

COUNTRY BRIEF UNITED KINGDOM

This brief has been prepared to support your participation in the workshop: **“Building Strategies to Protect Children in an Irregular Migration Situation in the United Kingdom”**.

The workshop has been co-organised by PICUM and Praxis Community Projects. 

It outlines the laws and policies relating to the rights of undocumented children to health care, education and housing in the UK, as well as the situation in practice: whether or not children in an irregular migration situation – the children of undocumented migrants and those who are themselves undocumented - can access these rights.

Goals:

The workshop is part of a two-year project called “Building Strategies to Improve the Protection of Undocumented Children in Europe”. The project aims to spread understanding of the challenges that children in an irregular migration situation face in accessing their fundamental rights to education, health care and housing in Europe, and to develop strategies to overcome them.

WHO ARE “CHILDREN IN AN IRREGULAR MIGRATION SITUATION”?

“Children in an irregular migration situation” refers to children whose lives are affected by an irregular migration status.

This is a diverse group. It includes children whose immigration status is irregular - “undocumented children”. The parent(s) or other caregiver(s) of these children may also be undocumented, for example, those who have entered irregularly or overstayed residence permits or visas as a family. The parent(s) or other caregiver(s) may also have regular migration status, for example, when children come to Europe to be reunited with their family but do not fall under the official family reunification schemes. Children who are born in Europe may also be undocumented, because their parents are undocumented.

Children in an irregular migration status may also be children whose own migration status is regular, but whose parent(s) or caregiver(s) are undocumented migrants. For example, some children gain citizenship through one parent or birthright citizenship laws. In some countries, such as France and Ireland, children are not required any documentation until the ages of 18 and 16 respectively. Therefore, in these countries there is no such thing as an “undocumented child”. However, they are still affected by the irregular migration status of their parents.

Undocumented children may also be sent by their families to Europe in search of better conditions, or have run away, and are therefore alone. Some children are trafficked to Europe, either alone or with their families, and so are also undocumented. This project focuses on children who are with their families or other caregivers, and their access to basic social rights. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with no access to basic social rights. Because most EU countries have specific systems in place, however flawed, to care for unaccompanied or separated children and victims of trafficking, this project does not address the particular issues these groups of children face. The issues regarding access to basic social rights are nonetheless relevant for those separated children who are outside of the reception circuits for unaccompanied children and are invisible to social services, and victims of trafficking before identification, in so far as they can access basic social rights.

Methodology:

Over the past 10 years of daily monitoring and advocacy for the rights of undocumented migrants, PICUM has noted a dangerous trend towards the erosion of the rights of children in an irregular migration situation.

The project focuses on the rights to education, health care and housing because they are fundamental to a child's development. Nonetheless, despite legal entitlements, these basic social rights are often denied to children in an irregular migration situation living in Europe, particularly those who are accompanied by their families or other caregivers and so are not under the direct care of the State. Only by guaranteeing basic access to education, health care and housing, are these children allowed sure and solid development.

Through a series of intensive **national workshops in seven countries** - Belgium, France, Italy, the Netherlands, Poland, Spain, and the UK, participants will build mutual understanding of the problems children in an irregular migration situation face when exercising their rights to education, health care and housing in each country, and devise concrete strategies to improve on some of the challenges identified.

The seven countries have been selected as they represent the northern, southern and eastern European regions, a mix of old and new European Union (EU) member states and different social welfare models. As well as the specific national recommendations, the findings will be generalised for pan-European application where possible, and customised to fit regional characteristics as needed. An **instructional guide** will be produced to aid efforts to secure these rights for children in an irregular migration situation in all Member States, and at the European level. It will be presented at a **European conference** in January 2013, and will be used to shape and support the **ongoing advocacy work** of PICUM and partner organisations.

What now?

The "Building Strategies to Improve the Protection of Undocumented Children in Europe" project workshops provide an opportunity for stakeholders to come together to discuss the barriers children in an irregular migration situation face when exercising their rights to education, health care and housing, including those outlined in this brief.

For more information on the project, or to continue your engagement as the project progresses, please contact Lilana Keith, Project Officer, lilana.keith@picum.org.



The "Building Strategies to Improve the Protection of Undocumented Children in Europe" project builds on the key findings of previous research, published in PICUM's 2009 report entitled "Undocumented Children in Europe: Invisible Victims of Immigration Restrictions". The report documents the barriers undocumented children face in accessing education, health care and housing in several EU member states.

THE PARTNERS

- PICUM (Coordinator)
- Belgium: Plate-forme [Mineurs en Exil](#)
- France: [Groupe d'Information et de Soutien des Immigré](#) - GISTI (Information and Support Group of Immigrants)
- Italy: [Associazione per gli Studi Giuridici sull'Immigrazione](#) - A.S.G.I (The Association for Legal Studies on Immigration)
- The Netherlands: [Defence for Children International](#) - DCI
- Poland: [Polish Migration Forum](#)
- Spain: [Red Acoge](#)
- United Kingdom: [Praxis Community Projects](#) - Praxis

The goal is to build common understanding and begin to develop strategies to overcome them. This is just the beginning. We invite you to pursue these goals outside of the workshops, raise awareness of the issues, and challenge the barriers through your work.

TERMINOLOGY

WHY REFER TO “UNDOCUMENTED” AND NOT “ILLEGAL” MIGRANTS?

In referring to migrants without a valid residence permit, the term ‘undocumented migrants’ (or alternatively, ‘irregular migrants’) is more appropriate. The term ‘illegal’ can be criticised for two main reasons:

1. Its connotation with criminality: being in a country without the required papers is, in most countries, not a criminal offence but an administrative infringement.
2. Defining an individual or group as ‘illegal’ can be regarded as denying them their humanity and risks violating their innate right to recognition as a person before the law.

