Written evidence from Migrant and Refugee Children's Legal Unit (NBB0051)

1. Introduction

1.1 The Migrant and Refugee Children's Legal Unit (MiCLU) is based at Islington Law Centre (ILC). We aim to uphold and improve the rights of asylum seeking, refugee and other migrant children and young people across the UK.

1.2 We have serious concerns about:

- The lack of clarity on how measures in the Nationality and Borders Bill will be applied to children and young people, whether unaccompanied or in families, and
- The general failure to consider the impact of the proposals on children's rights

Our response primarily will focus on children's rights as set out in the UN Convention on the Rights of the Child (UNCRC).

2. The impact of the proposed measures on children's rights

2.1 There appears to have been no assessment to consider how the rights of children will be affected by these proposals – between 2010 and 2020, children made up almost a quarter (23%) of all asylum applicants.[1]

2.2 The government has published a 'live' overarching Equality Impact Assessment (EIA) which, whilst acknowledging some of the issues referred to below, is at best superficial in its analysis.[2] Its coverage in relation to children's rights is minimal: it does not have a specific focus on children, with the exception of the statelessness measures does not include potential impacts on children in families, and by definition is limited to considerations of equality and non-discrimination so does not take into account the full range of children's rights. Additionally, in terms of age, a considerable proportion of initial decisions for unaccompanied asylum seeking children are delayed until they are over 18 – in 2019-2020 1,922 out of 4,650 initial decisions on UASC claims were made for young unaccompanied migrants over the age of 18.[3]

2.3 The potential impacts of the proposals on 18 to 25 year olds (former UASC) who arrived in the UK as children do not appear to have been considered in the original proposals as set out in the New Plan, nor the Bill Clauses nor accompanying EIA. In relation to migrant children, the UN Committee on the Rights of the Child recommends that: *"States should provide adequate follow-up, support and transition measures for children as they approach 18 years of age, particularly those leaving a care context, including by ensuring access to long-term regular migration status and reasonable opportunities for completing education, access to decent jobs and integrating into the society they live in."*[4]

[1] Of these 85,871 children, 23,810 were recorded as unaccompanied asylum-seeking children (28%) and the remaining 62,061 were children who were part of a family claim (72%)

[2] Since the EIA will evolve and be subject to revision as the Bill progresses, it would be helpful if the published version was given a date!

[3] Home Office Quarterly Immigration Statistics, Table Asy_D02

2.4 The UK government made a public commitment to give due consideration to the UNCRC when making new policy or legislation.[5] We recommend that the Home Office comply with this by carrying out and publishing a formal Child Rights Impact Assessment (CRIA) on the Nationality and Borders Bill to add a child rights focused perspective to its usual equality impact assessment processes.

3. Children's Rights considerations on selected Bill Clauses

3.1 Citizenship of stateless minors (Clause 9)

- **JCHR Question: Do these reforms adequately address any remaining areas of unjustified discrimination in British nationality law?**

3.1.1 Under s.3(1) of the British Nationality Act 1981 a child can acquire British citizenship under statelessness provisions where they were born in the UK, have lived here for 5 years and have never had another nationality.

3.1.2 In its EIA (para.20(a)(i)), the government appears to be saying that their policy aim is to control immigration by preventing parents from knowingly rendering their child stateless in order to be able to apply to regularise their own immigration status through their children acquiring British citizenship. This assertion is unevidenced in the New Plan and the EIA. Moreover, Clause 9 penalises the child for what their parent(s) have done or failed to do. If this route is removed, how will the Home Office make provision for 'genuinely stateless children' to acquire citizenship?

3.1.3 Under the UNCRC, governments must give high priority to a child's views (Article 12) and best interests (Article 3) in relation to decisions about their nationality and that of their family members (Articles 7 and 8), without discrimination based on the parents' status (Article 2). As an alternative approach to the measures set out in Clause 9, we recommend that the Home Office decision maker should make a more detailed and well-reasoned decision and, if there are other routes to citizenship for the child, then this should be the basis for a refusal.

3.2 Differential treatment based on method of arrival to the UK (Clause 10) and inadmissibility (Clauses 13-14)

- **JCHR Question: Does introducing a two-tier system of rights for refugees meet the UK's obligations under refugee law and human rights law?**

3.2.1 In Clause 10, the government proposes differential treatment of refugees based on their method of arrival. Among many others, MiCLU believes this would contravene international law. Article 31(1) of the Refugee Convention makes it clear that refugees should not be penalised for their illegal entry or stay, recognising that the seeking of asylum can oblige refugees to breach immigration rules. The government is attempting to circumvent this by reinterpreting the Refugee Convention in Clause 34 of the Bill which puts the onus on the asylum seeker to prove they *"could not reasonably be expected to have sought protection to have sought protection under the*

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[4] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment No. 23 (2017) of the Committee on the Rights of the Child on International Migration: States' parties obligations in particular with respect to countries of transit and destination, para.3

[5] https://questions-statements.parliament.uk/written-statements/detail/2018-11-20/hcws1093

Refugee Convention in that country." It is difficult to envisage what type of documentation or other evidence would satisfy this requirement.

