Mapping the Conditions of Stay and the Rationale for Entitlements and Restrictions for Family Migrants in the United Kingdom

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IMPORTANT NOTE

The restrictions and entitlements covered in this report are influenced by government policy and are subject to regular change. The mapping report aims to straddle a fine balance in condensing the detail of these arrangements and yet still providing a usable summary. As such, relevant sources noted throughout the text should be consulted for an accurate detailed picture of current policy. The report is correct at the point of completion of the final version on 29th November 2012.

The rules generally refer to the UK unless otherwise stated.

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SECTION ONE: Identifying Family Migrants

1. Who are family migrants?

In the UK, **third country** (that is, non-European Economic Area) **national** family migrants[1] are made up of the following categories differentiated in immigration regulations:

> Spouses, civil partners, fiancé(e)s, proposed civil partners, unmarried and same sex partners, children, parents, grandparents, and other dependent relatives who are **joining or accompanying** any of the following three categories:
>
> a) British citizens or settled residents (those with Indefinite Leave to Remain or Permanent Residence [Right of Abode[2]] in the UK)
> b) Citizens of European Economic Area (EEA) countries living in the UK (see Appendix 1)
> c) migrants subject to limited leave to remain (i.e. those entering or residing in the UK according to the points-based system (PBS) or seeking humanitarian protection, or granted discretionary leave)

The distinction between these categories is important for understanding differences in conditions of entry and stay. Particular attention is paid to the difference between family members of British citizens or settled residents (category (a) above), and family members of migrants (e.g. workers, students, asylum seekers) with time-limited leave to remain (category (c) above (Blinder 2012). But as we shall also see in the following pages, EU law grants certain rights to EEA citizens which affect their family members in the UK as well (category (b)), and to an extent demarcates their position from that of other categories of family migrants.

[1] The overall definition of 'family migrants' in this project follows that of Kofman (2004) and is made up of three categories: 'those who enter for family reunification (where an individual already in the country is joined by their spouse, fiancé(e), civil partner, child or other relatives); where an adult enters for family union (through marriage or civil partnership); and those who enter with a labour migrant or international student who is permitted to be accompanied by his or her 'dependants' (Kofman, 2004).

[2] All British citizens have 'a right of abode' - i.e. the right to live permanently in the UK without any immigration restrictions. Some Commonwealth citizens also have a right of abode in the UK. This applies to anyone who on 31 December 1982 was either i) a Commonwealth citizen with a parent who, at the time of his/her birth or legal adoption, was a citizen of the United Kingdom and Colonies because they were born in the UK; or ii)a female Commonwealth citizen who was, or had been, married before 1 January 1983 to a man who had the right of abode. http://www.ukba.homeoffice.gov.uk/britishcitizenship/right-of-abode/

2. How do conditions of entry shape conditions of stay[3,4]?

There have been significant recent changes to restrictions on family migration. In 2011 the coalition government set out a consultation on a package of proposals 'to reform the family route' focusing on 'preventing and tackling abuse, promoting integration and reducing burdens on the taxpayer'.[5] On 11 June 2012 the Home Secretary announced in parliament[6] that the following changes would take effect for **new** applicants from 9 July 2012:

- Extending the time before family unification migrants who are spouses or partners, and PBS dependants, can apply for settlement from 2 years to 5 years 'to test the genuineness of the relationship'.
- Introducing a national minimum income threshold for sponsors of spouses and partners, dependent children and other family members on a route to settlement. This has been set at a threshold of £18,600 for a partner, £22,400 for a partner with one child, and an additional £2,400 for each further child, on grounds that 'this is the level at which a sponsor can generally support themselves and a partner without accessing income-related benefits', while children are seen to involve additional costs for the state.
- Ending immediate settlement in the UK for spouses and partners who have been married or in a relationship for at least four years before entering the UK, and requiring them to complete a five year probationary period before they can apply for settlement.

[3] The term 'conditions of stay' here and in other parts of this report refers to being legally present for a period and does not imply permanent residence.
[4] The main source for Section 1.2 is: UK Border Agency: Immigration Rules, Part 8 (http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/)
[5] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/
[6] http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120611/debtext/120611-0002.htm#1206117000003

- Increasing the English language requirement for spouses and partners on a family route at the point of applying for settlement.[7]
- Allowing adult and elderly dependants to settle in the UK only where they can prove that, as a result of age, illness or disability, they require long-term personal care that can only be provided by a relative in the UK, and prohibiting switching in the UK from another category, for example as a visitor.
- Restricting family visit visa appeals, initially by narrowing the current definitions of family and sponsor, and eventually removing the full right of appeal against refusal of a family visit visa.
- Publishing a list of factors associated with genuine and non-genuine relationships for UK Border Agency caseworkers.

Family members who have already entered the UK with appropriate leave will continue to follow the existing route to settlement, under the old rules. The new rules apply to applications made from 9 July 2012. Thus the following sections will refer to both old and new rules, making distinctions between the two where applicable.

2.1 British citizen or resident permanently settled or seeking permanent settlement[8]

2.1.1 Spouses, civil partners, spouses to be, unmarried partners, same sex partners

1) Both partners need to be age 18 or over.

   The lowering of minimum spouse age - from the 2008 raise to 21 back to 18 again from Nov 2011 is the result of a Supreme Court judgement that increasing the minimum

[7] From October 2013 all applicants for settlement are required to pass the Life in the UK Test and present an English language speaking and listening qualification at B1 level or above of the Common European Framework of Reference for Languages.

[8] Non-citizen permanent residents have been treated the same as citizens since 1985 (Wray, 2011b).

marriage visa age from 18 to 21, while 'pursuing a legitimate and rational aim of seeking to address forced marriage ... disproportionately interfered with the Article 8 rights of those who were in genuine marriages'. Therefore, the government has decided to 'revert to a minimum age of 18.' [9]

2) The partnership must not be polygamous.[10]

3) Pre-entry English language proficiency requirements need to be met either through a language test or recognised higher educational qualifications. Those aged 65 or over, those with a physical or mental infirmity or with 'exceptional compassionate circumstances' (see Section A (b) below) and nationals of selected countries[11] are exempt from this requirement. The English language requirement was first introduced from November 2010. An addition to the requirement for demonstration of sufficient knowledge of language and life in the UK for settlement (the language component of which has now been strengthened – see changes to family migration rules above), the government argued that the pre-entry test[12] was important for the integration of migrants – 'those who come to the UK must be able to participate in society' (The Home Secretary, November 2010 quoted in Wray 2011a). The improvement of employment chances for those who have access to the labour market was also given as a rationale (Wray 2011a). The exemption of nationals from selected countries for this requirement was on the grounds that these were 'majority English speaking' countries.[13]

4) Entry Clearance must be obtained before arrival in the UK. Only those in the UK with valid leave that was granted for a period of six months or more can 'switch' into this category from within the UK. Those granted a fiancé(e) or proposed civil partner visa, or a visa as a spouse or partner of a PBS Tier 1 migrant (entrepreneurs, investors or people of

[9] Following the judgement of Quila v Secretary of State for the Home Department [2011] UKSC 45 (on appeal from [2010] EWCA Civ 1482).
[10] Polygamy is not permitted in domestic law (Matrimonial Causes Act, 1973).
[11] Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America.
[12] A speaking and listening test to A1 standard (the lowest level of the Common European Framework of Reference for Languages).
[13] An unsuccessful challenge to this policy was raised in Chapti & Ors, R (on the application of) v Secretary of State for the Home Department & Ors (Rev 1) [2011] EWHC 3370 (Admin)

'exceptional talent') are exempted from this time requirement.[14] Those on a family visit visa for up to six months are not able to switch to a family route to settlement visa while in the UK.[15] The limitation on 'switching' from another visa category, and removal from the UK to make an entry clearance application, have been justified on the grounds that those in the UK would otherwise have an unfair advantage compared to those applying from abroad. This has been challenged in case law, including Chikwamba v SSHD [2005] EWCA Civ 1779[16] and more recently Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 444 (IAC)[17].

5) Partners must have met and intend to live together permanently.

6) There must be **no recourse to public funds** for exclusively owned or occupied housing and maintenance including for dependants.

7) Indefinite leave to remain is now granted after completion of five years 'probationary' stay as spouse or civil/unmarried/same sex partner for new applicants. Note that this period of time has been increased from two years (see changes to family migration rules above).

8) For fiancé(e)s or proposed civil partners there is a prohibition on employment up to 6 months, the time period considered sufficient to enable the marriage or civil partnership to take place. After the marriage or civil partnership has taken place, the spouse/civil partner is required to make another application for further leave, and will then be granted thirty months of limited leave, to be renewed for a further 30 months. At the end of the five year period, the spouse/civil partner may apply for Indefinite Leave to Remain.

9) For unmarried or same sex partners leave to enter is dependent on: partners having being in a relationship similar to marriage or civil partnership (i.e. cohabitation) for two years or more; a previous marriage or civil partnership having permanently broken down; not being in a consanguineous relationship with each other. According to recent changes, leave to remain/enter is granted initially for a period of 30 months, renewed at the end of that

[14] UKBA family migration consultation July 2011. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary.

[15] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf.

[16] http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/chikwa-1.htm

[17] http://www.bailii.org/uk/cases/UKUT/IAC/2011/00444_ukut_iac_2011_kh_pakistan.html

period for a further 30 months. After five years, the applicant may apply for Indefinite Leave to Remain (ILR).

10) If the sponsor is also coming from outside the UK with indefinite leave to remain, he/she should have been living together in marriage or in a civil partnership with the applicant for at least 4 years outside the UK; in this case in addition to the English language requirement the applicant should have sufficient knowledge of life in the UK unless under 18 or over 65 at time of application, and should have no unspent convictions.

All of the above categories will apply to a person with citizenship or settled status returning to the UK with their partner, or being joined here by them. Previously the difference between points 9 and 10 was that in the case of the sponsor and applicant coming from outside the UK, if living together for four years, the applicant may be granted Indefinite Leave to Remain (technically, Enter) immediately, rather than the probationary period (but also have to satisfy Life in the UK requirement). But this is no longer the case according to the new rules. Now such sponsors and partners also are required to complete a five year probationary period before they can apply for settlement. This has been justified on grounds of 'greater fairness by generally requiring all couples wishing to set up home in the UK to meet the same requirements at each stage of the process' and to allow time for them 'to participate and integrate in British society, and to demonstrate their attachment to the UK, over time'.[18]

A similar minimum income requirement as for British citizens or settled persons living in the UK (see above) is applied for sponsors and applicants coming from outside the UK on the grounds that 'there is no reason why those who have lived and/or worked abroad should get a better deal than sponsors residing, and paying tax, in the UK'; but there is some flexibility to allow a verifiable job offer or signed employment contract in the UK for the sponsor on their return at the level of salary required to meet the financial requirement, together with evidence of having earned such a salary while abroad.[19]

[18] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/
[19] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf

2.1.1.1 Conditions of settlement for partners after the probationary period of five years, extended from two years

1) completion of five years limited leave to remain (with an initial period of 30 months limited leave and a second period of 30 months granted on application)
2) the marriage or civil partnership is existing and genuine (not a 'marriage of convenience')
3) intention to live together permanently
4) accommodation is available without needing public funds and for partners' sole use
5) The partners can support themselves and any dependants without needing public funds
6) no unspent convictions
7) knowledge of the English language and life in the UK (under the new rules, all applicants need to pass the 'Life in the UK' test and a course on everyday English [B1 of the Common European Framework of Reference]). There is no need to meet this requirement if aged 65 or over.

