Rights of Women briefing for House of Lords Second Reading of the Immigration Bill 2015

Introduction

Rights of Women is a charity specialising in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

To discuss the issues raised in this briefing or for further information please contact Jas Bhatoa, Senior Legal Officer or Nicole Masri, Legal Officer on 020 7251 6575 or jas@row.org.uk / nicole@row.org.uk.

Overview

We have very significant concerns about the impact of provisions of the Immigration Bill on migrant women affected by violence and attempting to secure safety in the UK.

We are concerned that in an attempt to reduce net migration the Government is not giving sufficient regard to the impact of the Bill's provisions on this vulnerable group of women. We are concerned that the Bill is also at odds with the Government's commitment to address violence against *all* women and girls set out in 'A call to end Violence against Women and Girls' and its subsequent action plans. The Government has expressly included migrant and asylum-seeking women at risk of violence in this commitment.

We urge Members to consider the impact of the Immigration Bill on migrant and asylum-seeking women affected by violence, to consider further amendments to the Bill which will secure the safety of this vulnerable group of women and to raise their concerns in Parliament.

The remainder of this briefing addresses our concerns, exemplified by case studies, in relation to the so-called 'right to rent' scheme in Part 2 of the Bill and the 'remove first, appeal later' provision in Part 4 of the Bill.

Part 2: Access to Services, Residential tenancies (aka 'the right to rent' scheme)

We are deeply concerned that the 'right to rent' scheme will place already vulnerable migrant women who have experienced domestic violence at further risk of harm as a result of a scheme that creates barriers to accessing private rented accommodation.

We are calling for the all the provisions in the Bill concerning residential tenancies to be removed and the 'right to rent' scheme in its entirety to be repealed.

We know that the 'right to rent' scheme places a heavy burden on landlords to obtain evidence of a prospective tenant's right to reside. The Bill serves to mount further pressure on landlords by introducing criminal liability. The evidence from the Joint Council for the Welfare of Immigrants independent evaluation[1] of the scheme shows that 42 % of landlords are less likely to rent to those who do not hold a British passport and 65% of landlords are much less likely to consider renting to those individuals unable to provide documents immediately.

Many women, including British citizens, experiencing violence in their relationships will have been deprived of access to important documents, such as passports and biometric residence permits, necessary to prove their right to rent and therefore these provisions will have a disproportionate effect on women fleeing abusive partners or other perpetrators of abuse regardless of their nationality.

Furthermore, women with limited leave to remain in the UK on the basis of their relationship with a British or settled person are dependent on that relationship subsisting for the continuation of their leave; when the relationship ends their immigration leave is at risk and women need to take steps to regularise their status in another category. Women who have fled abusive partners often need time to recover from their trauma before starting to address matters such as regularising their immigration status. It is not uncommon for a woman to find out much later after the breakdown of a relationship due to violence that unbeknownst to her the Home Office has curtailed her leave after her abusive partner informed them of the relationship ending. Without receiving notice of a Home Office curtailment decision, a woman can find herself suddenly without leave in the UK, unable to work or access housing.

Many of the vulnerable migrant women we advise on our telephone legal advice line have left or are trying to leave abusive relationships. Of these women a significant proportion are presently undocumented though either have an existing right to reside in the UK under European law or have a strong basis on which they can submit an application to the Home Office for leave to remain. The 'right to rent' scheme places these already vulnerable women at further risk by preventing them from accessing their own safe private rented accommodation due to a lack of documentation. Unable to access private rented accommodation, these women are at risk of homelessness,

[1] *No Passport Equals No Home,* JCWI 2015 –www.jcwi.org.uk

renting from exploitative landlords, returning to abusive partners or being forced into entering exploitative relationships.

We provide below two case studies of common scenarios that we encounter on our telephone legal advice line and the impact we believe that the 'right to rent' scheme will have on these vulnerable migrant women to support our call for the abolition of the 'right to rent' scheme.

1. The first scenario relates to an undocumented migrant woman who is the primary carer of a British child in the UK and has a derivative right to reside under Regulation 15A of the Immigration (EEA) Regulations 2006 (as amended).

