studying at university. He was born in Asia and lived there until he was 12, when he was brought to the UK and kept in domestic servitude before he escaped. He was eventually taken into care in the UK, but his immigration status affected his access to university and a lack of free legal advice meant he accrued a big debt. When Mahesh was young his father was killed in a car accident. Mahesh's mother paid for a passport and visa for Mahesh to come to the UK and live with a family friend. Mahesh was excited to come to the UK and trusted what was happening, but after a few weeks the family friend started to beat Mahesh on a daily basis with a leather belt over petty issues. Mahesh was not allowed to go to school and was trapped in the house while his guardians went to work. One day, when Mahesh was alone, he left the house and got on the next bus. Mahesh saw two police officers and decided he would ask them for help. He got off the bus and ran up to them and shouted 'Please help me, please help me'. The police took him to the local police station and interviewed him. Mahesh was met by a social worker and taken to a foster care home where he stayed happily for four years.

When Mahesh turned 17, he was told by his social worker that he must move out into semi-independent accommodation. At this time, he was unable to work or go to university due to his uncertain immigration status. He only had £45 a week to live on and tried desperately to find a job, but his paperwork meant no one would hire him. Mahesh's case worker and social worker were concerned he was deeply depressed, so it was recommended he contact The Children's Society and he got a free local counselling service. The Children's Society also helped him gain access to a university scholarship programme. Mahesh's immigration case went on for six years and was a difficult process. Mahesh applied for status under Article 8, which is no longer covered by legal aid, and as Mahesh could not work legally he had no way to pay, so a friend had to step in and pay his solicitor fees. In 2014, Mahesh was eventually granted status. He is currently repaying his friend back all the money. Now that his immigration status is resolved, Mahesh was able to start university in September 2014, but as he has limited leave to remain he is ineligible for a student loan. Therefore, if Mahesh had not obtained the scholarship, university would most likely have been inaccessible for him for at least another 10 years until he is eligible for indefinite leave to remain.

Former unaccompanied asylum seeking children

Children of refugees may not have asylum claims themselves and will therefore not qualify for legal aid if their claim is purely based on article 8 family and private life grounds, as the case study above highlights. However, even those unaccompanied children who do claim asylum may not be eligible for legal aid for the duration or entirety of their legal case. In 'mixed' cases, common for young people who have claimed asylum in the UK and subsequently been granted limited leave to remain, both asylum and human rights arguments under Article 8 European Convention on Human Rights are made in tandem.

In 2018, 2,872 asylum applications were made by unaccompanied children. Of the 1,327 decisions made that year on unaccompanied children's claims, 319 (or 24%) were grants of a temporary form of protection known as 'leave as an unaccompanied asylum seeking child (UASC leave) which lasts for 30 months or until the child reaches 17.5 – whichever is shorter'.¹¹ At the end of this period a child can apply to renew or vary their leave to remain, but their case will not currently fall fully within the scope of legal aid as it is likely to be a 'mixed' case containing both asylum and non-asylum grounds. For young asylum seekers who have lost their families in their home countries, often their only family is now in the UK. Having spent their formative years in the UK, many have integrated well into their communities, learnt English and adopted 'British values' as they are encouraged and expected to do. They have built up relationships with their foster carers and foster siblings; in some cases they may have started families of their own with British or settled partners or had children of their own.

¹¹ See Refugee Council, 'Children in the asylum system, May 2019' at <https://www.refugeecouncil.org.uk/wp-content/uploads/2019/06/Children-in-the-Asylum-System-May-2019.pdf>

As asylum seekers, these care leavers are not allowed to work to earn money lawfully and therefore are entirely reliant on local authorities or in some cases on asylum support from the Home Office. Therefore, they cannot pay for private legal advice and representation, and may be pushed into debt or exploitation in order to pay legal fees.

Case study 6: Samiullah

Samiullah is a 19 year old care leaver from Afghanistan. He arrived in the UK age 17 and claimed asylum. He was interviewed as a child but his decision was delayed and he did not receive an initial Home Office decision until now. He was refused asylum. He has appealed this decision but wishes to make arguments about his family and private life in the UK (under Article 8 of the ECHR) in his appeal. This includes information relating to his girlfriend, his social life and relationship with his uncle, aunt and their 3 children, who he met once in the UK. Due to legal aid restrictions, he would have to pay a legal representative to prepare this as part of his appeal, and cover any costs by a barrister or representative at the appeal. His arguments relating to asylum would be covered by legal aid. This puts him in a difficult position, particularly as the local authority are unlikely to fund this for a care leaver. Samiullah, as an asylum seeker, will not be able to work or earn any money to pay for this representation.

Case study 7: Adam

Adam arrived in the UK as a child from Afghanistan and claimed asylum. He was taken into local authority care. He was refused asylum but given discretionary leave. When this ran out, he applied for an extension but was again refused. His appeals were also refused and he has become 'appeal rights exhausted'. As a result, the local authority conducted a human rights assessment following which it withdrew its support from him, making him destitute. Developments in his life and subsequent evidence obtained have significant implications for his protection claim showing the risk to him if he is returned. At the same time he has married and has a family in the UK, however, without legal aid the article 8 family life part of his claim cannot be properly represented and considered. However, there are reasons why he is unable to both return to Afghanistan and to leave the UK and his family behind.