While referring to migrants as ‘illegal’ has political and/or societal consequences, it also fails to take into account the varying degrees of compliance which may apply to the situation of any one migrant. For example, a migrant may be legally resident but working in violation of some or all of the conditions of their visa.

This position on terminology is increasingly being taken by a multitude of actors, including the United Nations¹, the Council of Europe², the European Parliament³, and the European Commission, as well as numerous non-governmental organisations, local authorities, professionals from diverse fields, and undocumented migrants themselves.

WHY REFER TO “CHILDREN” AND NOT “MINORS”?

- Following the UN Convention on the Rights of the Child (CRC), ‘a child means every human being below the age of eighteen years.’ However, the age when someone is no longer defined as a “minor” varies from country to country.
- Especially in a climate where undocumented migrants are de-humanised, referring to undocumented children as “minors” rather than “children” has potentially negative connotations and risks their exclusion from the child rights/ child protection frameworks.

CHILDREN'S PROTECTION IN GENERAL

Are Undocumented Children's Rights Protected in International and European Law?

The fundamental rights of children, regardless of immigration status, are protected in several legally binding international and European laws (see box on next page), most notably:

- The **UN Convention on the Rights of the Child** (CRC):⁵
- The UK ratified the CRC in 1991.⁶
- The **International Covenant on Economic, Social and Cultural Rights** (ICESCR):⁷
- The UK ratified the ICESCR in 1976.⁸
- The **European Convention on Human Rights** (ECHR):⁹
- The UK ratified the ECHR in 1951¹⁰ and transposed it into national law with the **1998 Human Rights Act** (1998 HRA).¹¹

WHY DOES INTERNATIONAL AND EUROPEAN LAW MATTER?

The UK has a legal obligation to follow the international and European laws which it has "ratified" (formally consented to and made valid).

This means that **any policy or practice which is contrary to these laws can be challenged** as unlawful.⁴

Two fundamental legal principles are crucial when protecting the rights of children: non-discrimination and the best interests of the child. They are clearly laid out in the Convention on the Rights of the Child (CRC)¹² as follows:

- Non-discrimination: the CRC obligates all states to protect the rights set out the convention to:

"each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

 (Article 2)

The Committee on the Rights of the Child has explicitly stated that this means that the CRC applies regardless of immigration status.¹³
- The best interests of the child:

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

 (Article 3)

The Committee on the Rights of the Child has made clear that interests in migration control cannot override considerations of the best interests of the child.¹⁴

The Supreme Court has also ruled that, 'the best interests of the child shall be a primary consideration' means they must be considered first, and that interests in immigration control are not sufficient when, for example, considering the deportation of the primary carer, and so, reasonability for the child to live in another country.¹⁵

THE LEGALLY BINDING INTERNATIONAL AND EUROPEAN LAWS

The UN Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the European Convention on Human Rights (ECHR).

There is also the Universal Declaration of Human Rights (UDHR), which though not technically legally binding, is considered customary international law, and so is intended to be binding; and the European Social Charter (ESC), which is usually limited in scope to nationals or regular workers of Contracting State Parties, but for which some of the rights have been established by the case law to apply to irregular migrants, particularly in the case of children.¹⁶

What Are the National Laws and Regulations?

The tension between immigration control and child protection results in children with an irregular migration status being treated separately and differently from “all” children.

Children in an irregular migration situation are affected by repressive migration control policies and not adequately protected as children, first and foremost, under the systems for child protection.

- **The Children Act** (2004)¹⁷ places a duty on almost all state agencies to have regard for the welfare of children, but there is a reservation on immigration matters – the UKBA (formerly BIA) is exempt.
- The **2009 Borders, Citizenship and Immigration Act**¹⁸ brought a statutory duty to *safeguard the welfare of children in immigration matters*, and a **code of practice** has been developed.¹⁹ However, this has been criticised for not formally amending the Children Act (2004). Similarly, the code of practice did not actually change any immigration procedures affecting children. It provides lower standards than the Children Act, is more difficult to monitor, and essentially focuses on helping children cope with immigration control processes, rather than adapting those processes to respect and protect children’s rights.²⁰
- Otherwise UK government policy states its strong commitment to supporting the well-being of every child in the UK:
- The **Every Child Matters Framework** – aims “for every child, whatever their background or circumstances, to have the support they need to: be healthy; stay safe; enjoy and achieve; make a positive contribution; and achieve economic well-being.”²¹
- Responsibility for safeguarding and promoting the welfare of children is devolved, with **local authorities being primarily responsible** for children within their areas.
- The Children Act (2004) requires every local authority children’s services department to set up a **Local Safeguarding Children Board**, with the objective of ensuring that ‘each local area has a coherent approach to safeguarding children, based on contributions from all key agencies, and that this approach is managed effectively’.²²
- The Children Act (2004) also created the role of **Children’s Commissioner** responsible for promoting the interests of children, including investigating complaints regarding matters relating to children.
- The **UKBA’s Children’s Champion** supposedly champions the interests of children within the immigration system. However, the role has been frequently criticized for its lack of independence and apparent ineffectuality.

EDUCATION

Do Undocumented Children Have a Right to Education in International and European Law?

Yes, their right to education can be found in several laws.²³

In particular:

- The **Convention on the Rights of the Child** (CRC) says:

“States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.”
[Article 28, see also Article 29]
- The **International Covenant on Economic, Social and Cultural Rights** (ICESCR) says:

*“The States Parties to the present Covenant recognize the right of everyone to education.”*²⁴
[Article 13, see also Article 14]
- The **European Convention on Human Rights** (ECHR) and **1998 Human Rights Act** (1998 HRA) says:

“No person shall be denied the right to education.”
[Protocol 1 Article 2]²⁵

What Are the National Laws and Regulations?