3.2.2 Additionally, in the EIA (para.21(b)) officials admit that *"evidence supporting the effectiveness of this approach is limited".* Which leads to the question of why such draconian and untested measures are being legislated for; and how the impact of these measures will be monitored, what criteria will be used for measuring impact on asylum seekers and other stakeholders as well as the asylum system, the proposed duration of this monitoring programme, and whether or not this data will be made available for public scrutiny.

3.2.3 It is unclear whether the government intends that this differential treatment and application of Temporary Protection status will apply to individuals who arrived in the UK as a child, once granted status. It is further unclear what, if any, differential effect being granted temporary protection status would have on dependent children's access to public services.

3.2.4 We would argue that being granted temporary protection status results in permanent uncertainty. MiCLU has considerable experience of working with families on the 10 year route to settlement. Our experience of supporting children and families on this route is that the length of the route and the short grants of leave (i.e., temporary leave which must be renewed every 30 months until the 10 year period has been reached), together with long periods left in limbo, actually cause people to develop mental health problems on account of the ongoing stress involved in living a precarious existence.[6] We have clients on this route who have been diagnosed with mental health conditions as a direct result of the challenges they face having to reapply every 30 months, and the impact this precariousness has on their access to further or higher education, housing, employment and public services.

3.2.5 Clauses 13 and 14 deal with inadmissibility. The reasons for putting these measures in the Bill are unclear because they are already in place through paragraphs 345A-D of the Immigration Rules and accompanying statutory case guidance on inadmissibility. Currently, families with children under the age of 18 are subject to these powers; unaccompanied asylum seeking children are not. The EIA confirms that the exemption for unaccompanied asylum seeking children will remain (para.19(b)) – however, if that exemption continues to be operationalised through guidance, it could be subject to change in the future. As a minimum, we believe the exemption should appear in the Immigration Rules which would require that any change be presented to and therefore open to review by Parliament.

3.2.6 Article 3 of the Refugee Convention stipulates that: *"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."* The proposal to introduce a two-tier system where refugees arriving through resettlement or refugee family reunion will be granted refugee status and have settlement rights, whilst the asylum claims of those arriving clandestinely or through a safe third country to which they can be removed and, if not, will be granted a form of temporary protection status will have a disproportionate impact on particular nationalities and protected groups. The EIA recognises that it will in fact discriminate against particular nationalities, but insists it will not be

[6] Bawdon, F, Makinde, D and Akaka, Z (2019) Normality is a luxury: how limited leave to remain is blighting young lives. Let Us Learn.

unlawful because the discriminatory measure will be in primary legislation. Moreover, it makes the extraordinary assertion that, by encouraging asylum seekers travelling outside safe and legal routes to claim asylum in the first safe country they reach, the UK government is [somehow] advancing their equality of opportunity (para.22(a)).

3.2.7 Existing safe and legal routes do not provide a rapid route to safety for the majority of asylum seekers. Those compelled or forced to flee a crisis, violence or persecution will always have to move quickly to be safe. Visa processes are bureaucratic and slow; their official nature can place those fearing for their safety at greater risk; and they require documentary evidence that is difficult if not impossible to acquire – particularly for unaccompanied and separated children and young people. Children seeking refuge have little to no control over the decision to travel, the means of travel, or the final destination. Children who are trafficked or psychologically or physically coerced or tricked into leaving are not in control of their migratory decisions.[7]

3.2.4 Under Article 2 of the UNCRC, the principle of non-discrimination is foundational and universal: "*fully applicable to every child and his or her parents, regardless of the reason for moving, whether the child is accompanied or unaccompanied, on the move or otherwise settled, documented or undocumented or with any other status."*[8] Any differential treatment must be proportionate and in line with the child's best interests under Article 3. Governments *"should ensure that migrant children and their families are integrated into receiving societies through the effective realisation of their human rights and access to services in an equal manner with nationals."*[9]

3.2.5 We seek unequivocal assurance from the government that children who come to the UK on their own will be excluded from the effects of these Clauses. If they are meant to apply to unaccompanied young people (or, in reference to former UASC, those who arrived in the UK as a child), they will prevent application of the UNCRC's vision of proper permanence planning for a durable solution – a solution that meets all of a child's protection needs, takes into account their views, and leads to a longer-term sustainable arrangement. *"Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay."*[10] Young people we work with describe how the current asylum system effectively puts their lives on 'pause' for years. This has adverse and long-lasting impacts and denies them the opportunity to grow up feeling healthy, safe and secure.[11]

3.3 Evidence and credibility (Clauses, 16, 17 and 46)

- **JCHR Question: Do proposed changes to the application and appeals process for asylum applicants provide adequate human rights protection, including provisions providing for credibility and the weight given to evidence to be affected by the timeliness of applications and supportive evidence?**

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[7] Gazzotti, L (2019) Destination anywhere: The profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK, UNHCR UK