That is, these are all the same requirements as for the Entry Clearance application, and that they have satisfied those requirements throughout the now five year probationary period, plus the Life in the UK and English language test.

2.1.2 Children, parents, grandparents or other dependent relatives

2.1.2.1 Children

The rules refer to a child of one or both parents who are British citizens or permanent residents; age under 18; not leading an independent life, unmarried or not in a civil partnership, has no independent family unit; sponsoring parent not in a polygamous marriage or civil partnership; can be accommodated and maintained[20] by parent without recourse to public funds; has no unspent convictions. Indefinite Leave to Enter or Remain may be applied for a child whose parents are settled or admitted for settlement in the UK or where such a parent has sole responsibility for the child. If a child is accompanying or joining one migrant parent,

[20] The new minimum income requirement applies (see changes to family migration rules above) unless the child is a British citizen.

he/she will gain limited leave to remain in line with that parent and will obtain ILR at the time the parent does so – i.e. after 5 years according to the new rules (see above).[21] The child must be under 18 when limited leave is granted, but can be over 18 when the indefinite leave to remain application is made. Similar rules apply to adopted children.

2.1.2.2 Parents, grandparents, other dependant relatives

This applies to: one or two parent(s)/grandparent(s) over age 65 (or if under 65 in 'exceptional compassionate circumstances'[22]); or to a son, daughter, sister, brother, over age 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; is financially dependent on sponsor and has no financial support in country of origin; can be accommodated and maintained by sponsor without recourse to public funds.

Under the new rules, the requirement for demonstration that 'a level of long-term personal care that can only be provided in the UK by their relative here' appears to take precedence over the previous greater distinction by age, and applies to all eligible dependant relatives. Aunts and uncles are no longer allowed.[23] Evidence must be provided by medical professionals that applicants require long term personal care to undertake everyday tasks, and there must not be anyone in their countries of origin who can provide this level of care affordably.[24]

However, under the new rules the UK sponsor is not required to meet the new financial requirement of a gross annual income of £18,600 to sponsor an adult dependent relative, and the relative will continue to qualify for indefinite leave to enter the UK. If the applicant's sponsor is a British citizen or permanently settled in the UK, an undertaking signed by the sponsor confirming that the applicant will have no recourse to public funds, and that the sponsor will be responsible for their maintenance, accommodation and care without such

[21] http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/children/

[22] While not directly defined in the UKBA family migration rules preceding the changes from July 2012, this appears to refer to inability to 'organise care in the relative's home country' for relatives requiring personal care. http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120611/debtext/120611-0002.htm#12061117000003

[23] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf

[24] http://www.freemovement.org.uk/2012/09/25/out-with-the-old/

recourse, for a period of five years from the date the applicant enters the UK must be provided.[25]

2.2 EEA and Swiss nationals

Family members of EEA nationals have the right to enter and reside in the UK as long as their EEA citizen relative is exercising their Treaty rights. These family members – even if not themselves EEA nationals – have the same rights as the EEA citizen that they are accompanying/joining.

2.2.1 TCN Spouse or civil partner, children/grandchildren parents/grandparents

1) Children/grandchildren need to be under age 21, or dependent. Note that the maximum age of children, different from that in the UK (see above) is defined by European law.

2) Parents/grandparents if dependent.

3) Unmarried partners can only be admitted if a durable relationship can be demonstrated.

4) For students, only spouses/civil partners and children have a right to residence.

5) Extended family members can only be considered if they are dependent on the sponsor or are members of the same household.

6) In order to **enter** the UK, non-EEA national family members need to apply for a family permit. Once they have entered the UK, they can then apply for a residence card, which is valid for five years, after which the right to permanent residence can be obtained if the applicant has been living continuously in the UK with the EEA national who must have been either 'a qualified person' throughout the five year period (i.e. job-seeking, employed, self-employed, self-sufficient or a student during this time, or have themselves already acquired Permanent Residence).

[25] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf

7) Family members of British citizens should not enter the UK through a family permit unless they have been living with the sponsor in an EEA country where the sponsor has been living and working.

8) If married to or in a civil partnership with the EEA national but the relationship has ended through death, divorce, or the EEA national's departure from the UK, it may be possible to retain a right of residence in the UK under European law. However, unmarried partners do not have this right. The provisions in relation to retained rights also apply to children or step-children whose position as family members will be affected by the termination of the marriage.

9) Non-EEA nationals with a retained right of residence can acquire the right of permanent residence in their own right as long as they exercise treaty rights for the requisite period of time (i.e. through being a worker, self-employed, self-sufficient, a job-seeker or a student).

10) The parent(s) or primary carer of an EEA national child has a derived right to reside in a Member State with a self-sufficient EEA national child solely to facilitate the child in exercising their Treaty rights. This means that the child must not rely on funds earned by a non-EEA national parent(s) or primary carer in the UK, unless the parent(s) or primary carer is in the UK on a work permit. If the parent/primary carer wishes to live in the UK on the basis of their relationship with the EEA national child until the child is able to exercise free movement rights without the presence of their parent, he/she does not have the right to work in the UK or seek permanent residence.[26]

11) From 8 November 2012 further amendments to EEA regulations provide a derived right <u>to reside and work</u> to a third country national who is the primary carer of a <u>British citizen</u> residing in the UK who would be unable to live in the UK or another EEA country if the

[26] There are other treaty provisions that potentially overtake this in practical terms – but the Chen provisions (European Court of Justice [ECJ] judgement) are as set out here – i.e. the right of residence relates to a self-sufficient EEA national child. Rights will continue to age of 21, when no longer considered a 'child' under EEA provisions. Also relevant are provisions from [the ECJ judgement on] Ibrahim/Teixeira relying on Article 12 rights to a child in education. It is not clear as yet whether any of these rights of residence will lead to Permanent Residence (since PR arises under the 2004 Directive [Directive 2004/38/EC] and these rights do not). However, the same argument in relation to recognition of level of integration in host member state may apply. (update on Chen/Teixeira/Ibrahim now included through 2012 EEA amendment regulations – came into force on 16 July 2012 http://www.legislation.gov.uk/uksi/2012/1547/pdfs/uksiem_20121547_en.pdf

primary carer had to leave the UK – e.g. a British citizen child solely dependant on the primary carer. At the same time however, the UK government also amended the relevant social security, housing and homelessness regulations such that a person with a derivative right of residence (a 'Zambrano carer') – is excluded from housing assistance and welfare benefits.[27]

12) There is no requirement for EEA (direct) family members (Regulation 7[28]) to live together in same household. The rights of residence of direct family members arise by the family relationship, i.e. spouse, or child under age of 21. The relevant EEA national and the TCN must both reside in the UK.[29]

2.3 Points-based system (PBS) migrants: Tiers 1[30] & 2; Tier 4 (student)

2.3.1 Spouse, civil partner, unmarried or same sex partner

1) If an unmarried or same-sex partner, the applicant and the PBS Migrant must not be 'so closely related that they would be prohibited from marrying each other in the UK' and must have been living together in a relationship similar to marriage or civil partnership for at least 2 years.

2) In the case of all partners entry and leave to remain is only for the period of leave *granted to the PBS migrant.* They must intend to live with each other throughout the entire time.

3) Unless the PBS Migrant is a Tier 1 (Investor) Migrant or a Tier 1 (Exceptional Talent) Migrant, there must be a sufficient level of funds to support the applicant and dependants. From 14 June 2012, under Tier 1 (Entrepreneur) – i.e. for setting up or taking over a

[27] These amendments have come into effect to take account of the decision of the Court of Justice of the European Union (ECJ) regarding *Zambrano*. See http://www.legislation.gov.uk/uksi/2012/2560/pdfs/uksi_20122560_en.pdf and http://www.nrpfnetwork.org.uk/guidance/Documents/Zambrano%20Factsheet.pdf

[27] http://www.legislation.gov.uk/uksi/2006/1003/pdfs/uksi_20061003_en.pdf

[29] See PM (EEA – spouse –"residing with") Turkey [2011] UKUT 89 (IAC)) http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKUT/IAC/2011/00089_ukut_iac_2011_pm_turkey.html&query=%22turpin+and+miller%22&method=boolean

[30] From 23 December 2010, Tier 1 (General) of the PBS is closed to new applicants and to migrants in other categories, for entry clearance. From 6 April 2012 Tier 1 (Post-Study Work) is closed to all new applicants, although dependants of those who have prior entry clearance for this route can join them.

business in the UK - dependants of Tier 1 migrants who have been in the UK for less than 12 months need to have evidence of savings for maintenance of at least £1,800, reducing to £600 for those resident for longer.[31] This is in addition to personal savings required for the main Tier 1 applicant, and the amount of money required for investment in a business by the main applicant (not less than £50,000). Some other PBS migrant categories – e.g. Tier 1 (General & Post-Study), Tier 2, Tier 4 – are allowed to switch to the Entrepreneur category from within the UK, thus affecting their dependants as well (although dependants are not allowed to switch in their own right). There is a 'no recourse to public funds' requirement for this switching.[32]

4) Tier 4 migrants (students) must be enrolled in a course of study of at least 12 months at postgraduate level or higher.

5) In all cases, leave to remain is subject to no recourse to public funds and to not seeking employment as a doctor or dentist in training unless the applicant has a degree in medicine or dentistry from a UK or UK recognised institution or not previously restricted in being employed as a doctor or dentist.

6) To qualify for indefinite leave to remain at the same time as the PBS migrant, partners must have been living together in the UK for at least five years, as well as living on a route to settlement for five years.[33] PBS Tier 4 students and their family members are generally not on a route to settlement.[34] The applicant on a route to settlement must have sufficient knowledge of English (English language speaking and listening qualification at B1 level or above from October 2013) and of life in the UK, unless aged 65 or over.

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[31] http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/62-t1-maintenance-changes

[32] http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier1entrepreneurguidance1.pdf

[33] Very recent changes to family migration rules, coming into effect from 6 September 2012 stipulate that where the principal PBS migrant gains settlement prior to their partner, the partner can obtain a grant of further leave to remain in the Points Based System dependant category, rather than as the partner of a person who has subsequently settled. The duration of leave is for three years at a time in case they do not meet the requirements for settlement at the end of the five year probationary period. Partners are also allowed to count leave obtained in another category of the rules towards the probationary settlement period. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2012/hc565.pdf?view=Binary

[34] http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/occ94/occ94?view=Binary

In February 2012, the government announced changes to settlement for Tier 2 PBS migrant workers (skilled, with a job offer) which will take effect from 2016. While extending limited leave to remain from 5 to 6 years, these proposed changes mean that such migrant workers and their families will no longer have an automatic right to settle permanently in the UK based on length of residence. Further, a minimum income threshold of £35,000 will be set for those who want to apply for permanent settlement, but excluding migrant workers in shortage occupations and those with PhD level qualifications. These proposed restrictions do not apply to Tier 1 entrepreneurs, investors and 'exceptionally talented' migrants and their families. In the words of the Immigration Minister:

> *Settlement in the UK is a privilege. We are sweeping aside the idea that everyone who comes here to work can settle, and instead reserving this important right only for the brightest and best.*[35]

2.3.2 Children

1) The child needs to be under age 18 or if over 18 has previously being granted leave to remain as a child of a PBS migrant.

2) He/she must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.

3) He/she must not intend to stay in the UK beyond any period of leave granted to the PBS Migrant parent.

4) Both parents must be lawfully present in or entering the UK unless the PBS migrant parent is the sole surviving parent or has sole responsibility for the child.

5) Tier 4 migrants (students) must be enrolled in a course of study of at least 12 months at postgraduate level or higher.