Otherwise, national legislation speaks of education in terms of duties rather than rights.

It is a legal requirement for all children of compulsory school age to receive an education, implicitly including undocumented children.

- The **Education Act 1996** places a legal duty on local authorities²⁶ to:
 - ‘secure that appropriate education is available to all children of compulsory school age [5-16] in their areas.’²⁷
 - Parents have a duty to ‘cause their child to receive appropriate and efficient full-time education’.²⁸
- No reference is made to the residence status of the child, so undocumented children are implicitly included.
- The UKBA website clearly specifies that immigration status should not prevent a child from attending school:

*“It [the local authority] must ensure that all children living in its area receive full-time education, regardless of their immigration status.”*²⁹

What is the Situation in Practice?

- There are **concrete barriers** to children in an irregular migration situation's attendance in practice:
 - ▶ Documents are sometimes required for registration. Even if not immigration-related, **identification documents and proof of residence**³⁰ can be difficult to obtain and/ or make people fearful.
 - ▶ **Discretion** at the local level - schools are sometimes reluctant to accept undocumented children due to issues over funding arrangements³¹ or impacts on reaching government targets, so may reject their registration.
 - ▶ **Precarious living conditions** can affect performance and attendance in school.
 - ▶ Parents face difficulties meeting **extra-curricular expenses**, such as books, transport, uniforms, etc.
 - ▶ Poor knowledge of the **language**.
 - ▶ **Fear** that the information provided to schools could lead to detection by the Home Office and deportation, or the authorities taking the child into care, prevents parents from registering their children in schools.
- On completing their studies, undocumented children are often **not issued diplomas** or formal certification accordingly.
- Undocumented children are often denied access to non-compulsory education:
 - ▶ **pre-school** or **nursery**
 - ▶ **vocational** courses and **16-18** education. Transition to 16-18 education is particular problematic when children change schools. Although this schooling is optional, to exclude undocumented children specifically from such public services is discriminatory.
- For those that are able to complete their education until 18 years, further education at **university is not an option**, as the admissions process requires proof of residential status.

SCHOOL QUESTIONS MIGRATION STATUS AND CHILD'S RIGHT TO ATTEND

A staff member from a London school called the Praxis telephone helpline for professionals working with migrants. A parent has recently sought to enrol a child at the school and the school had requested evidence of payment of child benefit, which the caller claimed was their standard procedure. When the parent stated that they were not in receipt of child benefit as they had no recourse to public funds, the school then asked to see the parent's passport. The parent was legally in the UK on a 3-year student visa, but the school still questioned if the child was legally allowed to attend school in the UK.

HEALTH CARE

Do Undocumented Children Have a Right to Health care in International and European Law?

Yes, their right to health care can be found in several laws.³²

In particular:

- The **Convention on the Rights of the Child** (CRC) says:

“States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”
[Article 24 (1); see also Articles 25 and 39]
- The **International Covenant on Economic, Social and Cultural Rights** (ICESCR) says:

“The States Parties... recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”
[Article 12 (1)]
- The **European Convention on Human Rights** (ECHR) and **1998 Human Rights Act** (1998 HRA) says:

“No person shall be subjected to torture or inhuman or degrading treatment or punishment”
[Article 3]³³

What Are the National Laws and Regulations?

The national health care system in the UK is the **National Health Service** (NHS).

Undocumented children who are accompanied by their families or other caregivers have access under the same conditions as adult undocumented migrants.

- They should have access to the following care free of charge: primary care (from a GP), emergency care (in an Accident & Emergency department or walk-in centre), family planning, treatment of communicable diseases (excluding HIV) and in serious mental health cases.
- They are liable to pay the full costs for any other hospital treatment or diagnosis.³⁴
- This includes treatment considered “immediately necessary”, though it should not be delayed or refused if the patient is unable to demonstrate their ability to pay or pay up front.
- Treatment which is not considered “immediately necessary” but is nonetheless “urgent”, because it cannot wait until the patient returns home should also not be delayed or refused pending payment, but NHS bodies are ‘strongly advised to make every effort... to secure payment in the time before treatment is scheduled.’³⁵
- However, if the treatment is considered to be “non-urgent” and able to wait until the patient returns home, it should be withheld until a deposit equivalent to the estimated full costs of the treatment has been paid.³⁶
- New rules that came into effect on 1 August 2011 indicate that debt collection agencies should no longer be used when it is clear the patient will be unable to pay i.e. is genuinely without funds.³⁷
- But, they will place a duty on NHS staff to provide details of patients owing £1000 (approximately 1150€³⁸) or more to UKBA – pending applications with UKBA (new visas, extensions of stay, re-entry) can be refused until the debt has been paid.³⁹

What is the Situation in Practice?

- Undocumented children face **numerous difficulties** which prevent them from receiving the care they are entitled to:
 - Primary care from a GP is dependent on the **GP's discretion** whether or not to register them.⁴⁰
 - Pressure to reach government targets can make GPs reluctant to register undocumented children.
 - There is no legal or medical **definition of "immediately necessary"** treatment, so interpretations vary widely at the local level.
 - The **costs are prohibitive** for care that must be paid for.
 - **The rules are complex** and lack clarity.
 - This contributes to a **lack of awareness on the part of health professionals**, at the same time as they are given the responsibility to establish status and entitlements and provide care accordingly.⁴¹
- All children in an irregular migration situation - both children of undocumented migrants and those who are undocumented themselves - may also be prevented from accessing health care by several other obstacles:
 - **Migrants may lack awareness** of their entitlements.
 - There is a **fear** of being detected (which will likely increase with the new rules which introduce the duty for the NHS to share patient information with UKBA when £1000 (approximately 1150€) or more is owed).
 - There are **language** barriers.

