

CHILDREN & THE RIGHT TO FAMILY LIFE, A CONFLICT OF OPINION IN THE IMPLEMENTATION OF IMMIGRATION RULES –THE UK & THE USA

Family reunification and the recognition of a family life is a cornerstone for immigration law in many countries. Many countries recognize the need for the migration of family members to join their relatives in another country. This article considers how children fit into this family life and how the treatment of a child's family right differs between the United Kingdom and the United State of America.

The immigration system provides the ability to reunite families from across the globe. U.S. citizens or permanent residents may sponsor foreign spouses, children, and relatives for permanent residency through family-sponsored immigration. In addition, citizens who have reached the age of 21 may sponsor their siblings and parents.

The United Kingdom is a member of the European Union and has adopted many of its laws in respect to human rights. One of the key rights for immigration law is the human right to a family life and the right to a private life.

Enshrined in these rights is the recognition of the rights of family member to live together so that they can continue to foster their family life, which is the criterion for family based immigration. In the UK, citizens as well as those with permanent and temporary residency have a right to sponsor their spouse and children into the UK. This right is not absolute and is balanced with the right of the country to maintain immigration control. Unlike the USA however, there are no rights for citizens to sponsor their parents to the UK except for those who are wholly dependent on the citizen.

Children & Immigration (Comparing United Kingdom & United States)

Children are the heritage of our society; they are the tomorrow's future. How we treat and develop our children plays an important role on the kind of society we have in the future, in terms of Social Culture, Economics, Technology etc. So why are they being ignored in the application of some immigration rules? The way in which the U.S. and the UK treat the rights of children when it comes to the enforcement of immigration control differs greatly in law and in application.

The United Kingdom

Since 1983, not all children born in the UK are automatically considered British Citizens. The nationality of a child at birth is dependent on the immigration status of the child's parents at the time of birth. However, children can be registered as British Citizens if they spend the first 10 years of their life in the UK regardless of the status of their parents.

Consideration of Children in Immigration Decisions.

Section 55 of the 2009 Borders, Citizenship and Immigration Act places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs function with regards to the need to safeguard and promote the welfare of children in the UK.

Article 8 of the Human Rights Act also requires the Secretary of State to consider the right to

a family life and the right to a private life. These rights are also applicable to children and their families.

It has been reconfirmed in several UK judgments that the “best interests” of the children must be a “primary consideration” when taking immigration control actions against families with children. These are not limited to children who are citizens of the United Kingdom.

Thus where a family is in the UK legally or illegally and they have a child in that family who has resided in the UK for at least 7 years and remains under the age of 18, both Section 55 and Article 8 play an important role when it comes to the refusal of an application for residency or the intention to remove or deport members of the family from the UK.

Previously the UK had what was called the 7-year concession whereby such a family would be entitled to make an application for permanent residency in the UK based on the presence of a child in the family in the UK for over 7 years. This rule was abolished as it was thought be disproportionality advantageous to illegal immigrants especially when there was no rule in the UK which would permit the parent of a British child to stay in the UK by virtue of the nationality of their child.

However, the 7-year rule was reintroduced on the 9th of July 2012; the changes also extended rights to parents of British Citizens. For example, if a mother who is illegal in the UK gives birth to a child in the UK who has a British father, that child is British and the UK would need to consider the interest of that child before it can remove the mother from the UK. It is considered that a British Child has the right to be resident and grow up in the UK, which essentially makes the removal of that child’s mother difficult if not impossible, hence the mother is likely to be granted permission to remain in the UK. This enables her to reside and work in the country legally as the primary caregiver for her child. This often leads to permanent residency.

Those over the age of 18 but have lived a long time in the UK

The current UK rules provides that person aged between 18 and 25 and who have spent at least half of their lives in the UK can apply to remain in the UK under the Principles of Article 8 private life.

Those outside that age group would need to demonstrate 20 years (formerly 14 years) of continuous residence in the UK in order to qualify for leave to remain in the UK, if they can prove they have no social, cultural and family ties to their country of origin.

The UK rules address some important social issues concerning children.

- (a) In today's society a child should not be punished for the wrong deeds of its parents. When the parent takes the steps to enter a country illegally or breaches the terms of their visa, the young child or unborn child of the family has no say in the matter. When that child grows up in the only society it knows, it would be unfair and unduly harsh to uproot that child from the society and in turn place that child in a new society where the culture and sometimes the language are completely alien to the child. Hence the UK paves a way for that child to be able to continue his/her life in the environment in which he or she grew up.
- (b) Several researches have shown that a child develops better with a stable upbringing, especially when the child is being raised by its natural father and mother. Therefore to intentionally separate a child from either one or both parents for the sole purpose of maintaining immigration control is to intentionally deprive that child the required stability for development which may lead to under achievement, a life of crime or even medical illness such as depression.

The United States of America

Unlike the UK, in the U.S. unlike the UK every person born on U.S soil is an American Citizen regardless of the immigration status of its parents. Every American Citizen is entitled to the American Dream.