6) The same rules apply to a child born in the UK.

[35] http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/february/66-settlement

Previously a child dependant would be granted ILR at the same time as the parent on whom their application depends regardless of the amount of time the child had spent in the UK. For example, a child may have entered the UK some time after the PBS migrant, and would be granted leave in line with the parent. In the new rules, this no longer applies – the child must also complete their own full five year period of limited leave, satisfying the relevant requirements throughout the period.

2.4 PBS Tier 5 (temporary workers)

The third main route for migrants to work in the UK, Tier 5 is made up of Youth Mobility and Temporary Worker categories. While those in the Youth Mobility category are not allowed to bring dependants to the UK, some other Tier 5 migrants, including domestic workers accompanying diplomats, can do so. Dependants of Tier 5 migrants are defined as: spouse/civil partner/unmarried or same sex partner; and children under age 18. Dependants need to prove that they have sufficient funds to support their entire stay in the UK without recourse to public funds; at the time of making an application this is £600 for each family member. There is no route to settlement from Tier 5 and the time spent in any Tier 5 category will not count towards any settlement applied for in the future.[36] Recent employment-related settlement rule changes[37] mean that Overseas Domestic Workers in private households will only be allowed to accompany, and work for, visitors. They are only permitted to stay in the UK up to six months and have to leave the UK with the visitor. They are not allowed to extend their stay, switch employer, sponsor dependants or settle in the UK.[38]

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[36] http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/government-authorised-exchange/dependants/eligibility/
[37] Applying to those submitting applications on or after 6 April 2012.
[38] http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/employment-related-settle-wms/

2.5 Asylum seekers and refugees

Asylum seekers and their family members are subject to a different system of regulation by the UKBA, including support, than other categories of migrants.

2.5.1 Spouse, civil partner, unmarried or same sex partner, children, parents/grandparents or other dependent relatives

Family members can accompany asylum seekers when they enter Britain OR they can join them once the latter has gained refugee status.

2.5.1.1 Asylum seekers

The same rules apply to partners and children under 18 as to the main applicant. Other dependants such as parents are allowed in 'exceptional compassionate circumstances'.

Maintenance and/or accommodation support from the UKBA is provided according to need.

2.5.1.2 Refugees

Since 30 August 2005 those applicants recognised as refugees are granted asylum or humanitarian protection initially for five years, at the end of which time application could be made for indefinite leave to remain. Those not recognised as refugees or as qualifying for humanitarian reasons to remain may in limited circumstances be given 'discretionary leave to remain' for a limited period.[39]

[39] In addition, a limited number of very vulnerable refugees and their dependants are resettled in the UK through The Gateway Protection Programme which is completely separate from the standard procedure for seeking asylum in the UK, and is operated by the UKBA in partnership with the United Nations High Commissioner for Refugees (UNHCR). http://www.ukba.homeoffice.gov.uk/asylum/gateway/

Rules for family reunion (under family reunion programme[40]):

Spouse/civil partner/ Unmarried or same sex partner

1) is married to or the civil partner of a person who has limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection; or have been living together in a relationship similar to a marriage or civil partnership for two years or more before the person granted asylum or humanitarian protection left the country of his former habitual residence in order to seek asylum or humanitarian protection.
2) There is no language or income requirement for family reunion and also no fee for the application.
3) Leave to enter or remain may be granted for 5 years in line with sponsor.

Children

1) Age under 18.

2) Not leading an independent life.

3) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his/her habitual residence in order to seek asylum.

Parents, grandparents, other dependent relatives: are not generally included in family reunion – they can apply under immigration rules if they satisfy requirements as set out above, but family reunion only applies to spouse/civil partner, unmarried partner and child under 18.

However, a new provision from 6th April 2011, of the Immigration Rules stipulates that a refugee or person with humanitarian protection with indefinite, or limited, leave to remain, who wishes to sponsor a **post-flight** partner (i.e. a partner with whom they formed a relationship after they left the country in which they were resident) and dependent children, can do so on an equivalent basis to a settled person – i.e. they are subject to the same requirements as that of the family route. Therefore, they will be subject to the new family Immigration Rules,

[40] http://www.ukba.homeoffice.gov.uk/visas-immigration/partners-families/family-reunion/

including the income threshold and the five year probationary period (after which they can apply for indefinite leave to remain provided their sponsor is settled in the UK).[41]

With the adoption of the new asylum model (NAM) in 2007, the processing of the backlog of asylum applications ('legacy' cases) that had not been resolved by 5 March 2007 were being considered within the Case Resolution Directive until 2011. Some of these applicants, who were given indefinite leave to remain, are not able to seek family reunification within the refugee family reunification programme, but need to follow the family route regulations including the minimum income requirement and visa costs for family members. [42]

2.6 Partners subject to domestic violence

The requirements for applying for indefinite leave to remain for spouses, civil partners, unmarried or same sex partners on a family route who are subject to domestic violence (Settlement DV) are that: they were granted limited leave up to five years (in the new rules) as the spouse, civil partner, or unmarried partner of a person present and settled, the relationship existed at the beginning of their leave to remain or period of extension; there is evidence that the relationship has permanently broken down as a result of domestic violence during that period; applicants do not have unspent criminal convictions.

While the definition of 'violence' is broad, including psychological, financial or emotional incidents as well as those of a physical or sexual nature, the requirement for proving relationship breakdown before the end of the probationary period of stay may cause barriers for those who are reluctant to come forward early or who may attempt to seek reconciliation initially (Wray 2012). From 1 April 2012 those subject to domestic violence and who need accommodation and financial help may be able to access public funds while making a claim for

[41] In 'exceptional circumstances' refugees or people under HP can also sponsor a child of a dead or displaced brother or sister without having to meet the income requirements.
http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf

[42] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ and interview with an NGO supporting refugees in Birmingham, December 2012.

indefinite leave, through the Destitution Domestic Violence (DDV) concession[43]. In this case, they may be allowed 3 months limited leave to remain with access to benefits.[44] To prevent applicants becoming overstayers, this three month period can be extended by virtue of Section 3C of the Immigration Act 1971[45], as in all cases, when a valid application has been lodged.

The exception to standard family migration rules enshrined in the Settlement DV provision, and including access to support, was justified by a former Home Secretary in 2010 on grounds of the government's commitment to a long term solution to the need for protection of victims of domestic violence. The rationale for introducing this policy only for those on spousal visas was that:

> *those on spousal visas are here, solely, because of their relationship. The spousal visa route is one that leads to permanent residency – whereas other routes are only temporary and migrants are expected to return home once their visa expires.*[46]

2.7 Leave to remain on human rights grounds (Under Article 8, ECHR)

Changes to the immigration rules in July 2012 included a change in policy that those given limited leave to remain in the UK on human rights grounds (with respect to their right to private and family life under Article 8 ECHR) would be subject to No Recourse to Public Funds (NRPF). This is unless they can demonstrate exceptional circumstances, which would always require the applicant to establish destitution in their application. As long as an applicant who is destitute and is receiving Section 95 asylum support/support from a local authority states this in their application then they should receive access to public funds with their grant of leave.

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[43] The precursor to the DDV concession is The Sojourner Project, a pilot scheme funded by the Home Office since 2009 that has been working with a range of voluntary service providers to co-ordinate support, subsistence and accommodation for women and their dependants with no recourse to public funds, who entered the UK on a spousal or partner visa and are eligible to apply for Indefinite Leave to Remain (ILR) under the Domestic Violence Rule.
http://www.wrc.org.uk/what_we_do/campaigns/women_with_no_recourse_to_public_funds/the_sojourner_project.aspx

[44] http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/domesticviolence/#header2

[45] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/section5/section5.pdf?view=Binary

[46] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/FAQs-DDV-concession.pdf

However, if a person who is not destitute when they get their grant of leave on the basis of Article 8 later becomes destitute then there is no mechanism to remove the NRPF condition, even in exceptional circumstances. The rationale for these rules is the qualified nature of Article 8, in which the rules expect to balance the right to respect for private or family life and to safeguard the welfare of children in the UK, with other priorities including safeguarding the economic wellbeing of the UK through immigration control and protecting the public from foreign criminals.[47]

[47] http://www.nrpfnetwork.org.uk/SiteCollectionDocuments/ukba-guidance-fm1pt0-upd-jan-2013.pdf (p.51)

SECTION TWO: Entitlements and Restrictions

In this section, the entitlements and restrictions of family members according to their entry route are explained across specific domains (education, employment, welfare benefits, healthcare, housing and civic participation).

3. Education

3.1 Pre-school and compulsory education

3.1.1 Family members of British citizens or permanent residents

All children aged three and four are entitled to free early education of 15 hours a week for 38 weeks a year. Access to all compulsory schooling is free[48] - education is not seen as a public fund from which family migrants are restricted from accessing[49]. 'Reasonable steps' must also be made to provide opportunities for children to use their home language if this is not English[50]. Local authorities must ensure there is no unreasonable delay in securing school admission for a child and children must not be discriminated against on the basis of their race, colour, nationality (including citizenship) ethnic or national origins[51].

Family members' entitlement to claim additional benefits such as 15 hours a week free early education for children aged two[52], free school meals, public transport and school clothing allowance for uniform costs from the local authority may be restricted depending on whether

[48] Currently for children aged 5-16, although this will rise to 17 by 2013 and 18 by 2015, Education and Skills Act 2008.
[49] '"Public funds" are defined in the Immigration Rules (and constitute a finite list of specific benefits which is updated as required, and the benefits and services listed do not include education or any education funding' (YPLA 2011).
[50] Department for Education 2012 *Statutory Framework for Early Years*: 6.
[51] Following the Race Relations Act 1976 and the Race Relations (Amendment Act (2000)
[52] This is due to be introduced in 2013 for the poorest 20% of families (and by 2014, the poorest 40%) although it is already operating in some local authorities. The eligibility criteria is still subject to a consultation, although it is expected to be the same 'gateway' criteria that governs access to free school meals, for which the main condition is being in receipt of qualifying benefits (which includes Support under Part VI of the Immigration and Asylum Act 1999).

the qualifying criteria are set as those in receipt of certain benefits/public funds, to which family migrants may be excluded (as part of access conditions). For example, eligibility for free school meals is restricted to those whose parents claim: income support, income-based Job Seekers' Allowance, Income-related Employment and Support Allowance, the Guaranteed element of State Pension Credit, support under Part VI of the Immigration and Asylum Act 1999 and Child Tax Credit, provided they are not also entitled to Working Tax Credit and have an annual gross income of no more than £16,190. Family members would in most cases be unable to claim benefits, although the sponsor might (the new income requirement on the sponsor would however preclude their eligibility in many cases). Generally speaking for a dependent child to gain entry to the UK through the family route, 'the parent(s) must demonstrate that they are able to maintain the dependent child and have adequate accommodation for the whole family without needing public funds' (Migration Advisory Committee 2011:15).

3.1.2 Family members of EEA and Swiss nationals

As under (1) with regard to compulsory schooling and early education, although they may more easily qualify for the additional provisions (e.g. free school meals) if they meet the criteria through being in receipt of gateway benefits. See the section on *welfare benefits* for further clarification on the circumstances in which some of these qualifying benefits can be legitimately claimed.

3.1.3 Family members of PBS migrants: Tier 1 (highly skilled) & Tier 2 (skilled with job offer)

As in category (1)

3.1.4 Family members of PBS migrants: Tier 4 (students)

As in category (1)

3.1.5 Family members of asylum seekers

As in category (1) although eligibility for additional support (nursery provision for 2 year olds, free school meals, help with travel costs) is possible as one of the qualifying benefits which act as a gateway to these benefits include Support under Part VI of the Immigration and Asylum Act 1999.