FEAR ABOUT ACCESSING HEALTH CARE ENDS IN TRAGEDY FOR UNDOCUMENTED FAMILY

An undocumented family placed their young baby with an unregistered child minder while they worked. The child minder shook the baby causing severe injury. Instead of taking the baby straight to hospital, the parents sought the help of an unlicensed medical practitioner due to fear that their immigration status would be exposed if they went to A & E. The family did later present to A & E, but the baby died. There is no evidence that the baby would have survived if she had reached A & E sooner, but the delay may have been an aggravating factor.

Therefore:

- Many undocumented children **only receive treatment in hospital Accident & Emergency departments, when it is an emergency**. They do not receive continuous care.
- This is not only highly detrimental to children's health but more expensive than preventative care.
- Those who have been able to register with a General Practitioner (GP) also **receive primary care**, but still have **limited access to secondary care**.
- Access to **specialist, dental or optometry treatment** is very difficult.
- **Mental health care** is rarely available; despite undocumented children's vulnerability to mental health needs.⁴²

HOUSING

Do Undocumented Children Have a Right to Housing in International and European Law?

Yes, their right to housing can be found in several laws.⁴³

In particular:

- The **Convention on the Rights of the Child** (CRC) says:

“States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” and *“in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”*
[Article 27 (1) and (3)]
- The **International Covenant on Economic, Social and Cultural Rights** (ICESCR) says:

“The States Parties... recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing... The States Parties will take appropriate steps to ensure the realisation of this right....”
[Article 11 (1)]
- The **European Convention on Human Rights** (ECHR) and **1998 Human Rights Act** (1998 HRA) has the prohibition of inhuman and degrading treatment (Article 3) and, in Article 8:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

Whilst there is no general duty to provide housing, European Court of Human Rights jurisprudence indicates that these rights can imply a positive obligation on States to avoid imposing “intolerable living conditions” that would breach these rights.⁴⁴

What Are the National Laws and Regulations?

Local authorities have an obligation to provide support (including accommodation) to **avoid a breach of human rights**.⁴⁵

Otherwise, there is no national legislation which specifies the right to housing for children in an irregular migration status *with* their parent(s) or other caregivers. Section 20 of the Children Act 1989 requires local authorities to ‘provide accommodation for any child in need within their area’, but this only explicitly imposes the duty to house the child.⁴⁶

What is the Situation in Practice?

- Children in an irregular migration status usually **do not have access to social housing with their family** unless one member of the family has a residence permit.
- The local authority's duty is usually interpreted as an obligation to house the child, but not the family – **the child is separated from their family and put under the care of the local authorities. This is a breach of the right to family life** (Article 8 ECHR/ 1998 HRA) and often contradicts the **best interests of the child**⁴⁷
- In some extreme cases, **temporary lodging in shelters or hotels** is offered to a family.⁴⁸ There is a shortage of such emergency accommodation and the shelters are usually inappropriate housing for children.
- Shortage of social housing makes **cheap, decent housing difficult to find** on the private market.
- A **residence permit** is sometimes required to legally rent on the private housing market.
- Housing arrangements are often insecure, with families having to **move frequently** and rely at times on friends and family.
- When accessing the **private housing market**, undocumented families often:
 - face racism and **discrimination**
 - are forced to live in **sub-standard conditions** (overcrowded, unsanitary etc)
 - have their precarious situation **exploited** by landlords
 - **rarely report** such exploitation to the authorities for fear of being identified, or at best having to find alternative accommodation.

MOVING FROM PLACE TO PLACE

Ms A, a refused asylum seeker from Nigeria, was denied social services assistance with accommodation although she had a child aged 2 years. She moved from place to place with her child and on at least one occasion slept in the park overnight with the child.

Barriers Common to Accessing All Social Rights

- National legislation that is below the standards set out in human rights law, inexplicit or contradicted by other rules and practices
- Lack of clarity in the rules and frequent changes in policy
- Discretion and lack of training for local authorities/ service providers, at the same time as they are given increasing responsibility for determining immigration status
- Fear
- Lack of awareness of undocumented families of their rights

Cross-cutting Issues

- **Interdependence of rights** – children’s health, living conditions and access to education are all closely interlinked, and only by guaranteeing basic access to education, health care and housing, are these children allowed sure and solid development. To deny access of one of these rights affects all the others.⁴⁹
- **The use of child poverty as a tool of immigration control** – migration control tends to take priority over child protection, so much so that repressive policies are often justified by the (flawed) logic that making life as intolerable as possible will motivate “voluntary” return. A clear example is that the government has the power to withdraw Section 95 support from refused asylum seeking families if they are not taking steps to leave the UK (or explain why they aren’t). There is also concern that, in this context, the power to separate children from their families could be used to be ‘tough’ on irregular migrants, rather than only in cases where it is clearly in the best interests of the child. These policies are implemented without consideration of the impact on children.
- The practice of child **detention** is also a major concern. Children’s access to their rights to education and health care is severely limited in detention, and it is a de facto breach of their right to housing as detention centres (or ‘Immigration Removal Centres’) are completely unsuitable accommodation for children. Detention has been found to be highly detrimental to children’s physical and mental health, and in breach of international and European laws.⁵⁰ There have also been concerns raised regarding knowledge of child protection by staff of removal centres.⁵¹

“The Commissioner [for Human Rights of the Council of Europe] is particularly concerned by the practice of detaining accompanied children... The Commissioner recommends that the UKBA pay particular attention to these cases.”