*names have been changed to protect the identity of our service users.

Case Study 1

Jane* called our legal advice line because she was homeless with her three month old baby and was too scared to approach any authorities for help.

Jane is an undocumented woman from Nigeria who came to the UK several years ago. She had been in an abusive relationship with a British man who is the father of her child. After being attacked by her abusive ex-partner whilst pregnant Jane fled their shared home and was staying with a friend. Jane called us for help because her friend could no longer accommodate her and the baby and she needed to find a safe place to live.

After taking full details from Jane about her circumstances our lawyer advised her that she has a right to reside in the UK under European law. Jane has a derivative right to reside in the UK under Regulation 15A of the Immigration (EEA) Regulations 2006 (as amended) because she is the primary carer of a British child who would be unable to continue residing in the UK without Jane present to look after him. As with most rights to reside under European law, Jane's right is not contingent on her having been issued with a derivative residence card by the Home Office however in order to assert her right we advised her to obtain one in due course.

It will take Jane some time to get the evidence she needs in order to submit an application to the Home Office for a derivative residence card because her case is complicated as a result of her history as a victim of domestic violence. Jane will need to prove her child is British in order for her right to reside to be recognised. Jane's child is by law a British citizen though, like many British children born in the UK to abusive British fathers, Jane has not been able to obtain a British passport for her child in order to assert his nationality (and her derivative right to reside) as she has insufficient documentary proof that her ex-partner is the child's father and insufficient proof that he is a British citizen. Our lawyer advised Jane on ways she can obtain such proof by applying for Family Court orders. Jane's vulnerability make accessing these legal processes on her own challenging and so we referred her to a solicitor who is willing to submit an application for exceptional case funding so that she can be represented by a legal aid solicitor.

We are confident Jane will be able to obtain a derivative residence card from the Home Office in the future but it will be a long and challenging process for her which will require significant support and legal interventions.

The impact of the 'right to rent' scheme

Under the 'right to rent' scheme Jane would not be able to access private rented accommodation for her and her 3 month old baby despite the fact she is lawfully present in the UK with a derivative right to reside.

If she tried to access private rented accommodation she would only have her Nigerian passport containing an expired visitor's visa to show to a prospective landlord. From this any prospective landlord would understandably conclude that she had no right to rent.

After speaking to our lawyer, Jane may be able to assert her right to rent to any prospective landlord however her assertions would likely fall on deaf ears when landlords face the prospect of such hefty civil and criminal sanctions for failure to comply with the scheme. Even if a landlord went to the additional effort of contacting the Landlord Checking Service to seek confirmation of Jane's right to rent, there is no evidence to suggest that a positive response would be received especially whilst Jane remains unable to produce a British passport to prove her son's citizenship.

The effect of the scheme will be to exclude a British child and his vulnerable lawfully present mother from renting accommodation in the UK for a considerable period of time whilst she battles her way through legal procedures to obtain the evidence she needs to get herself and her child documented.

2. The second scenario we frequently encounter is of an undocumented migrant woman who is the sole carer of a child in the UK and meets the criteria to apply for leave to remain in the UK as the parent of a child under Appendix FM of the Immigration Rules.

*names have been changed to protect the identity of our service users.

Case Study 2

Julia* called our legal advice line because she was having great difficulty getting the Home Office to accept her application for leave to remain in the UK as the parent of a British child and needed advice on how to regularise her status.

Julia is a Russian national who had arrived in the UK as a teenager and overstayed her visa. She had recently fled an abusive relationship with a British man who had been prosecuted for assaulting her. They had a 4 year old son for whom they shared responsibility following a Family Court order concerning arrangements for the care of the child. Julia and her son were being accommodated by the Local Authority under

Section 17 of the Children Act 1989 whilst she was unable to work or access public funds pending the resolution of her immigration situation.

Julia had been trying to submit an application to the Home Office for leave to remain as the parent of a British child in the UK under Appendix FM of the Immigration Rules. Our lawyer advised Julia that she had a very strong application and the prospects of her being granted leave to remain by the Home Office were high.