3.1.6 Family members of refugees

As in category (1) with regard to compulsory schooling and early education. Family members of refugees are eligible for additional benefits providing they are in receipt of the gateway qualifying benefits.

3.2 Post-compulsory education: Further and Higher Education

Rules on funding of further and higher education and student financial support vary according to immigration status and are complex and are liable to change throughout the year. They also vary between England, Wales, Northern Ireland and Scotland where rules exist on both tiers of education (further and higher education) and have different eligibility rules for student support. For the purposes of brevity and comprehension, in this report, we focus on the rules in England. For correct up-to-date explanation of the current funding structures, it is recommended to consult: http://www.ukcisa.org.uk/student/information_sheets.php#fees_ss. Relevant sections are referred to below.

3.2.1 Family members of British citizens or permanent residents

Access to **further education** to study GCSEs, AS and 'A' levels (and their equivalents), NVQs, GNVQs, BTECs and Access courses is dependent on schools'/college's individual admissions policies; students must meet the entry requirements of a course. Further education courses are not automatically free; students must be exempt from or able to pay the course fees.

Publicly-funded institutions are funded either by the Skills Funding Agency (SFA) or the Education Funding Agency (EFA) depending on the age of the student. The SFA funds those aged 19 or above. The EFA funds those aged 16-18. However, those aged 16-18 on apprenticeships are funded by the SFA.

Eligibility for financial support with funding for courses, vocational training and apprenticeships in England is based on residence. Further education providers cannot claim funding for non-EEA spouses or civil partners joining 'settled' residents ('settled' means being ordinarily resident in the UK without any immigration restriction on the length of stay, e.g. having Right of Abode, Indefinite Leave to Enter or Remain or have the right of permanent residence under EC law) unless they have been ordinarily resident for 3 years. They will be charged 'overseas' fees which are substantially higher than for 'home' students. The exception to this would be the spouse or civil partner aged 16-18 of a British citizen where that non-EEA spouse or civil partner has been resident in the UK for one year or for students aged 16-18 years old. Those 'accompanying, or joining, a parent, or parents, who have Right of Abode in the UK, or who have any sort of immigration permission to be in the UK'[53] are eligible for funding.

Automatic fee remission for courses for English for speakers of other languages (ESOL) has been removed since 2007 to 'focus public funds on those least able to pay' and to ensure those who benefit from migration (i.e. employers and higher paid workers) contribute to costs. Family members on spousal visas with NRPF are eligible only if they can confirm they are in receipt of certain benefits (Jobseekers Allowance or Employment and Support Allowance) and that they want to enter employment (Niace 2011). Others who are in families in receipt of Working Tax Credit will not be eligible and unable to access funding for the first three years through the SFA (see page 15). This is problematic for women with children who cannot claim they are seeking work (ibid.)

Higher education includes courses such as HNC and HND courses, undergraduate degrees (for example, BA, BSc, BEd) and postgraduate degrees (for example, MA, MSc or PhD). In this case, family members may only be able to access home student rates if they themselves are 'settled' residents (i.e. have no immigration restriction on length of stay, such as having the

[53] UKCISA 2012 (http://www.ukcisa.org.uk/student/info_sheets/tuition_fees_e_fe.php#home_overseas).

Right of Abode or Indefinite Leave to Enter or Remain or right of permanent residence in the UK under EC law). They must also have been ordinarily resident for 3 years in the UK and Islands[54]. Spouses, civil partners and children who do not meet these criteria will be charged 'international' student rates (unless they qualify under one of the other eligible categories), which can range from £3500 to about £18000 a year. Eligibility for statutory student support (student loans and university bursaries) have similar criteria. For courses which started on or after 1st September 2011, residence criteria do not apply to relevant family members of a UK national who have exercised a right of residence in another EU member state for more than 3 months as a self sufficient person, a student or a worker and who have been ordinarily resident in the EEA/Switzerland/overseas territories for 3 years before the start date of the course.

3.2.2 Family members of EEA and Swiss nationals

To be entitled to further education funding, spouses or civil partners of EEA nationals living in the UK must be aged 19 or older and have been resident in the UK for at least one year to access the home student rate. If aged 16-18 and joining a spouse or civil partner, they must also have been married or in a recognised civil partnership for at least one year[55]. 16-18 year olds accompanying or joining their parents are eligible for home student rates.

Spouses, civil partners, or child, grandchild, dependent parent or dependent grandparents of an EU national or their spouse or civil partner will be eligible for funding if they have been ordinarily resident[56] in the EEA/Switzerland or overseas territories for 3 years preceding the start date of the course. This also applies to those joining EEA/Swiss workers and eligibility for funding is also maintained when children join an EEA worker parent even if the EEA worker is no longer working or living in the UK. It also applies to children of Turkish nationals who have

[54] The 'Islands' are the Channel Islands and the Isle of Man.

[55] www.ukcisa.org/uk 2012

[56] Ordinarily Resident for funding purposes is 'in a given country or region any person who habitually, normally and lawfully resides from choice and for a settled purpose in that country. Temporary absences from the relevant area should be ignored. Someone who has not been ordinarily resident because he or she or the person's parent or spouse or civil partner was working temporarily abroad will be treated as though the person had been ordinarily resident in the relevant area (Young People's Learning Agency and the Skills Funding Agency 2010:10).Ordinarily resident was defined in Shah v London Borough of Barnet 1983 All ER 226 http://www.ukcisa.org.uk/student/info_sheets/ordinary_residence.php

been lawfully employed in the UK and who themselves have been ordinarily resident in the EEA, Turkey or the overseas territories for 3 years before the start of the course.

Family members of EU nationals who have the right of permanent residence in the UK (after a 5 year period of uninterrupted lawful residence in the UK) are also eligible for funding for both further and higher education.

For higher education, family members can be eligible for the home student rate if on the first day of the academic year they are the 'relevant family member' (as referred to in UKCISA's 2012 fees and Student Support information sheets[57]) of a EU national who is in the UK as a self-sufficient person, a worker or as a student (this also applies to EEA/Swiss workers' family members). The student must also have been ordinarily resident in the European Economic Area (EEA) and/or Switzerland and/or the overseas territories for the previous three years, but not there for education purposes (ibid.). This residence criterion does not always apply in the cases of courses which started on or after September 2011 – that is, where the student is the family member of an EU national who is exercising a right of residence in the UK under EC law and that EU national has been ordinarily resident for three years in the EEA, Switzerland or overseas territories. Funding eligibility also applies to children of Swiss nationals who meet the three-year residence condition in the EEA, Switzerland or overseas territories and the children of Turkish parents, where the child must have been ordinarily resident in the EEA/Turkey/Switzerland/overseas territories for the three years before the start of the course (ibid.)

3.2.3 Family members of PBS migrants: Tier 1 (highly skilled) & Tier 2 (skilled with job offer)

The spouse, civil partner or child of a non-EEA national with work-related immigration permission can access the 'home' rate for further education, providing that the person with work-related immigration permission has been resident in the UK for 3 years with work-related immigration permission.

[57] http://www.ukcisa.org.uk/student/information_sheets.php#fees_ss

For higher education however, this is not the case. To access the home-student rate, again as in (1) the non-EEA national family member must be 'settled' (ordinarily resident in the UK and without any immigration restriction on the length of stay in the UK) and be, for the 3 years preceding the start of the course, ordinarily resident in the UK and Islands (ibid.).

3.2.4 Family members of PBS migrants: Tier 4 (students)

As in category (1).

3.2.5 Family members of asylum seekers

In England, there is no provision based on being a family member of an asylum seeker either in FE or HE (only in Ireland has eligibility for funding been extended to the family members of asylum seekers). 16-18 year old asylum seekers themselves are eligible for funding for college courses and ESOL. They must meet the entry requirements of the course and there must also be a reasonable expectation that they will complete the course. Those refused asylum but granted section 4 support are considered home students for the purposes of further education funding. Any vocational work placement must be unpaid; if it involves training the conditions attached to their temporary admissions may need to be amended.[58]

For higher education, asylum seekers and their families are usually charged at the 'overseas' student rate, even if they have been in the UK for over 3 years (although institutions may use discretion to charge the home student rate or waive the fees altogether). This group is also ineligible for financial support under the statutory student support system, although they may apply to a University's hardship fund again at the institution's discretion. There has also been a recent change that although until 9th February 2011, asylum seekers and their families granted Discretionary Leave were eligible for 'home' student rates for higher education, the Government has now restricted eligibility to those only with Humanitarian Protection and their family members (ibid.) These people must have remained ordinarily resident in the UK and Islands since being so recognized.

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[58] Coram Children's Legal Centre:
http://www.childrenslegalcentre.com/userfiles/file/chapter%20of%20guide%20work%20and%20training.pdf

3.2.6 Family members of those granted refugee status or humanitarian protection

Spouses and dependents of recognised refugees are considered home students for financial support for further education at college and ESOL. Family members of those recognised as refugees, as well as those given Humanitarian Protection can claim the 'home' student rate for higher education. They are also eligible for statutory student support if 'ordinarily resident' on first day of academic year of the course. They must have been the spouse or civil partner of that person on the date on which their partner's asylum application was made AND, for children, they must have been under the age of 18 on the date that their parent or step-parent applied for asylum.[59] There is no requirement for three years' ordinary residence except for a student who is claiming Student Support and who has Humanitarian Protection, or who is the family member of such a person.

It is important to note that when someone granted Refugee Status becomes a British Citizen, this will have implications for the fees support given to their spouse, civil partner or children, since the eligibility criteria are stricter (see (1)).

Up until 9th February 2011, asylum seekers and their families granted Discretionary Leave were eligible for 'home' student rates for higher education. As from February 2011 those with Discretionary Leave and their family members are no longer eligible (ibid.)

3.3 Recognition of educational and vocational diplomas obtained in TCs

Third country nationals can have their qualifications recognised through the UK-National Academic Recognition Centre (NARIC) which provides a baseline of information to recognise international qualifications and can certificate equivalents. However, this service is used mainly by universities and some further education institutions. Most employers do not use this service and consult with relevant professional bodies to assess overseas qualifications and experience. For some highly regulated industries, such as education and medicine, it is not possible to

[59] www.ukcisa.org/uk 2012

practice without registration. The costs associated with accessing NARIC services are considered high by overseas students, migrants and refugees[60].

3.4 Reskilling, e.g. driving licence

Third country nationals with a driving licence from the country they have come from are allowed to drive for up to 12 months from the time they became a resident, but to gain continuous driving entitlement, they must obtain a provisional GB licence and pass a driving test(s) before the end of the 12-month period. New residents with a vocational licence (e.g. to drive a minibus, bus or lorry) are not permitted to drive such vehicles until they have passed the relevant GB driving test[61].

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Local authorities have a duty to provide suitable full-time education for all children of compulsory school age regardless of the immigration status of the child, a provision which is underpinned by various human rights obligations (*Human Rights Act 1998*, The first protocol of the *European Convention on Human Rights* 1998 (article 2) the *United Nations Convention on the Rights of the Child 1989* (article 28) and the *Education Act 1996*). Entitlement to additional benefits associated with schooling costs in most cases is qualified (there is ongoing consultation on eligibility for some of these benefits, informing the move to introducing Universal Credit in 2012) as they may be reliant on being eligible for 'public funds', e.g. income-based support[62] which are used as the 'gateway' to eligibility for these other entitlements (Liberty 2012). Sponsors of family migrants may be eligible however to apply for the provision for their children if they themselves are not 'subject to immigration control', are 'ordinarily resident', and in receipt of qualifying benefits.