Thomas Hammarberg, *Memorandum following visits to the UK on 5-8/02/08 & 31/03-02/04/08*

Despite a pledge to end the practice of child detention for immigration purposes by the current coalition government, many are concerned that the proposed alternative – “pre-departure accommodation” – retains many of the defining features of detention, and will be used based on the same justifications, so does not represent a real alternative to detention, and will still have significant negative effects on children.⁵²

Regularisation

There is also a pressing need for **durable solutions** for undocumented children – pathways into a regular migration status and documentation.

As outlined in this brief, all children are entitled to various rights regardless of immigration status, but the precarious living conditions associated with irregular migration status are highly detrimental to their wellbeing. Further, as children grow older and transition to adulthood, they must face the reality of living as an adult with undocumented status, which is particularly harsh for the many that have spent many years and grown up in the UK.

In the UK, **most irregular migrants will not be able to regularise their status easily, if at all**. The UK government has usually set its face against general amnesties.

There are a limited number of specific conditions which individuals (and their children) could meet:

- An immigration rule allows some of those ending a relationship because of **domestic violence** to apply for indefinite leave to remain, in specific circumstances.
- Those in fear of returning home because of human rights abuses (including those at risk of being trafficked again) may be able to apply for **asylum**, and there are specific arrangements to allow some victims of trafficking to have a short time with no threat of immigration enforcement to consider their options.
- Those who face the prospect of inhuman or degrading treatment at home may be able to apply for leave to remain on **human rights grounds**.
- People with very close family links in the UK may be able to argue that the UK is the only place they can exercise their **right to family life**.
- Individuals may find that because of ancestry or marriage they can use the freedom of movement and residence rights allowed by **European Union rules**.
- **Long residence -**
Immigration rules allow for the grant of Indefinite Leave to Remain to people on the grounds of long residence.⁵³ Long residence is defined as:
 - ▶ 10 years lawful residence
 - ▶ 14 years residence of any legality (with any or all of the time spent in breach of immigration law)

The residence has to be continuous. Leave will not be granted if “in all the circumstances of the case” it would be “against the public interest”. The Immigration Directorate Instructions say:

“the Rule is not intended to reward people for their success in evading, or failing to cooperate with, the immigration control. Therefore, any deliberate or blatant attempts to circumvent the control, e.g. by absconding, contracting a marriage of convenience or using false documents (this is not an exhaustive list) may well mean that it is not in the public interest to grant leave.”

Even regularization by these routes is by no means guaranteed, due to numerous obstacles, including:

- ▶ Lack of good quality free **legal representation**
- ▶ **Discretion** and **poor quality initial decision-making**
- ▶ **Application fees**: Some applications to stay in the UK require fees to be paid: for example, an Indefinite Leave to Remain visa costs a minimum of £750. Applications through the asylum system do not attract fees. Where an application is made on human rights grounds and the applicant is destitute, the UKBA should waive the fee on application, but this may require a lawyer to insist.
- ▶ **Lack of awareness** on the part of both families in an irregular migration situation and their advocates and lawyers
- ▶ **Complex procedures** and requirements

Further, leave granted on human rights grounds is usually only Discretionary Leave of 3 years. It is imperative for children to have stable and long-term regularization possibilities.

- **Residence of children -**

Until 9th December 2008, there was a concession (called DP5/96) that allowed some families to apply for indefinite leave on the basis that they had a child under 18 who had lived at least seven years in the UK. This has now been withdrawn and only applies to applications made before that date.

When the concession was withdrawn, the government stated that cases would now be dealt with on the basis of the Human Rights Act (and particularly the right to private and family life under Article 8 ECHR/ 1998 HRA). So families with children can still apply for leave on the basis that their children's long residence in the UK means that it would not be proportionate to remove them, but there is no longer a fixed policy of seven years for the residence: in some circumstances this might mean that a family could apply earlier than that, but it is clearly possible that leave might be refused if the human rights grounds are not considered strong enough even where the family had been in the UK for more than seven years.

The main change, however, would appear to be that those who apply to stay on human rights ground normally do not get indefinite leave, but three years' discretionary leave (which includes the right to work, claim benefits etc).

- **Nationality of children -**

A March 2011 judgment in the European Court of Justice - the Zambrano case⁵⁴ - opens up new possibilities for regularisation for the parents of British children. A child is automatically British if either parent is British or settled, and for these purposes, a 'parent' is defined as the mother, an adoptive parent, or the father if married to the mother, on the child's birth certificate (since 2006) or proven by the courts to be the child's father. So, for example, the child of an undocumented mother and a British father, who has put himself on to the birth certificate, is British.

In the Zambrano case, the Court concluded that:

"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

In other words, a British child has a right to live in the UK, because s/he is also a European citizen, and so the parents, who are the primary caregivers of the child, also have to be given the right to reside and associated rights in order for the child to enjoy its rights. In the case of Mr Ruiz and Ms Zambrano, who were Colombian refused asylum seekers in Belgium; the Court ruled they had to be given the right to work and claim out of work benefits.