When the local authority carried out the human rights assessment they recognised that Adam might have the basis for a family life application, and he was given £60 for an advice appointment with his old legal representative to investigate this. However, there was no further follow up from the local authority to ensure that the young person had accessed advice, or to support him to make a decision on how to action this advice and resolve his status before the care leaver's accommodation and subsistence was terminated. The Children's Society has supported him to get legal advice and provide other support to overcome destitution and promote his safety and well-being.

Local authority policies in response to LASPO

Research has highlighted that since LASPO, very few local authorities have developed policies and processes to respond effectively to care leavers' needs to access legal advice and representation in immigration and nationality cases. While some authorities do pay for advice privately in some cases, these decisions are often made on an ad-hoc basis, are left down to individual social workers and personal advisers, and are significantly limited by budgetary constraints and a lack of understanding of immigration and nationality law and policy, with damaging consequences for care leavers' access to justice.

In the 'Cut Off From Justice' report (2015) on the impact of legal aid cuts for separated children, a series of FOI requests to local authorities revealed that out of the 121 responses received back, only 1 local authority had developed an explicit policy on how to deal with children's immigration legal support that they were piloting. We interviewed the service manager from this local authority who shared the details of the policy. As an example of good practice, they have established an agreement with a reputable private firm to assess the immigration circumstances of all unaccompanied and separated children and young people in their care. The immigration lawyers then advise on what needs to be funded by the local authority based on their legal expertise and the immigration needs of the child. This helpfully takes what are effectively legal decisions out of the hands of social care managers and practitioner¹².

This situation hadn't changed much by the second 'Cut Off From Justice' 2017 report – 4 years since the cuts had come into force which asked the same questions of local authorities. The re-issued FOIs in 2017 revealed that whilst over 50 local authorities told us that they supported over 1,000 children to access immigration legal advice, only 12 said they paid for the immigration advice needed. Only two local authorities had a policy on providing immigration advice for children subject to immigration control, leading to a postcode lottery for many children and young people in need of immigration advice. For many of these young people, their immigration status is inextricably linked to the safeguarding risks they face now and in the future¹³.

The situation is far worse for care leavers, particularly where their status is uncertain or unresolved, and they are therefore liable to detention or forced removal, despite having legitimate reasons and needs to remain in the UK. The 2017 report highlighted that some local authorities may be actively limiting the types of legal status applications they will fund for children and young people based on financial considerations and a lack of specialist knowledge of immigration and nationality legislation. In one example a solicitor highlighted that some local authorities may be

¹² <https://www.childrenssociety.org.uk/what-we-do/resources-and-publications/cut-off-from-justice-the-impact-of-excluding-separated-migrant>

¹³ https://www.childrenssociety.org.uk/sites/default/files/full-research-report_cut-off-from-justice.pdf

directing young people away from advice which proposed costly citizenship registration (£933 at the time) over 'leave to remain' applications which were exempt fees for looked after children, despite this not providing the child with the best protection in the long run. Another example highlighted that some local authorities may be directing young people through the 'free' and legally-aided asylum route and choosing to ignore other legal avenues available to young people them such as Article 8 extensions. This is particularly critical as children transition to adulthood and become care leavers; as under 18s, children are protected (to some degree) from restrictions to local authority support based on their immigration status. However, once they turn 18 immigration legislation 'kicks in' (specifically provisions under Schedule 3 of the Nationality, Immigration and Asylum Act 2002) and where young people's status is uncertain or where young people are 'appeal rights exhausted', they are particularly at risk of having the support from local authorities – such as housing and subsistence – withdrawn rendering them destitute and homeless¹⁴.

Care leavers with a precarious status also become liable for immigration detention and forced removals. One solicitor interviewed for the 'Cut Off From Justice' report said that they had dealt with several enquiries from social workers saying they were taking the [former unaccompanied] asylum seeker to the police station on their 18th birthday suggesting that this would prompt a Home Office removal. In addition, even where local authorities recognise that care leavers may have other legal options, they may still terminate services to that young person leaving them destitute and with no way to secure legal support (see case study of Adam above).

More information

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The Refugee and Migrant Children's Consortium (RMCC) is a group of over 50 NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international human rights and welfare standards. For more information and a list of members, please visit www.refugeechildrensconsortium.org.uk

¹⁴ Schedule 3 of the 2002 Act allows local authorities to withdraw support from care leavers who are 'appeal rights exhausted' and classed as 'unlawfully in the UK' on the basis of their immigration status, but this is in conflict with care leaving legislation and the role of the corporate parent. Support should only be withdrawn if it would breach an individual's human rights: <https://www.childrenslegalcentre.com/wp-content/uploads/2018/01/Leaving-Care-Support-January-2018-FINAL.pdf>