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[60] Refugee Assessment and Guidance Unit 2007

[61] http://www.direct.gov.uk/en/Motoring/DriverLicensing/DrivingInGbOnAForeignLicence/DG_4022561.

[62] Including: income-based Jobseeker's Allowance, income-related Employment and Support Allowance, support under Part VI of the Immigration and Asylum Act 1999, the Guarantee element of State Pension Credit, Child Tax Credit, provided they are not entitled to Working Tax Credit and have an annual income (as assessed by HM Revenue & Customs) that does not exceed £16,190, Working Tax Credit 'run-on' - the payment someone may receive for a further four weeks after they stop qualifying for Working Tax Credit.

Although compulsory education is free, there is a very different picture facing family migrants when seeking to access post-compulsory schooling (through further and higher education in publicly funded institutions[63]). This is not immediately free and there are also restrictions on applying for statutory financial support. In further and higher education there is a bifurcation of fee structures between 'home' students and 'overseas students', with course fees for international students higher. Family members of migrants might be ineligible to claim 'home' student rates through a number of obstacles: if they do not have the requisite immigration status, nationality and/or three years residence in the relevant residence areas.

[63] Further education includes courses directed to achieving GCSEs, AS and 'A' levels, NVQs, GNVQs, BTECs and Access courses. Higher education courses may include HNC and HND courses, undergraduate degrees (for example, BA, BSc, BEd) and postgraduate degrees (for example, MA, MSc or PhD).

4. Employment

4.1 Family members of British citizens or permanent residents

Spouses, civil partners, unmarried partners and same sex partners have a right to work during the probationary period. Fiancé(e)s do not have this right for their initial six month period of leave.

4.2 Family members of EEA and Swiss nationals

Partners, including partners of students in the UK, have a right to:

- accept offers of work
- work as an employee and/or in self-employment
- set up a business
- manage a company
- set up a local branch of a company

There should be no discrimination by employers because of nationality in terms of conditions of employment, pay or working conditions.

In the case of non-EEA family members, direct family members (under Regulation 7 of the 2006 Regulations)[64] do not require the Residence Card and Article 25 of the 2004 Directive provides that such a card may not be made a precondition for the exercise of rights arising under the directive. In the case of Extended Family Members, their rights under European law do not arise until they are recognised as such by UKBA. They therefore require a Residence Card in order to hold a right of residence and to take up employment.

[64] http://www.legislation.gov.uk/uksi/2006/1003/pdfs/uksi_20061003_en.pdf

A spouse, civil partner or a child under 18 (and other family members) of an A2 national who has worker authorisation will be exempt from the restrictions affecting A2 nationals themselves – as will the family members of an A2 national who is self-employed.[65]

4.3 Family members of PBS migrants: Tier 1 (high value) & Tier 2 (skilled with job offer)

Partners have a right to work during the period of limited leave. However, they are not able to seek employment as a doctor or dentist in training unless they have a degree in medicine or dentistry from a UK or UK recognised institution or not previously restricted in being employed as a doctor or dentist.

4.4 Family members of PBS migrants: Tier 4 (students)

Dependants of Tier 4 students are only able to take up employment in the UK if the main applicant is a Government sponsored student, or their course is for over 12 months and above degree level.

4.5 Family members of asylum seekers

As in the case of main applicants, partners are not allowed to work if subject to immigration control. If the only 'status' held by applicant and partner is as 'asylum seeker' then they do not hold any status in the UK – they will usually be granted 'temporary admission' during the process of assessing the claim. This is NOT leave to remain. The UKBA justifies this in the following way: 'Entering the country for economic reasons is not the same as seeking asylum, and it is important to maintain a distinction between the two'.[66]

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[65] A2 (Bulgarian and Romanian) nationals themselves do not have free access to the labour market. They are able to be self-employed without prior permission but need specific authorisation to work as an employee. When they have worked for 12 months lawfully and continuously under the Worker Authorisation Scheme, the restrictions no longer apply. But A2 nationals who are self-employed are not exempt from the restrictions on A2 nationals after being self-employed for 12 months. It is only those who have worked lawfully as an employee who will become exempt after 12 months. http://www.ukba.homeoffice.gov.uk/eucitizens/bulgaria-romania/

[66] http://www.ukba.homeoffice.gov.uk/asylum/support/employment/

An asylum seeker whose claim has not been decided within 12 months of application has a right to request permission to work (paragraph 360 HC 395)[67],)[68], but note that if granted, such right to take up employment is restricted to the shortage occupation list.

4.6 Family members of refugees

Partners are allowed to work.

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All family members with access to the labour market can attend JobCentre Plus offices, the main official gateway for job seekers, to look for employment. However, as the main aim of labour market policies and programmes is to divert people from welfare to employment, generally targeted programmes exist mainly for family members of refugees and those with humanitarian protection, as well as established migrants with ILR, who do have recourse to publicly funded welfare support.[69]

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Employment rights of non-EEA spouses and partners are relatively straight-forward compared to some of the other areas of entitlements covered in this report, and even to an extent more straight-forward than for some categories of sponsors, where there is a 'trade off' between selection and numbers on the one hand, and rights accorded on the other (Ruhs 2010). Only migrants considered to be 'higher skilled (valued)' are allowed to bring in family members; and most of these family members, with the exception of family members of asylum seekers, have some access to the labour market (see Section 1).

Non-discrimination and equality in employment are most recently covered in UK domestic law by the Equality Act 2010; discrimination on grounds of 'race' includes colour, nationality, ethnic or national origins. Spencer and Pobjoy (2011) discuss two broad exemptions to the Equality

[67] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2010/cm7929.pdf?view=Binary
[68] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2010/cm7929.pdf?view=Binary
[69] http://www.hwwi.org/uploads/tx_wilpubdb/HWWI_Policy_Paper_3-7.pdf

Act (and its precursors) which affect all domains **including employment**: one, according to immigration rules affecting different visa requirements for nationals of different countries; and the second, which allows direct discrimination on grounds of nationality, and indirect discrimination based on residency requirements such whether ‘ordinarily resident’ (as in rules on access to healthcare) and length of residence (see Section 3 on rationale).

5. Welfare benefits[70]

The UKBA website lists the following range of benefits, generally available to the UK population on a low income, but which are part of 'public funds' and are therefore generally not available to anyone 'subject to immigration control':[71]

1) income-based jobseeker's allowance (JSA);
2) income support (IS);
3) child tax credit;
4) working tax credit;
5) a social fund payment;
6) child benefit;
7) housing benefit;
8) council tax benefit;
9) state pension credit;
10) attendance allowance;
11) severe disablement allowance;
12) carer's allowance;
13) disability living allowance;
14) an allocation of local authority housing;
15) local authority homelessness assistance;
16) health in pregnancy grant; and
17) income-related employment and support allowance.

However, people subject to immigration control and who are, or have been, working are entitled to claim benefits based on national insurance contributions from earnings. This includes non-EEA family members of settled persons as well as of sponsors who have limited leave themselves. These benefits are:

- contribution-based jobseeker's allowance;
- incapacity benefit;
- retirement pension;
- widow's benefit and bereavement benefit;
- guardian's allowance;
- statutory maternity pay;

[70] Source: Child Poverty Action Group (2012) *Welfare benefits and tax credits handbook 2012/13.*
[71] http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/rightsandresponsibilities/publicfunds/
From April 2013 universal credit will replace most means-tested benefits. Generally entitlement is based on whether subject to immigration rules.

- maternity allowance; and
- contribution-based employment and support allowance.

As a general rule, then, **non-contributory benefits are affected by immigration status but contributory benefits are not**.

The **Habitual Residence Test** governing access to some means-tested social security benefits such as Income Support, Pension Credit and Council Tax Benefit, and housing assistance from a local authority, was introduced in 1994 in response to concerns about 'benefit tourism'. It is applied to people who have been living in the UK for two years or less, including returning British nationals. The term 'habitually resident' is not defined in legislation and definitions based on domestic and EC case law have been considered to be 'notoriously opaque' (Kennedy, 2011a). Two main components in deciding whether someone is habitually resident are: whether they have a 'settled intention' to reside, and whether they have actually been resident for an 'appreciable period of time', but usually decisions made by local authorities are according to individual circumstances. A review by the Labour Government in 1999 led to a reduction of the time period during which the test is to be applied from five to two years, and the qualification of the test for people returning to, and re-establishing their ties in, the UK[72] and of people fleeing to the UK from areas of civil unrest or deported to the UK.

> *Otherwise ... the habitual residence test will continue to apply to seek to prevent abuse by those who do not have the appropriate ties to this country. (Junior Social Security Minister, 3 March 1999)*[73]

5.1 Family members of British citizens or permanent residents

Given 'no recourse to public funds' as a condition of stay, family members are not entitled to benefits and tax credits that are part of public funds until settlement is granted (in accordance with changes in family migration rules, after five years – see Section 1).

[72] The CPAG Benefit guide relating to e.g. returning citizens or residents states "one to three months" – but can be less if they can demonstrate they have cut off connections abroad.
[73] http://www.parliament.uk/briefing-papers/SN00416

Child benefit and child tax credit can be claimed for children subject to immigration control, as long as one parent is not subject to immigration control – e.g. a British citizen or a settled resident – even if the other parent is subject to immigration control.

Tax credits have to be claimed as a couple, and provided that one partner is settled, claiming does not breach the prohibition on recourse to public funds for the other partner.[74]

Housing benefit and council tax benefit may be claimed by a settled partner, but if the amount paid is higher because of the presence of the family member(s), the latter may be regarded as having had recourse to public funds. This poses particular problems as the local authority has no discretion to ignore the partner and children.

For an adult dependent relative the UK sponsor must sign an undertaking of responsibility for maintenance without recourse to public funds, including welfare benefits, for a period of five years (see Section 1). But someone granted indefinite leave 'on the conditions of a maintenance undertaking' can claim such benefits as: Disability living allowance, Severe disablement allowance; Social fund payment.[75]

Partners subject to immigration control and in present or previous employment can claim contributory benefits, as listed above.

Some partners were given Discretionary Leave outside the pre 9th July 2012 Rules on Article 8 grounds, and these have full access to public funds for the six years before they can settle.

5.2 Family members of EEA and Swiss nationals[76]

Sponsors not working or self-employed should be able to support their families in the UK without becoming an unreasonable burden on the social assistance system of the host state.

[74] See public funds comments at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/

[75] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/public-funds/funds.pdf?view=Binary

[76] There are also reciprocal arrangements with some non-EEA (European and non-European) countries.

EEA nationals' family members have 'a right to reside'[77] as part of the Habitual Residence Test since 1 May 2004, as long as the relevant EEA national is a qualified person – see p.9-11 above (under Regulation 6 of 2006 Regulations[78]). This includes as a jobseeker – and the family are entitled to claim Jobseeker's Allowance (JSA). They would only be eligible for Income Support (IS) as a top up benefit. They are eligible to receive all appropriate benefits including Child Benefit, Child and Working Tax Credits, Housing and Council Tax benefit. There are no restrictions on the type of right to reside that family members need in order to claim Child Benefit (CB) or Child Tax Credit (CTC), as long as the relevant EEA national is a qualified person. Once family members have acquired the right of permanent residence (after 5 years continuous legal residence) they are entitled to welfare benefits on the same basis as UK nationals.