Endnotes

*Please see online version for active links to websites at:

<http://picum.org/en/publications/conference-and-workshop-reports/29486/>

TERMINOLOGY

- 1 In 1975, the UN General Assembly requested “The United Nations organs and the specialised agencies concerned to utilise in all official documents the term ‘non-documented or irregular migrant workers’ to define those workers that illegally and/or surreptitiously enter another country to obtain work (General Assembly, Measures to ensure the human rights of all migrant workers, 3449, 2433rd plenary meeting, 9 December 1975, para 2).
- 2 The Council of Europe adopted a resolution in June 2006 on the human rights of irregular migrants, in which it states that it “prefers to use the term ‘irregular’ migrants.” (Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), Human rights of irregular migrants, at point 7)
- 3 The European Parliament “Calls on the European institutions and Member States to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to ‘irregular/undocumented workers/migrants’” (European Parliament, Report on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI), Recommendation 158)

CHILD PROTECTION IN GENERAL

- 4 For guidance on making a complaint about a breach of human rights nationally, see the [Equality and Human Rights Commission](#). Although they are legally binding once ratified, international instruments are not directly enforceable in domestic courts unless an Act of Parliament transposes it into national law. Cases can be taken to court for breaches of the 1998 HRA, and to the European Court of Human Rights if all options in the domestic courts have been exhausted. The regional and international legal instruments also have monitoring bodies to which State Parties must report periodically. Alternative reports can be submitted to complement information provided in the government self-assessments, and some bodies accept communication from individuals or collective complaints. For further information on the CRC see footnote 6, and on the ICESCR see footnote 8. Details of the UN monitoring bodies can be found [here](#), of the European Court of Human Rights [here](#), and of the European Committee on Social Rights (European Social Charter) [here](#).
- 5 The full text of the CRC is available [here](#).
- 6 At the time, there was a reservation on immigration and nationality matters. The reservation was withdrawn in 2008. The CRC has not been transposed directly into national law; but its provisions have been incorporated into various national laws. Civil society can also submit “shadow” or alternative reports to the Committee on the Rights of the Child to complement the government’s self-assessment (initially, 2 years after acceding to the Convention, and then every 5 years). An [Optional Protocol](#) was adopted by the Human Rights Council on 17 June 2011 that allows the Committee to also examine communications from children and their representatives as well as inter-State communications. In its resolution (A/HRC/17/L.8), the Council recommended that the General Assembly adopts the Optional Protocol and that the Optional Protocol be opened for signature at a signing ceremony to be held in 2012. A Children’s Rights Bill, which would incorporate the CRC into domestic law, was proposed and had its first reading in the House of Lords on 19 November 2009. However, a second reading was never scheduled and the 2009-2010 session of Parliament has ended so the Bill will not make any further progress. However, in the case *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4, United Kingdom: Supreme Court, 1 February 2011).
- 7 The full text of the ICESCR is available [here](#).

- 8 The ICESCR has not been transposed directly into national law; its provisions have been incorporated into various national laws and administrative measures (see '[Fifth Periodic Report from the United Kingdom, the Crown Dependencies, the British Overseas Territories' to the Committee on Economic, Social and Cultural Rights](#), July 2007). NGOs have various ways of participating in the review by the Committee of Economic, Social and Cultural Rights following the submission of the government's self-assessment (initially, 2 years after acceding to the Convention, and then every 5 years) (details available [here](#)).
- 9 The full text of the ECHR is available [here](#).
- 10 Entered into force 3 September 1953.
- 11 The full text of the 1998 HRA is available [here](#). The 1998 HRA means that breaches of the ECHR/ 1998 HRA can be brought before the domestic courts. Cases can also be taken to the European Court of Human Rights if all procedures in the domestic courts have been exhausted.
- 12 For the analysis of the UK's implementation of these general principles of the CRC, see "[The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England](#)", Further information for the Joint Committee on Human Rights, Work in Progress, March 2010, p24-32.
- 13 "State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction (art. 2). [...] Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness." (Paragraph 12, [General Comment No. 6 \(2005\)](#), Committee on the Rights of the Child).
- 14 "Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations." (Paragraph 86, General Comment No. 6, Committee on the Rights of the Child.) Although this paragraph refers specifically to return, the general principle may apply to every right.
- 15 ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), *ibid*.
- 16 Two other important legal instruments are also relevant: the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) and the Charter of Fundamental Rights of the European Union (the Charter). Although no EU Member State has ratified the ICRMW, and the UK has opted out of the Charter, they reiterate international standards. Other relevant EU policies include the EU Strategy on the Rights of the Child and the EU 2020 Strategy; regarding education, the 2000 Lisbon Agenda and Proposed Directive on equal treatment (COM (2008) 426) extending protection against discrimination to education; regarding adequate standard of living/ child poverty, Articles 13, 136 and 137 EC, the Lisbon Strategy and Social Inclusion Process, the On-going Work of the Social Protection Committee EU Indicators Sub-group.
- 17 The full text of the Children Act (2004) is available [here](#).
- 18 The full text of the Borders, Citizenship and Immigration Act 2009 is available [here](#).
- 19 [UK Border Agency Code of Practice for Keeping Children Safe from Harm](#)
- 20 Sigona & Hughes (2010) "[Being children and undocumented in the UK: A background paper](#)", page 18; Webber (2009) "New immigration code does not fully protect children"; [IRR News](#).
- 21 NB: The position of the Every Child Matters Framework in the policy and priorities of the new Coalition government is unclear. More information is available [here](#).
- 22 Paragraph 88, Section 14: Functions and procedure of LSCBs, [Explanatory Notes, Children Act \(2004\)](#).