The American Dream which is a notion rooted in the United States Declaration of Independence is best described in the words of James Truslow Adams in 1931, "life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement" regardless of social class or circumstances of birth.

Implicit in the American dream is the notion of freedom and that no one should be illegally deprived of their right and freedom to pursue happiness and success.

Child Citizens of Illegal Immigrants

The children of illegal immigrants have a relatively tough time in the USA. Unlike their British counterparts, there are no in country routes for the parents to regularize their status within the USA.

Though the U.S. has provisions in the rules that permit a child to sponsor the parent for permanent residency which is considered a great privilege, that child can only sponsor the parent once he/she has reached the age of 21.

The problem is that under the current law, those individuals who entered illegally may not adjust their status inside the country. However, leaving the United States triggers a ban on reentering.

If the parent was present in the U.S. between 180–364 days, that parent will be subject to a 3-year ban, whilst those parents who exceed 365 days are subject to a ten year ban on entering the U.S.

Non – Citizen Children Brought into the U.S. at an Early Age.

These are children who were brought into the United States when they were at an age where they were unable to make an informed decision about their travels. Some of these children came with their undocumented parents as young as age 1 or under and have lived in the U.S. ever since.

Many of these children have siblings who were American born Citizen and are ordinarily eligible to be sponsored by their siblings who have reached the aged of 21, however their current illegal status is a bar to that sponsorship.

Sadly, there are no routes for these children to regularize their immigration status in the U.S., therefore these children are at risk of deportation from the country. Even when they are old enough to marry an American Citizen or have American born children, they are unable to regularize their status within the county and if they leave the U.S they will be subject to the 3 or 10-year ban described above.

So What Has Happened to these Children's American Dream or Right to a Family Life?

American born children are entitled to the American Dream. The dream is all about the ability and opportunity to achieve. Many studies over time have shown that a child's development and consequently the ability to achieve success are dependent on the environment and upbringing of that child. Children often do better when they are brought up by both parents.

Generally, children of illegal immigrants are at a disadvantage because their parents are usually low income earners due to their undocumented status and are unaware or unable to tap into state provided resources available to low income earners.

However, what generally shatters the dreams of these children is when deportation or removal proceedings are instigated against the parents.

On Many occasions the parents are detained whilst deportation proceedings are instigated, these generally lead to the children being placed in foster homes, though with the intention to reunify the children with their parents as soon as possible. However practicability can never occur whilst parents are in detention.

The parents are often deported from the detention centers or prisons, which makes reunification with the children impossible at this stage. After all, the children who are American Citizens cannot be subject to deportation. Hence many of these children remain in America without their parents and they are placed in foster homes and move from home to home. Life as they know it is gone and there goes their stability.

Applied Research Center reported that between 2009 and mid 2011 Some 46,000 undocumented parents of U.S. citizens were deported and roughly 5,100 children of immigrants have been put into foster care. Many of these children do not get to see their parents again.

Though many parents try to get their children back, it often proves difficult and many are forced to re-enter the U.S. illegally in search of their children and if apprehended they would be subject to criminal charges with possible imprisonment.

Whilst it is the duty of the child welfare department to attempt reunification of children with their parents, they have successfully argued in several cases that it is in the child's best interest to remain in the United States than to allow them to join their parents due to conditions in the parents' home town. The effect of this is the prevention of a child- parent relationship (especially as the parents are unable to legally visit their children in the U.S.). Most children brought up in foster homes lack the foundation and stability that allows them to achieve the American dream. Their right to a family life with their parents is obviously breached.

There are also those children who are themselves illegal and have spent all of their lives in the U.S. Some are in their 20's or 30's and many of them believe themselves to be Americans. These individuals are subject to deportation. The question is what happens to the private life that they have established in the U.S., how are they able to function in a society alien to them? After all, many of these children did not make the informed decision to enter the U.S. illegally, but they are being punished and treated harshly by the system.

A scholar student made recent news when the ICE began a deportation proceeding against her. She was 22 years old, came to the US at age two, had attended all of her education in the U.S., and was a top academic achiever.

A temporary Fix for U.S. Children

In recent time, U.S. President Barack Obama established two notable policies in an Executive Order.

Firstly, an immigrant who has a U.S. citizen spouse, children or parents can apply within the country for a waiver of the 10-year ban by proving that their absence will create an extreme hardship for their American families.

Secondly, a policy was introduced to allow certain documented immigrants who were brought to the United States as children under the age of 16 and who remain under 30 years of age the opportunity to apply for a two-year stay that would shield them from deportation. There is also a proposal that allows them to apply for a two-year work visa (which can be renewed indefinitely)

These policies are a welcome development because they protect children; however, a more permanent solution is required and should be written into law as opposed to the enactment of policies. Many call for an amnesty; however, an amnesty is only a temporary fix and does not deal with the issues on a permanent basis. Therefore, a clear process of law is required.

Perhaps another solution to protect children would be an effective control of the borders to prevent or at least minimize illegal immigration, so that children are not put in these positions where their lives are left in limbo through the actions of their parents and the country's lack of protection of their family and private life.

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December 2012