Family members of A2 nationals in authorised employment (but not jobseekers) in the first 12 months have a right to reside, after which time period they have the same rights to welfare benefits as family members of other EEA nationals.

5.3 Family members of PBS migrants: Tier 1 (high value) & Tier 2 (skilled with job offer) and Tier 4 (students)

Given 'no recourse to public funds' as a condition of stay, family members are not entitled to benefits and tax credits that are part of public funds unless/until settlement is granted (see Section 1).

Partners subject to immigration control and in present or previous employment can claim contributory benefits.

[77] Generally, a person who moves from one EEA country to another (including since 30 April 2011 A8 nationals and their family members) has a right to reside if they are economically active, or are able to support themselves. The right to reside was introduced as part of the Habitual Residence Test in 2004 in response to concerns about the impact on the social security system of the enlargement of the European Union. On 30 April 2006, the *Rights of Residence Directive* 2004/38/EC came into force, giving everyone, including economically inactive people, a right to reside for the first three months. However the UK Government amended the rules on access to benefits to ensure that there are restrictions on satisfying the requirements, such as applicability beyond economically active people only to 'qualified persons' seeking work and their family members. There is some challenge to this decision from the European Commission on grounds of discrimination according to nationality, and case law on this is continually evolving. http://www.parliament.uk/briefing-papers/SN05972

[78] http://www.legislation.gov.uk/uksi/2006/1026/regulation/6/made

5.4 Family members of asylum seekers

Family members are included within the definition of people subject to immigration control, and so are excluded from welfare benefits unless they have applied for asylum before 3 April 2000 (or appealed a decision made before 5 February 1996) and are still awaiting a decision (but this is very unlikely to be relevant any more).

Destitute asylum seekers are eligible for asylum support from the UKBA (NASS support). This includes subsistence and accommodation.[79]

5.5 Family members of refugees

Family members joining people granted refugee status, humanitarian protection or exceptional leave (including discretionary leave) are not considered to be subject to immigration control and therefore can claim all benefits according to normal entitlement rules. Discretionary leave can be given with conditions, which may include no recourse to public funds.

Further, they are exempt from the habitual residence test (have a right to reside and 'be habitually resident in fact' – see above) to claim some benefits like Income Support (IS), Income-based Job Seeker's Allowance (JSA).

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There are some categories of people subject to immigration control who are able to claim means-tested benefits or tax credits, and non-means tested benefits such as Child Benefit. These are:

- Nationals of Croatia, Macedonia or Turkey who are 'lawfully present in the UK' are entitled to working tax credit. Nationals of Algeria, Morocco, San Marino, Tunisia or Turkey who are lawfully working in the UK or have stopped working because of pregnancy, childcare, illness or accident, or reaching retirement age, can claim child tax

[79] http://www.ukba.homeoffice.gov.uk/asylum/support/

credit. These arrangements with specific countries are the result of association/co-operation arrangements the UK as a EU country has with some non-EEA countries (Child Poverty Action Group (CPAG) 2012).

If partners are subject to immigration control settled sponsors are only paid benefits at a single person's rate, although partners are still treated as part of the household and their work, income and capital can affect entitlement – e.g. a sponsor cannot claim Income Support as a lone parent. However, for pension credit partners are not treated as being part of the household, and their income or capital does not affect the claim. Joint tax credit claims can be made and do not affect the rights of partners subject to immigration control to remain in the UK.

Family members subject to immigration control, with assessed social care needs[80] face no restrictions, under social services legislation, in accessing free social care packages or nursing home placements provided by local social services departments even when they have no recourse to public funds.[81]

[80] http://www.housing-rights.info/02_11_People_social_care.php

[81] http://www.migrantsrights.org.uk/news/2011/social-services-support-people-no-recourse-public-funds-national-picture

6. Healthcare

At present people subject to immigration control entering the UK from countries considered as having a high incidence of Tuberculosis (TB) are screened by x-ray at Heathrow and Gatwick airports. The immigration minister announced in May 2012 that, instead, pre-departure tests for TB will be introduced as part of visa application procedures in over 80 high incidence countries, for migrants seeking to stay in the UK for over 6 months. He justified this change of policy on grounds of saving costs of screening by placing the financial responsibility for testing for TB on visa applicants.[82] Most of these non-EEA migrants are from Asian and African countries.

Within the UK, currently there is a distinction in regulations governing free access to primary healthcare on the one hand, and those governing free access to NHS hospital care on the other, with the latter ultimately dependent on the immigration status of the patient. While the NHS Act of 1964 stipulated that health services are provided free at the point of need for people of England and Wales, the NHS Act 1977 gave powers to the government to make charges for healthcare from people who are not 'ordinarily resident'. [83] In policy, primary health care from a General Practitioner (GP), including for people with no free access to routine secondary care, is at 'a degree of discretion' of each GP, and can be refused on 'reasonable grounds' such as lack of space or residence beyond the catchment area, but not on grounds of race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition.[84] As in the case of all who are ordinarily resident, charges apply for dental treatment, sight tests, and prescriptions for medicines, unless low income or other – e.g. age related (under 16, or under 19 if in full time education, over 60) - criteria for exemption are met.

[82] http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/may/42-tb-test. This was again updated in the most recent statement of changes http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2012/hc565.pdf?view=Binary

[83] A common law definition as 'someone who is living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being, with an identifiable purpose for their residence here which has a sufficient degree of continuity to be properly described as settled'. (See also footnote 54). http://www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074374 see also *NHS* (Charges to *Overseas Visitors*) *Regulations* 2011

[84] See current Department of Health guidance: http://www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074373

The following categories of healthcare are free to all, irrespective of immigration status or nationality:

- Treatment given in an accident and emergency department or similar walk-in centre, but excludes emergency treatment given elsewhere in the hospital.
- Treatment for certain communicable diseases such as TB and pandemic flu.
- Compulsory psychiatric treatment.
- Family planning services.

So far HIV testing and counselling have been free of charge for all, but not subsequent treatment on the grounds that 'individual treatment for HIV is life-long and does not offer a cure' (NHS Newham, 2010). In October 2012, regulations will come into effect ending charges for HIV treatment for people not 'ordinarily resident' in the UK. This brings it into line with treatment for other infectious diseases such as TB [85]

Increasingly restrictive government immigration policies affecting migrants' conditions of stay in the past two years have potentially significant implications for their access to healthcare. Changes to immigration rules in October 2011 mean that migrants with unpaid NHS debts of over £1,000 may be refused re- entry or extension of stay. [86]

6.1 Family members of British citizens or permanent residents

Access to both primary and secondary (hospital) care is free. British citizens and permanent residents are considered to be 'ordinarily resident' (see footnote 80), therefore anyone coming to the UK to take up permanent residence with someone who is 'ordinarily resident' is exempt from charges from time of arrival.

1. [85] 'UK government agrees to fund free drug treatment for foreign nationals with HIV', *BMJ 2012; 344:e1562, 29 February 2012* http://www.bmj.com/content/344/bmj.e1562
2. [86] 'The immigration applications of NHS debtors can now be refused – how do we manage the public health fallout?' Migrants Rights Network, 9 December 2011 http://migrantsrights.org.uk/migration-pulse/2011/immigration-applications-nhs-debtors-can-now-be-refused-how-do-we-manage-public

6.2 Family members of EEA and Swiss nationals

Access to primary care is free. Access to NHS hospital care is free for medical conditions developed after entry to the UK, with the European Health Insurance Card (EHIC). Both are in accordance with EEA Treaty rights.[87]

6.3 Family members of PBS migrants: Tier 1 (high value) & Tier 2 (skilled with job offer)

All have free access to primary care. Dependants of employed or self-employed Tier 2 migrants have free access to hospital care.[88]

6.4 Family members of PBS migrants: Tier 4 (students)

Access to primary care is free. Dependants of students following a full-time course of postgraduate study for twelve months or more, or a course of study that is of any length but is substantially funded by the UK Government have free access to hospital care.

For family members of all PBS migrants, the rationale of entitlements is the balancing of humanitarian principles, public health considerations and cost where lack of early necessary treatment may lead to subsequent use of more expensive emergency treatment. On the other hand the government justifies the restrictions by the idea of the importance of preventing people entering the UK for 'health tourism'.

> *We cannot afford to become an 'international health service', providing free treatment for all. This would also risk encouraging people to enter, or remain, in the country solely to access treatment. (Parliamentary Under-Secretary of State for Health, February 2010)*[89]

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[87] There is controversy over whether students and self-supporting EEA nationals and families need comprehensive private health insurance. UKBA now seem to have accepted that if students make it clear that they intend to return home after their course, they can rely on EHIC cards. See end of ch.4 at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/

[88] http://www.legislation.gov.uk/uksi/2011/1556/made

6.5 Family members of refugees and of asylum seekers

For family members of refugees, access to both primary and secondary (hospital) care is free. For family members of asylum seekers, access to primary care is free, and access to secondary care is free while application for asylum is being considered, including appeals.

6.5.1 Refused asylum seekers

Recently there was a ruling that those with Section 4 or Section 95 support (i.e. those with barriers to return to countries of origin or those with minor children) including dependants, are exempt from paying for any hospital treatment. Other than that, hospital treatment except for emergency care (see below) is chargeable for asylum seekers and their dependants who have exhausted all appeals processes. But 'immediately necessary' or 'urgent' treatment may still be provided in advance of payment although a charge is made subsequently. This includes maternity care. Charges may be written off after reasonable efforts have been made to seek recovery, taking into account the person's ability to pay.

The rationale for allowing free access to all healthcare for recognized refugees and people in the process of seeking asylum relate again to balancing humanitarian principles and public health considerations (see Section 3 below). The rationale for extending free hospital treatment to the most 'vulnerable' refused asylum seekers (i.e. those with Section 4 or Section 95 support – see above) is to provide 'a fair level of access' to the NHS for those who are co-operating with the UKBA but have barriers to return home and would be destitute otherwise. This ruling distinguishes these categories of people from 'groups whom it has been decided could feasibly return home but choose not to do so'.[90]

With regard to 'immediately necessary care', in line with obligations under the Human Rights Act, current guidance makes clear that immediately necessary treatment (to prevent a condition from becoming immediately life threatening or is needed to prevent permanent

[89] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_113243.pdf
[90] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_113270.pdf

serious damage to their health) must not be denied, irrespective of whether a patient is liable to charges or their ability to pay such charges.[91]

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People from a country which has a bilateral healthcare agreement with the UK (see Appendix 2) are exempt from charges for NHS hospital treatment, if the treatment is needed for a condition that arose after they arrived in the UK.[92] This is irrespective of whether they are ordinarily resident.

[91] NHS Newham, 2012

[92] http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074388

7. Housing

Unlike in relation to healthcare and education, there is no universal entitlement to local authority or housing association[93] owned social housing even for British citizens; eligibility criteria set out in the 1996 Housing Act and subsequent amendments, are based on **physical and economic need** (e.g. people with a serious medical condition affected by present home conditions, families with children living in overcrowded conditions, homelessness)[94] and '**habitual residence**' (i.e. the right to reside and 'be habitually resident in fact' in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland – known as the 'common travel area') – see above section on welfare benefits. Therefore, even British citizens who generally have not lived in the UK continuously for two years may not be eligible for social housing, but in practice this depends on individual circumstances as assessed by local authorities (Wilson 2012; Kennedy, 2011a).