EDUCATION

- 23 Article 28, 29 CRC, Article 26 (1) UDHR, Article 13 (1) (2), 14 ICESCR, Article 5 (e)(v) ICERD, Protocol 1 Article 2 ECHR. It is also in Article 17(2) ESC - the Committee on Social Rights has not stated explicitly that undocumented children must have equal access to education, but it has found that, notwithstanding the general exclusion of undocumented migrants from the scope of the ESC, other basic social rights, such as health care and housing, must be provided to children in an irregular migration situation in certain conditions (see footnotes 31 and 42). Further, it has said that "Particular attention must be paid to ensure that vulnerable groups benefit from the right to education and have equal access" (e.g. Secretariat for ESC, "[Children's Rights under the European Social Charter](#)"). Therefore, it is likely that the Committee would find that Article 17 ESC applies to undocumented children. Though not legally binding, it can also be found in Article 30 ICRMW, Article 14 of the Charter, Article 3 (1)(e) UNESCO Convention Against Discrimination in Education (accepted but not ratified by the UK).
- 24 "The Committee takes note of Article 2 of the Convention on the Rights of the Child and Article 3(e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status." (Paragraph 34, [General Comment No. 13](#), Committee on Economic, Social and Cultural Rights)
- 25 Protocol 1 was signed and ratified 1952 (Entered into force 1954). In the case *Timishev v. Russia*, the European Court of Human Rights ruled that the exclusion of two children (aged seven and nine) from school as a result of their Chechen father no longer having a migrant's card was a violation of the ECHR. (European Court of Human Rights, [Timishev v. Russia](#), judgment of 13 December 2005, Application Nos. 55762/00 and 55974/00, para. 66.
- 26 Local Education Authorities (LEAs) in England and Wales, and Education and Library Boards in North Ireland
- 27 Children of compulsory school age and those under or over that age (up to the age of 20), and registered as a pupil at a school maintained by the authority. Article 13A [Education Act 1996](#). This is reiterated in the Article 1 [Education and Inspections Act 2006](#).
- 28 Article 7 [Education Act 1996](#).
- 29 See UKBA [website](#).
- 30 This is often required both to establish the duty of the LEA and to demonstrate eligibility for the school, as admissions are usually according to catchment areas. It can also be justified by the fact that funding is often based on the number of pupils, so the school administration needs some documentation when registering the child.
- 31 For example, schools receive additional funding for children from low-income families. However, this amount is calculated according to the number of children receiving free school dinners – a benefit from which undocumented children are excluded unless their parents are receiving some kind of support from social services.

HEALTHCARE

- 32 Article 24 (1), 25, 39 CRC, Article 25 UDHR, Article 12 (1) ICESCR, Article 5 (e)(iv) ICERD, Article 14 (2b) CEDAW, Article 3 ECHR. It is also in Article 13 ESC, which the European Committee of Social Rights has extended to apply to irregular migrants. Further, the Committee found that limiting care of children to emergency situations was a violation of Article 17 (International Federation of Human Rights Leagues (FIDH) v. France, complaint n° 14/2003, decision on the merits of 8 September 2004, §§ 26-32; Council of Europe (2008) "[Digest of the Case Law of the European Committee of Social Rights](#)", page 183-184. Though not legally binding, it can also be found in Article 28 ICRMW, Article 35 of the Charter. As a WHO Member State, the UK also "has a duty to ensure that national and regional healthcare systems and, in particular, hospitals and health services, address migrant children's right to healthcare; and hospitals and health services have a duty to empower migrant children and their families, by promoting knowledge and awareness on migrant children's rights" (IOM (2009) *Ensuring the Right of Migrant Children to Health Care: The Response of Hospitals and Health Services*, page 9-10).
- 33 In the case *Pretty v. United Kingdom*, the European Court of Human Rights ruled that treatment which risks exacerbating suffering from illness can fall under Article 3, where the authorities can be held responsible (e.g. detention, expulsion). (European Court of Human Rights, [Pretty v. United Kingdom](#), judgment of 29 April 2002 (Application No.2346/02), para. 52.
- 34 This has been the case since 2004, when Statutory Instrument No614 (SI614) came into force, making groups not 'lawfully resident' in the UK liable to pay NHS hospital and secondary care charges ([Statutory Instruments No. 614 of 2004](#), The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, March 2004. Charging for overseas visitors was then enabled by Section 175 of the [National Health Service Act 2006](#). Undocumented migrants' access to health care is governed by the rules for 'overseas visitors' as they are not considered 'ordinarily resident' in the UK. Changes to the rules that came into force on 1 August exempt unaccompanied children under local authority care and refused asylum seekers in receipt of Section 95 or Section 4 support ([Statutory Instruments 2011 No. 1556](#), The National Health Service (Charges to Overseas Visitors) Regulations 2011).
- 35 Department of Health (2011) [Implementing the Overseas Visitors Hospital Charging Regulations](#), para 4.8-4.9
- 36 *Ibid*, para 4.11
- 37 *Ibid*, para 4.39
- 38 Rate on 19 September 2011: 1 GBP = 1.15048 EUR (www.xe.com/ucc)
- 39 The government [announced](#) these changes on 18 March 2011, but they are not yet in force, and further guidance will be issued (Department of Health (2011) [Implementing the Overseas Visitors Hospital Charging Regulations](#), para 5.55, *ibid*.
- 40 Health Service Circular, HSC 1999/018 (DOH,1999) states that groups considered to be not 'lawfully resident' in the UK are not entitled to be registered with a GP. Despite this, the [Department of Health Table of Entitlement to NHS Treatment](#) (June, 2007) states that GPs have the discretion to register excluded groups as NHS patients. Usually, children born in UK hospitals are registered with a GP automatically with their birth certificate. For children born outside of the UK it is more problematic. Those that were registered while legally residing (e.g. if their parent claimed asylum or overstayed a visa) are usually able to remain with their GP (who may be unaware of the change in status), but for those who need to change GP or who have not been in the system at all, registration is entirely dependent on the GP's discretion.
- 41 A survey carried out by Pulse found that "one in ten primary care organisations flout official guidance by investigating GPs thought to be treating undocumented migrants, amid widespread confusion over the treatment rights of asylum seekers". The survey found widespread disparity among PCO stances regarding access to primary health care for undocumented migrants (and GPs' discretion to register patients), as well as GPs' awareness of the rules and attitudes ([Pulse](#), 18 July 2011). Further Miller-Sprafke & Qureshi (2010) 'Mystery Shopper Exercise for NHS London PCT's' found that 'over two thirds of PCT's in London have issued

guidance to GPs that is incompatible with their legal obligations. Many PCT's advise GP's they should only register people living legally in the UK for more than six months', wrongly applying the 'ordinarily resident' test which only applies to hospital services (MRN, Doctors of the World & Pierce Glynn (2011) "[Access to Primary Health Care for migrants is a right worth defending](#)").