As legal aid is no longer available to assist women like Julia to make their immigration applications, she had prepared and submitted her own which unfortunately had been rejected by the Home Office without consideration because, it stated, she had not paid the £649 application fee. Julia had done everything she could to prove to the Home Office that she was eligible for a fee waiver on account of her being unable to afford to pay the fee. Our lawyer advised Julia that she could challenge the Home Office refusal to accept her application through the courts however a quicker solution for her might be to re-submit the application to the Home Office with additional evidence of her financial circumstances.

We are confident that Julia will be granted 2.5 years limited leave to remain in the UK once the Home Office accept and determine her application however at present there is no prospect of this happening any time soon. She will have to continue to try to get her application accepted by the Home Office without the benefit of legal representation and if they continue to reject her application for failure to pay the fee she will be left with no option but to obtain legal assistance to apply to the High Court for judicial review.

The impact of the 'right to rent' scheme

Julia's situation is depressingly common. Many vulnerable migrant women who are undocumented and have no recourse to public funds have strong applications for leave to remain as the parent of a child in the UK but are finding it near impossible for their applications to be heard by the Home Office who continue to unreasonably reject their requests for fee waivers which accompany the applications. The result is that these women remain undocumented and under the 'right to rent' scheme they are prohibited from renting.

Julia didn't have enough money to rent privately herself and so was dependent on the Local Authority to provide her and her son with accommodation until she resolved her immigration status. If she had been able to pay for her own accommodation she would have faced major barriers under the scheme as she would not have a right to rent until she had been granted leave to remain in the UK (which may be many months if not years away if appeals or judicial review are necessary).

Whilst the scheme appears to allow prospective landlords to contact the Landlord Checking Service for approval to rent to a person with an ongoing application with the Home Office, it is doubtful to say the least that approval would be forthcoming and that a prospective landlord would be willing to rent in these circumstances anyway.

Part 4: Appeals, Clause 34 (aka 'remove first, appeal later')

Clause 34 is an extension of the provision introduced in the Immigration Act 2014 to remove foreign national offenders from the UK before their deportation appeal is considered if it would not be a breach of their human rights (the so-called 'deport first, appeal later' provision). With the introduction of clause 34 it will no longer be the case that only foreign national offenders challenging a deportation decision face the prospect of pursuing an appeal from abroad, it will become the norm for everyone. Clause 34 of the Bill extends the scheme so that the prospect of an out of country appeal applies to everyone who has a right to appeal against a human rights decision. In practice, this will impact greatest on those who seek to remain in the UK on the basis of their private life or their family life with a partner or child under Article 8 of the European Convention on Human Rights.

We have advised many women who have experienced domestic or sexual violence and have left their abusive partners but are not eligible to apply for settlement as a victim of domestic violence under the Immigration Rules because they don't have qualifying leave as the partner of a British or settled person but have another form of leave instead such as a dependant of a student (Tier 4 migrant) or worker (Tier 2 migrant). In these circumstances, women are advised to make an application under the Immigration Rules either as the parent of a British child or child who has lived in the UK for seven years or under the private life provisions. These applications carry a right of appeal if the application is refused. Legal aid is no longer available for women to obtain representation and the application process is challenging, particularly for women with a history of abuse, to undertake alone. The in-country right of appeal provides important protection to ensure a just outcome.

Clause 34 would mean that families are separated and lives are uprooted. A mother seeking to remain in the UK as the parent of a child who is wrongfully refused by the Home Office faces the prospect of leaving her child in the UK with an abusive father or taking her child with her forcing them to leave behind a network of friends and family, abandoning their schools and communities and being forced to live in a country where in many instances they have no ties, no understanding of the language or culture. This upheaval is by no means short-term. The current timeframe for the listing of appeals in the First tier Tribunal is in excess of 6 months. We have been informed by several callers to our telephone advice line that implementation of a positive Tribunal decision can also take around six months. It is more than likely that the interference with family / private life would persist for more than a year.