Migrants, and particularly recent migrants, are far more likely than UK-born people to be living in private rented housing and far less likely to be owner-occupiers, although there is a decrease in proportions of non-UK born people renting privately and an increase in home ownership with increasing length of residence (Vargas-Silva 2011). Smaller scale research with specifically family migrants suggests that significant proportions, even among those recently arrived, live in owner-occupied homes or with relatives, reflecting the greater tendency among particularly family members joining settled residents to be on a path to settlement (Jayaweera, 2012). Similar proportions of UK born and non-UK born people live in social housing, but among recent migrants proportions are lower (Vargas-Silva 2011).

Most non-EEA nationals entering the UK and who are subject to immigration control do not have access to social housing according to immigration rules and as well on grounds of not

[93]Housing Associations are independent, not-for-profit organizations run by a committee of volunteers that provide affordable homes in local areas for people in housing need. Apart from providing social housing in agreement with local councils in some areas they also provide rented housing. In principle most people subject to immigration rules can rent housing from Housing Associations if they can pay rent, although people subject to short stay restrictions may be refused. http://www.housing-rights.info/02_1_Housing_explained.html
[94]http://www.direct.gov.uk/en/HomeAndCommunity/Councilandhousingassociationhomes/Councilhousing/DG_188701

being 'habitually resident' (Wilson, 2012).[95] In cases where they are eligible to apply for social housing – e.g. when immigration control is removed:

> *... they would have their housing needs considered on the same basis as other applicants in accordance with the local authority's allocation scheme.*[96]

However, as Spencer and Pobjoy (2011) point out, local authorities have recently been given greater freedom to make decisions about social housing allocation including giving greater priority to people who have been on waiting lists for longer or have family connections in the local area while taking equality considerations into account, thus leading in practice to the elevation of the 'needs' of British citizens and long term residents over those of more recent arrivals with entitlement. Further, the Borders, Citizens and Immigration Act 2009 which came into force in July 2011 stipulated that non-EEA family migrants will only receive full access to benefits by becoming a British Citizen or permanent resident. The then Parliamentary Under Secretary of State at Communities and Local Government(CLG) gave the following response to a parliamentary question in the House of Commons n November 2009:

> *This policy upholds the principle that the rights and benefits of British Citizenship and permanent residence in the UK should be matched by responsibilities and contributions to the UK; and means that in practice most migrants will have to wait longer to access benefits and social housing (Wilson, 2012).*

7.1 Family members of British citizens and permanent residents

Until family members obtain indefinite leave to remain (see general rules in Section 1), they do not have the right to obtain a rented home through the council, apply as homeless to the council or claim housing benefit to help pay rent (see section on welfare benefits above). Once indefinite leave to remain has been granted – for instance, for partners or children this may now be five years after arrival – these restrictions to applying for social housing are lifted, on

[95] The main source for the following sections is http://www.housing-rights.info/02_2_1_Housing_eligibility_law.html

[96] The present housing minister responding to a question in the House of Commons on 17 May 2012 (Wilson, 2012).

satisfying two conditions: 1) being habitually resident (which automatically applies after living two years in the UK); and 2) not being subject to an undertaking for support and accommodation signed by a relative within the last five years, although this will not apply if those who signed it are dead. This requirement particularly applies to elderly dependent relatives – see Section 1.

There are many cases where a partner or family member holds Discretionary Leave (although bear in mind that DL can be granted with various conditions, one of which may be a restriction on recourse to public funds), in which case they will be entitled to social housing (since they have recourse to public funds).

7.2 Family members of EEA or Swiss nationals

Family members have the same social housing rights as the EEA nationals (workers or students), (including A8 nationals after 30 April 2011) they are accompanying or joining in accordance with their 'right to reside' as part of the 'habitual residence' test (see definition in section on welfare benefits). This means that they may generally apply for social housing as long as their sponsor is employed, self-employed, temporarily out of work, or a former worker who is retired or have acquired Permanent Residence. EEA students and family members can apply to go on Council housing waiting lists but cannot usually claim homelessness if they have a home in another country, unless they show their circumstances have changed since the students signed a declaration on starting their course that they are able to support themselves. Self-sufficient EEA nationals and family members also may apply for social housing. A non-EEA parent of an EEA child in education in the UK may apply for social housing as long as one parent of the child has worked in the UK. Most former family members (those affected by the death of the sponsor or relationship breakdown) also retain social housing rights. In the case of divorce there are time restrictions applying to the duration of the relationship (at least 3 years) and joint residence in the UK (at least one year) or there is a child from the relationship who must live in the UK or evidence of domestic violence. For all non-EEA family members of EEA nationals all restrictions to obtaining social housing end upon gaining permanent residence five years after arrival. But it is important to note that permanent residence does not always take

five years – there are other provisions for retired people or those who are permanently incapable of work, for whom the route may be less than five years.

Bulgarian and Romanian (A2) nationals who are self-employed or self-sufficient, and their family members, have the same housing rights as other EEA nationals and their family members with similar status, again in accordance with 'right to reside' as part of the habitual residence test (see section on welfare benefits above). In the first 12 months Bulgarian and Romanian employees who have received authorisation to work from the UKBA and their family members, but not jobseekers who have never worked in the UK or those who have lost their job within the 12 months, have housing rights.

7.3 Family members of Points-based system (PBS) migrants

As in the case of family members of UK citizens or permanent residents on arrival, unless/until family members obtain indefinite leave to remain (see Section 1), they do not have the right to obtain a rented home through the council, apply as homeless to the council or claim housing benefit to help pay rent (see section on welfare benefits above). However there is a temporary exception for those whose funds for support have been temporarily disrupted such that they may be able to claim housing benefit for up to six weeks, in spite of any restrictions placed on leave in the UK, as long as there is 'a reasonable expectation that their funds will resume shortly'.

7.4 Family members of refugees

Partners and children of people who have gained refugee status are eligible for housing and homelessness services as long as families have been established before the main applicants have left their home countries. Family members of those granted humanitarian protection or discretionary leave also have similar housing rights even though leave is time limited (as is refugee status – limited to five years).

7.5 Family members of asylum seekers

Under the Immigration and Asylum Act (1999) asylum seekers do not have access to housing assistance through local authorities since 2000, but can get accommodation support if 'destitute' (i.e. do not have anywhere to live and/or money to buy food) from the UKBA. Asylum seekers have no choice about geographical areas that they are sent to, and must stay in their allocated housing in the specific area until they are given permission to move. Homeless and destitute asylum seekers with social care needs such as disability, infirmity or long term illness can apply to the social services department of the local council for housing assistance. However, refused asylum seekers, visa overstayers and other migrants with illegal status and their dependants may only get help with housing from National Asylum Support Service (NASS), in accordance with the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, under the Immigration and Asylum Act 1999, if they are prevented from returning to countries of origin for medical reasons or because of threats to safety if they return (Section 4 support).[97] In addition, refused asylum seekers with children under 18 are eligible for Section 95 support for housing if they are willing but unable to leave the UK (Aspinall and Watters 2010; Spencer and Pobjoy 2011).

7.6 Non-discrimination in housing

Non-discrimination in housing, as in other domains of public life, is currently covered by The Equality Act 2010. This includes prohibition of direct and indirect race discrimination, where 'race' includes colour, and nationality (including citizenship), ethnic or national origins, and as well a duty on public sector authorities to eliminate discrimination and harassment, advance equal opportunities, foster good relations in the community and 'take proportionate action to overcome disadvantage, meet needs, and tackle under-representation'.[98] The two broad exemptions affecting migrants, as discussed in Section 2 (Employment) are, one, according to immigration rules affecting different visa requirements for nationals of different countries; and the second, which allows direct discrimination on grounds of nationality, and indirect

[97] http://www.legislation.gov.uk/uksi/2005/930/pdfs/uksi_20050930_en.pdf
[98] http://www.slideshare.net/equalityhumanrights/equality-act-presentationshowforweb-10779174

discrimination based on residency requirements such as whether 'ordinarily resident' and length of residence (Spencer and Pobjoy 2011).

7.7 Mortgages

Banks normally offer mortgages to UK permanent residents.[99] Where the applicant is a foreign national, the lender may seek to satisfy itself that applicants are entitled to live and work in the UK – for instance by asking to inspect passports or national identity cards. Non-EEA nationals may be less likely to obtain a mortgage as they may not 'have sufficiently open-ended permission to stay in the UK to reassure a lender about the permanency of [their] circumstances' unless they have indefinite leave to remain.[100]

[99] http://www.testimonyproject.org/testimonyprojectuk/content/housing-and-money/i-was-refused-mortgage-there-anything-i-can-do
[100] http://www.cml.org.uk/cml/policy/issues/42

8. Civic participation

8.1 Electoral participation

Anyone who is 18 years or over and is a citizen of the UK, or of the Irish Republic and is resident in the UK, is eligible to vote in UK parliamentary general elections, European and local elections and referendums. Citizens of Commonwealth countries including British Crown Dependencies and British Overseas Territories, also have similar voting rights if they are resident in the UK and have leave to remain or do not require such leave. Citizens of Fiji and Zimbabwe retain their voting rights despite their countries having been suspended from the Commonwealth.

Citizens of the European Union (who are not Commonwealth citizens or Citizens of the Republic of Ireland) can vote in European and local elections in the UK, but not in UK Parliamentary general elections or referendums. But family members of EEA nationals who are Commonwealth citizens can vote in all UK elections. Citizens of Cyprus and Malta are also eligible to vote in all elections held in the UK.[101]

Thus, it follows that TCN family members of UK citizens, permanent residents, EEA nationals or PBS migrants, are eligible for electoral participation only if they are citizens of a Commonwealth country themselves. This appears to be one situation where family members' own citizenship status as well as their right to residence in the UK conferred by their sponsors' immigration status, are both deciding factors in the granting of entitlements.

8.2 Political party membership and candidacy

Rules on membership in the Labour Party require the need to be: age 14 years or over, a subject or resident of the United Kingdom of Great Britain and Northern Ireland, or a citizen

[101] http://www.aboutmyvote.co.uk/who_can_register_to_vote.aspx

of Eire, and registered as an elector at the address given.[102] The nature and length of residency is unclear.

To stand as a candidate in a UK Parliamentary General Election a person needs to be at least 18 years old and:

- **(i)** a British citizen
- **(ii)** a citizen of the Republic of Ireland
- **(iii)** a citizen of a commonwealth country who does not require leave to enter or remain in the UK, or has indefinite leave to remain in the UK.[103]

To stand as a candidate in a district, borough, county, county borough or unitary authority in England and Wales a person needs to be:

- **(i)** At least 18 years old
- **(ii)** A British citizen , a Commonwealth citizen who does not need leave to enter or remain or has indefinite leave to remain, or a citizen of a member state of the EU.
- **(iii)** Have lived and worked in the local authority area for at least 12 months.[104]

Thus any TCN family member other than those who are Commonwealth citizens cannot obtain membership of a political party or stand as a political party candidate in any election.

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[102] https://www.labour.org.uk/join/. There was no information on the Conservative Party website.

[103] http://www.parliament.uk/get-involved/elections/standing/

[104] http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/141784/Part-1-Can-you-stand-for-election-LGEW.pdf. Similar qualifications apply for Scotland (http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/141854/Part-1-Can-you-stand-for-election-SLG.pdf

SECTION 3: EXPLORING RATIONALES

Restrictions and entitlements facing family migrants apply to criteria for both entry and post-entry conditions of stay and are necessarily related. As Spencer and Pobjoy (2011) point out, the provision or denial of entitlements at both stages to various categories of family migrants coming to the UK is based on competing policy objectives reflecting (at times different) priorities of central government, different government departments and professional service providers. These objectives include: economic, social policy, human rights, professional ethics, practical, as well as immigration control, considerations. More fundamentally though, the framework upon which entitlements and restrictions are built and articulated, is made up of three key aspects: 1) obligations under international and European human rights instruments translated to a national level; 2) national commitments to tackle discrimination and promote equality; and 3) immigration control - limiting some rights to certain categories of residents on grounds of controlling immigration, prioritising the entitlements to employment, services and civic rights of citizens and permanent residents, and protecting the public purse. The first two aspects underlie the granting of entitlements, while the third is the basis of restrictions. However, while this gives a general framework to understand such conditions and while central government provides justification for some restrictions and entitlements in Parliament or court cases as referred to throughout the report, the rationales for specific restrictions are not always made clear.