42 There is a lack of specific information about undocumented children's mental health needs, as with data about their needs in general, but it is particularly necessary for undocumented children to have access to mental health care because the experiences related to being undocumented may cause strain on mental health. For example, children may have experienced trauma over events in their countries of origin, on route, and in the UK itself, such as in detention or due to the uncertainties of living with an irregular status, the threat of deportation (themselves with their families, and of one of their caregivers), and reaching the age of majority/ uncertainty about the future in general.

HOUSING

43 Article 27 (1) (3) CRC, Article 25 (1) UDHR, Article 11 (1) ICESCR, Article 5 (e)(iii) ICERD, Article 14 (2h) CEDAW, Article 3, 8 ECHR. It is also in Article 31 ESC, which the case law of the European Committee of Social Rights establishes applies to irregular migrant children (the usual scope of the ESC is limited to nationals or regular workers of Contracting State Parties). (Complaint No. 47/2008, [Defence for Children International \(DCI\) v the Netherlands](#); Carrera & Merlino (2010), "[Assessing EU Policy on Irregular Immigration under the Stockholm Programme](#)": page 28-30. Though not legally binding, it can also be found in Article 43.1 ICRMW, Article 34 (3) of the Charter.

44 Cholewinski (2005) *Study on obstacles to effective access of irregular migrants to minimum social rights*, page 32-33; See also e.g. *Gillow v. UK*, judgement of 24 November 1986 (Application no. 9063/80), *Buckley v. UK*, 15 September 1996 (20348/92), *Connors v. UK*, 27 May 2004 (66746/01).

45 As enshrined in the ECHR / 1998 HRA. Local authorities do not receive funding from the government for the provision of such services.

46 The House of Lords has 'rejected the idea that it was unlawful for authorities to offer to provide for the children and not the parents in these circumstances'. At the same time local authorities do have the power to provide accommodation for the family under Section 17 of the Act, and the Lords have acknowledged the need to look specifically at the facts of the case regarding a possible breach of Article 8 if accommodation is not provided for the family to live together (Sue Lukes, Praxis, 2010, *A manual for people advising undocumented migrants*, page 36).

47 There is sufficient case law establishing that this is a breach of the right to family life (Article 8 ECHR). However, when families do not have legal representation or know their rights, they are sometimes threatened with separation nonetheless, in order to scare them away, or otherwise, as some are desperate enough to agree, since it is easier to accommodate separated children than whole families. [E.g.s of relevant case law include: *Wallová and Walla v. Czech Republic*, judgment of 26 October 2006 (Application no. 23848/04, para.74-75), *Saviny v. the Ukraine*, 18 December 2008 (39948/06, para. 57), *Havelka and others v. Czech Republic*, 21 June 2007 (23499/06, para. 61), *Moser v. Austria*, 21 September 2006 (12643/02, para. 70, 73)].

48 Most of the families who receive such support are those who have overstayed their visa and are waiting for a decision from the UKBA on an application for leave to remain on human rights grounds, or women with children fleeing domestic violence who are waiting for a decision from the UKBA on an application for leave to remain under the Domestic Violence Rule (No Recourse to Public Funds Network (2011) *Social Services Support to People with No Recourse to Public Funds: A National Picture*, page 4). If there is no pending application to regularise the stay, the local authority has the duty to inform the Home Office, so although temporary shelter can be provided to avoid a breach of human rights, it usually results in the speeding up of immigration removal processes (detention and deportation) (Sue Lukes, Praxis, 2010, *A manual for people advising undocumented migrants*, page 28-29)

- 49 For example, a report by Shelter warns that children in poor housing conditions have up to 25% higher risk of severe ill-health and disability during childhood and early adulthood. Both unstable and unsuitable housing and poor health affect children's ability to attend school and academic achievement. (Harker (2006) *Chance of a lifetime: The impact of bad housing on children's lives*).
- 50 For more information, see the Jesuit Refugee Service – Europe [website](#); see also e.g. Hammarberg, T (2009) "It is wrong to criminalise immigration" – Viewpoints by T. Hammarberg, Commissioner for Human Rights, Council of Europe; PICUM (2009) *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe*
- 51 Bedfordshire Local Safeguarding Children Board, [Executive Summary](#), "Independent Review, Child A and Child B placed with family at Immigration Removal Centre", June 2010
- 52 See [UKBA](#), 28 February 2011; [Migrant Rights Network](#), 10 March 2011; [The Guardian](#), 10 March 2011; [IRR News](#), 17 March 2011.
- 53 Details of these arrangements can be found in Chapter 18 of the [Immigration Directorate Instructions](#).
- 54 European Court of Justice, [Gerardo Ruiz Zambrano v Office national de l'emploi \(ONEM\)](#) Case C34 – 09.

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PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

Rue du Congrès/Congresstraat 37-41, post box 5
1000 Brussels – Belgium
Tel: +32/2/210.1780
Fax: +32/2/210.1789
info@picum.org
www.picum.org