[8] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, para.21

[9] Ibid, para.22

[10] General Comment No. 6 (2005) of the Committee on the Rights of the Child on the Treatment of unaccompanied and separated children outside their country of origin, para.21

[11] UNHCR and UNICEF (June 2016) What the UK can do to ensure respect for the best interests of unaccompanied and separated children

3.3.1 Clause 16 of the Bill gives the Home Secretary or an immigration officer the power to serve an evidence notice on an asylum seeker. Clause 17 creates a principle that, if a person making an asylum or a human rights claim provides evidence late, or fails to act in good faith, this conduct shall be taken into account as damaging the claimant's credibility. Similar measures for victims of modern slavery are in Clause 46. The EIA acknowledges that some protected groups *"might find it more difficult than others: to disclose what has happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements. There may also be trauma-related considerations, in terms of how any vulnerable groups adduce evidence."*

3.3.2 The UN Committee on the Rights of the Child stipulates that *"procedures should guarantee the adoption of certain specific measures in order to ensure that administrative and judicial proceedings are adapted to the needs and development of children, and that the best interests of the child is a primary consideration in all such proceedings."*[12]

3.3.3 Processes requiring children to raise all protection-related issues 'upfront' fly in the face of any understanding of the human experience of trauma, abuse and child development. Evolving levels of maturity will affect a child's capacity to provide a clear, chronological, coherent and consistent account of what happened; they are often too afraid and mistrusting to disclose their experience immediately and it is common for abusers to coach them with a story to tell authorities. Unaccompanied asylum seeking children should be exempt from the serving of both the evidence notice, or slavery or trafficking information notice.

Other issues:

3.4 Reception arrangements (Clause 11)

3.4.1 Neither the New Plan nor the Bill specifies whether or not these reception centres will be used to house asylum seeking families with dependent children. The UN Committee on the Rights of the Child recommends that governments *"develop detailed guidelines on standards of reception facilities, assuring adequate space and privacy for children and their families"*,[13] stipulates that these arrangements must be temporary, and that they must not restrict children's freedom of movement.

3.5 Age assessment (Clause 58)

3.5.1 It is difficult to comment on the specifics of a "placeholder" Clause, but the age assessment Clause is one of only two specific to children identified in the EIA. We fully endorse the Refugee and Migrant Children's Consortium (RMCC) response to the age assessment proposals in the New Plan for Immigration.[14]

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[12] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment No. 23 (2017) of the Committee on the Rights of the Child on International Migration: States' parties obligations in particular with respect to countries of transit and destination, para.14

[13] Joint general comment No. 3 and 22, para.50

[14] RMCC (June 2021) Age assessment proposals in the New Plan for Immigration

3.5.2 The UN Committee on the Rights of the Child recommends: "*To make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals* [e.g. social workers] *who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. . . The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods . . . which may be inaccurate, with wide margins of error . . . States should ensure that their determinations can be reviewed or appealed to a suitable independent body."*[15]

3.5.3 In response to the areas that may be covered by Regulation (we welcome the government's commitment to these be subject to the affirmative resolution procedure), we note the following:

3.5.4 **The test to be used.**
Good practice in age assessment must involve and be informed by others who play a significant role in that young person's life. Therefore, age assessment processes and skills development need to involve holistic assessments. It is unclear how that will work with a panel of social workers based in a national Board.

3.5.5 **Conferring age assessment functions and decisions on the Secretary of State.**
The proposed National Age Assessment Board's (NAAB) functions will cross over Home Office, DfE and potentially DHSC responsibilities (depending on the identification, development and future use of 'scientific methods' of assessing age). How independent the NAAB will be from its sponsor government department, the Home Office, is of concern. Any function that may affect children in the care of the state requires independent professional and regulatory social work oversight.

3.5.6 **The use of scientific methods.**
Professional medical bodies have been unequivocal in their rejection of the use of scientific methods to assess age because it is imprecise and the use of ionising radiation for this purpose is not appropriate (please see the RMCC age assessment briefing for further detail). It is unclear why the government wishes to revisit the use of scientific technology in the absence of any new techniques that could be used safely and accurately as part of a holistic, multiagency age assessment. It is also unclear what weight would be given to the social work component of the age assessment process, and the 'scientific' test.

3.5.7 **The right of appeal.**
The First-tier Tribunal will hear appeals against age assessment decisions. This right of appeal should apply to local authority age assessments and NAAB age assessments, and both short form and full age assessments should be appealable. It would also be important to clarify how the new appeal system will focus on findings of fact, and ask whether it will still be able to comment on the age assessment process. In its aim to reduce the use of judicial review for disputed age assessments, we would not want the tribunals to lose a scrutiny of age assessment processes, since that learning could inform and support improvements in both local authority and NAAB practice. In terms of ensuring children's access to justice, since age disputes need to

[15] Joint General Comment No. 4 and 23, para.4

be carried out expeditiously, we recommend that the government carefully assess what knock-on effect they may have on Tribunal capacity and ensure they identify and implement effective mitigation measures.

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