A first relevant influence is human rights. 'The right to family life' as enshrined in the 1998 Human Rights Act (HRA) in the UK and deriving from Article 8 (respect for a private and family life) of the European Convention on Human Rights (ECHR)[105] limits the extent to which the government is able to restrict entry of family members of settled residents or other migrants despite a long history in the UK of progressive erosion of rights of entry and stay relating to family migrants from some parts of the world (Stechman, 2009). Challenge or attempted challenge to restrictions occur through the law courts and mostly revolve around the perceived breach of Article 8 (the right to respect for a private and family life) or Article 12 (the right to

[105] This right is a universal human right, enshrined for example in the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (ICCPR).

marriage) of the ECHR. Since Article 8 is a qualified right restrictions are allowed if they have a legitimate aim and are proportional:

> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (Article 8.2, quoted in Wray (2012))*[106]

There have as such been competing rationales given by government for recent – and proposed – entry restrictions on family migration, revolving around three themes: 1) maximizing the potential for integration, particularly of spouses; 2) reducing the potential for forced marriage; 3) preventing 'bogus' marriages, thus reducing the extent to which other – e.g. economic – reasons for migration occur disguised as marriage migration. One or more of these themes account for most of the immigration rules on entry affecting different categories of family migrants set out in Section 1, including those that relate to lengths of time between entry and settlement and since marriage, between sponsor and applicant. Underpinning these is also the broader aim of overall reducing net migration (the third major influence, above) and the financial burden of migrants on the country. As Wray (2012) states: 'The critical factor here is that intimate and defining relationships are pitched against macro policy decisions' such as a focus on reducing numbers of migrants from some countries.

An example of the tensions ensuing between the human rights of an individual and what the government considers is a legitimate restriction on immigration can be seen in relation to 'switching' visa categories while living in the UK. In 2002 the government prohibited applicants who entered as visitors or those with no leave to stay from such 'switching', requiring them to return to countries of origin to make a separate entry clearance application. Such a policy has been 'substantially undermined' (Wray 2012) by the House of Lords with respect to particular cases (e.g. Chikwamba[107]), especially where the security of individuals in returning to politically unstable countries and where disruption to family life are involved. The most recent

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[106] http://www.equalityhumanrights.com/human-rights/what-are-human-rights/the-human-rights-act/respect-for-your-private-and-family-life/

[107] http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/chikwa-1.htm

restrictions to the migration of non-EEA family members (announced in June 2012 – see Section 1) draw upon the government's firm resolve to maintain that the right to a family life is a qualified right. As Tonkiss (2012) points out, the policies 'serve the Government's own interests in reinforcing British sovereignty and citizenship'.[108]

Finally, entry conditions are also influenced by equality considerations, including the need to avoid perceptions that particular national (non-White) groups are discriminated against at entry. For instance, rules have been relaxed in the broadening of the entitlement to family union or reunion to unmarried and same sex partners, as well as for married and civil partners, across sponsor categories, in line with changes in domestic law reflecting changing values in the majority population[109] (Simmons 2008; Spencer and Pobjoy 2011). However, there are exemptions to this, including the justification of the points-based system for non-EEA nationals, while civil society attempts to challenge the new family migration rules have criticised the ways in which equalities impacts have largely been ignored in disproportionately affecting women, younger people and those from certain ethnic groups.

Similar tensions between according human rights, the principles of equality and non-discrimination on the one hand, and immigration control on the other are played out also within the field of entitlements and restrictions in the specific domains considered earlier in this paper.

As Spencer and Pobjoy point out there are exemptions that rationalize restrictions on the rights of some migrants: to public services according to different visa requirements of different nationalities; and direct discrimination with respect to provision of services such as employment and education on the grounds of nationality and indirect discrimination on the basis of residency requirements such as 'ordinary residence' and length of residence. The examples here include the requirement for higher university fees from overseas students, and charging those not 'ordinarily resident' for hospital treatment (Spencer and Pobjoy 2011).

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[108] http://www.migrantsrights.org.uk/migration-pulse/2012/migration-marriage-and-muscular-liberalism-competing-claims-common-goal

[109] Civil Partnership Act, 2004.

The rationales for entitlements are often not spelt out, although in some cases they can be discerned. For instance, in relation to healthcare, universal entitlement to some kinds of healthcare (primary, emergency, family planning, infectious disease) has been justified on human rights, public health, as well as long term economic grounds (e.g. prevention ultimately reducing higher costs of emergency care). At post-entry level human rights rationales underpin the granting of some entitlements, particularly to health care – for example allowing immediately necessary treatment to prevent threat to life or further damage to health irrespective of ability to pay; or the extension of free hospital treatment to the most vulnerable amongst refused asylum seekers. But there is evidently another struggle between allowing and denying access to aspects of secondary healthcare to categories of migrants seen as less useful to the economy and a burden on public resources (although in relation to our focus on family migrants this applies only to family members of refused asylum seekers). This compares with another tension explicit in current policy to 'attract the brightest and the best'; migrant workers whose skills are seen as desirable, as well as international students, are allowed to bring their families with them and are granted free entitlement to healthcare, and primary education for dependent children, as otherwise they may choose not to come to the UK (Spencer and Pobjoy 2011).

On the other hand, social housing is an area where access is severely constrained even for migrants who do have recourse to public funds, and where formal or informal length of residence rules may discriminate against those without long standing local ties. Such restrictions have reference to easing tensions arising from public perceptions of migrants seen as taking resources away from long standing residents who have greater entitlement. Within the field of employment however, as stated in the section on Employment, the Equality Act 2010 protects migrants post-entry from direct and indirect discrimination on the grounds of race.

Another important rationale which explains one of the biggest distinctions in the stratification of post-entry restrictions is the rights of most non-EEA national family members of EEA nationals to draw upon free movement rights "which fundamentally have an economic rationale – the prosperity of EU Member States as a whole." (Spencer and Pobjoy 2011: 36). However, there is a recent interesting example of the 'qualification' at the national level, of the right to social security benefits and housing assistance for EEA nationals and their family members derived from EU law (the *Rights of Residence Directive* 2004/38/EC – see footnote 74) 'as a

proportionate response to the legitimate aim of protecting the public purse'. This illustrates a contradiction between the aims of the UK government promoting national economic interests and those of the European Commission promoting free movement (Kennedy, 2011b) which is currently again under the spotlight in view of the imminent lifting of restrictions in 2014 to Bulgarian and Romanian intra-EU migrants and has provoked negative commentary on the tone of the debate from the Council of Europe's HR commissioner.

The rationales underpinning restrictions and entitlements are often entangled. In particular, as Article 8 is a qualified human right, restrictions are allowed if legitimate and proportional. But since little evidence exists on the actual impacts of the restrictions in this study, there is little to say whether such restrictions are indeed proportional. Assessing whether the restrictions are proportional can only be based on evidence on their impacts, which must be established empirically. We offer such evidence in the latter stages of the project, in Work Package 4.

SUMMARY AND CONCLUSION

In the UK TCN family members allowed to accompany or join sponsors are primarily nuclear family members – spouses, spouses to be, partners including same sex partners, and minor dependent children. Parents and grandparents are also allowed if over retirement age. Younger parents and other close adult relatives are only admitted in exceptional compassionate circumstances (see Section A (b)).

For all family migrants, general conditions of stay and entitlements and restrictions in different domains are dependant not so much on the nature of the kinship relation, but on the immigration status and rights deriving from these, of different categories of sponsors. Three main categories of people **who are allowed to bring family members** have been identified: 1) British citizens or settled residents; 2) EEA nationals and 3) migrants who are themselves third country nationals and have limited leave to stay in the UK, for instance some PBS workers and students, asylum seekers and refugees.

Within these three categories of sponsors, conditions of entry and stay of most family migrants refer to requirements of age, English language, and maintenance and accommodation. There are exceptions, particularly for the language requirement for entry and/or settlement, for family members of EEA nationals, asylum seekers and refugees.

Recently there has been a significant increase in restrictions affecting conditions of entry, stay and access to rights of family migrants, particularly family members of British citizens or settled residents seeking a family route to permanent settlement. The main justification for restrictions provided by the government refers to preventing abuse, promoting integration, and reducing the financial burden on taxpayers. In accordance with free movement rights in EU law, TCN family members of EEA nationals are less affected by restrictions. There is also a lesser targeting of family members of some categories of TCN sponsors with limited leave – e.g. very highly skilled migrants in the points-based system, those seeking refugee status.

In relation to healthcare, family migrants under immigration control are subject to a condition of 'ordinary residence'. And TCN family members of EEA nationals, together with their sponsors are subject to 'a right to reside' as part of a 'habitual residence' test. Both these

conditions refer not to specific immigration restrictions of TCN migrants, but to conditions of residence that are in common with British citizens and permanent residents. Employment rights of TCN partners are relatively straight-forward; among TCN migrants admitted for employment under the points-based system, only those considered to be higher skilled are allowed to bring family members, who then have access to the labour market.

However, generally, for any category of family migrants, **once permanent settlement is attained** most restrictions on access to rights in the different domains, disappear. Thereafter, TCN family migrants have the same entitlements to social security benefits, public housing assistance, and free/subsidized non-compulsory education as British citizens and settled residents. Electoral participation is an exception where only family members of British citizens, of EEA citizens, of PBS migrants or of refugees, who are themselves Commonwealth citizens are eligible to vote irrespective of whether they have acquired permanent settlement.

The rationale for granting or restricting rights of family migrants is primarily three-fold: 1) obligations under international and European human rights instruments translated to a national level; 2) national commitments to tackle discrimination and promote equality; and 3) limiting some rights of migrants on grounds of national security and national economic wellbeing. Recently, under attack from case law both in the UK and in the EU, there have been increased attempts on the part of the national government to stress that the human right to a family life (Article 8 of the ECHR) is a 'qualified' right and to justify restrictions on the basis of legitimate aims and proportionality. The rationales therefore are the basis of the justification for the restrictions. But whether the restrictions are proportional can only be established through evidence of their impacts, which are presented in Work Package 4 of this study.

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Appendix 1

European Economic Area

The European Economic Area (EEA) consists of Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, the Republic of Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. Although Iceland, Liechtenstein and Norway are not members of the European Union (EU), their citizens have the same rights as EU citizens to enter, live in and work in the UK.

While Switzerland is not in the EEA, its nationals have the same rights as EEA nationals.

Appendix 2

Bilateral Healthcare Agreements

Nationals of, and UK nationals in, the following countries:

Armenia, Azerbaijan, Belarus, Bosnia, Croatia, Georgia, Gibraltar, Yugoslavia i.e. Serbia & Montenegro, Kazakhstan, Kirgizstan, Macedonia, Moldova, New Zealand, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

Residents irrespective of nationality of the following countries:

Anguilla, Australia, Barbados, British Virgin Islands, Falkland Islands, Iceland, Isle of Man, Jersey, Montserrat, St. Helena, Turks and Caicos Islands.

http://www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074391