For many vulnerable women returning to a country they no longer consider home, the challenges of pursuing an appeal and doing so effectively would be too great to overcome. The result of the 'remove first, appeal later' provision will inevitably be that fewer appeals are pursued and those that are pursued are ineffective on account of the procedural unfairness inherent in pursuing an appeal from overseas. In the words of the then Sedley LJ in the Court of Appeal "*[t]he reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal*."[2]

[2] R (BA (Nigeria)) v Secretary of State for the Home Department [2009] EWCA Civ 119 at paragraph 21.

The usual safeguard of challenging the lawfulness of the Secretary of State's decision to certify an appeal by way of judicial review will no longer be available to those without significant means following a recent decision in the Court of Appeal[3] which will see the re-introduction of the 'residence test' for legal aid, the effect of which will leave most people seeking to challenge a certification ineligible for legal aid.

We strongly oppose the removal of in-country appeal rights and calls on Members of the House of Lords to seek the removal of this clause from the Bill. We ask Members to consider the impact of the 'remove first, appeal later' provision on vulnerable women and have set out below a case study featuring a common scenario we encounter in support of our call to halt this unjust and destructive provision.

Case study 3

Mary is a disabled Ghanaian national who entered the UK more than 10 years ago as the dependant of her then partner who had a student visa. Mary's relationship was abusive and she eventually fled the relationship. As a dependant on her ex-partner's visa her right to remain in the UK became insecure on leaving him. She notified the Home Office of her relationship breakdown and applied for leave to remain in the UK independent of her abusive ex-partner. Her application was rejected and she subsequently overstayed her visa.

Following a later relationship with a British man, Mary had a child who was born earlier this year. Her child is also a British citizen by virtue of him being born in the UK to a British father. Unfortunately the relationship broke down since which time Mary has been the primary carer for her child whilst the father visits on a weekly basis but provides no financial support.

Earlier this year Mary applied for leave to remain in the UK as the parent of a British child under the Immigration Rules. She submitted the application alone without the benefit of legal advice or representation since none is available under legal aid for this type of application. Her application was refused by the Home Office citing her failure to supply evidence that she met the requirements for leave as a partner of a British citizen. Mary never intended to apply for leave as a partner and one can only assume that she mistakenly completed the wrong sections of the application form. The Home Office also considered the evidence Mary had submitted of her British child but rejected it as she had not provided her child's original passport but instead submitted a photocopy which the Home Office found to be inadequate proof.

Mary contacted our telephone advice line for advice on appealing the Home Office decision. Our lawyer advised Mary about the procedure for lodging an appeal to the First tier Tribunal and invited Mary to call the advice line for further assistance in preparing her appeal. We warned Mary that it may be many months before her case will be listed for appeal.

[3] Public Law Project v The Lord Chancellor & Anor [2015] EWCA Civ 1193.

Mary is the single mother of a British child who has contact with his British father in the UK. She has a good case to argue before a judge that she qualifies for leave to remain in the UK under Appendix FM of the Immigration Rules as the parent of a British child.

Impact of the 'remove first, appeal later' provision

Mary's application falls to be considered as a human rights claim, relying as it does on her right to a family and private life under Article 8 of the European Convention on Human Rights. Under the proposed 'remove first, appeal later' provision, Mary's claim may be certified with the effect that she would not be able to pursue her appeal whilst in the UK but instead she would face the prospect of removal and pursuing her appeal rights from Ghana.

Mary would face a stark choice. Either leave the UK together with her British child separating the child from its father and facing the prospect of looking after the child alone with no support in Ghana or leave her child behind in the care of its father whilst she returns to Ghana alone with no guarantee of when she will be able to return to the UK and her child. Neither option can be in the best interests of the child which is undoubtedly served by remaining in the UK, in the day to day care of his mother, contact with his father and with the benefit of section 17 Children Act 1989 support that he has been receiving from the Local Authority.

Mary has a good chance of succeeding on appeal. However this is not relevant to the question of whether she should be removed pending the appeal. She is a vulnerable woman with a history of abuse and mental health issues. An inevitable consequence of removing her and requiring her to appeal from overseas is that she will be less able to prepare her appeal and less able to effectively participate in the appeals process. She is unlikely to receive adequate care and support on return to Ghana. The result being that her chances of succeeding at appeal are lowered.

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