

## **Guidance on application of EX1 – consideration of a child's best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do NOT apply**

1. Paragraph EX1 (as below) sets out the criteria to be applied in assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, as interpreted in recent case law, in particular, ZH(Tanzania).

EX.1 This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
  - (aa) is under the age of 18 years;
  - (bb) is in the UK;
  - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) it would not be reasonable to expect the child to leave the UK;

### **Assessing whether the criteria in EX1 apply**

2. The decision maker should carefully consider the application to determine whether EX1 applies. The decision maker should carefully consider all of the points raised by the person in relation to the application of any exceptions set out above as well as any exceptional issues raised. The decision maker should carefully assess the quality of any evidence provided. Decisions must not be taken on the basis of mere assertions about the best interests of the child. All factors need to be assessed in the round.

### **Is there a genuine and subsisting parental relationship?**

3. This is a key factor under EX.1. In considering whether the relationship is genuine and subsisting the following factors are likely to be relevant:

#### **Does the applicant have a parental relationship with the child?**

- what is the relationship – biological, adopted, step child, legal guardian? Are they the child's de facto primary carer?

#### **Is it a genuine and subsisting relationship? –**

- does the child live with the person?
- where does the applicant live in relation to the child?
- how regularly do they see one another?
- are there any relevant court orders governing access to the child?
- Is there any evidence or other relevant information provided within the application – for example, views of the child, other family members or from social work or other relevant professionals?
- to what extent is the applicant making an active contribution to the child's life. Factors which might prompt closer scrutiny include:
  - there is little or no contact with the child or contact is irregular
  - any contact is only recent in nature

- support is only financial in nature, there is no contact or emotional or welfare support
- the child is largely independent of the person

**Is the child a British Citizen or have they been in the UK for a continuous period of 7 years?**

4. You should establish from the application or claim the age and nationality of each child affected by the decision and where they are foreign nationals their immigration history in the UK (e.g. how long have they lived in the UK and where did they live before?).
5. In establishing whether a non-British citizen child has been in the UK continuously for more than 7 years you should include time spent in the UK with and without valid leave.
6. Short periods outside the country – for example for holidays or family visits – would not count as a break in the 7 years required. However, where a child has spent more than 6 months out of the UK at any one time this should normally count as a break in continuous residence unless any exceptional factors apply.

**Would it be unreasonable to expect the child to leave the UK?**

In the case of British citizen children

7. Save in cases involving criminality it will not be possible to take a decision in relation to the parent of a British citizen child where the effect of that decision would be to force the British citizen child to leave the EU – this is consistent with the ECJ judgement in Zambrano.
8. Where there is satisfactory evidence that **all** of the following criteria are met the case should be referred to the European case working team for review:
  - i. the child is under the age of 18; and
  - ii. the child is a British citizen; and
  - iii. the primary carer (care responsibilities and court orders are examples of evidence) of the child is a third country national in the UK; and
  - iv. there is no other parent/ guardian/ carer upon whom the child is dependent or who could care for the child if the primary carer left the UK
9. Where the person with parental responsibility is entitled to an EU law right of residence European case work will issue documentation and there is no further need to give further consideration to the criteria in this policy.
10. In cases where the person with parental responsibility does not benefit from a right of residence as a matter of EU law consideration will need to be given to whether they fall within the scope of this EX1.

Parent being returned to country outside of EU

11. In cases where the decision being taken in respect of the person with parental responsibility would require that person to return to a country **outside of the EU** then the case must always be assessed on the basis that it would be unreasonable for the child to leave the UK with their parent. In such cases it will usually be the case that the person with parental responsibility will be allowed to stay in the UK with the child provided that there is satisfactory evidence of a genuine and subsisting relationship. It may however be appropriate to refuse to grant leave where the conduct of one of the parents gives rise to

considerations of such weight as to justify separation, if the British Citizen child could otherwise stay with another parent or primary carer in the UK. The circumstances envisaged could cover amongst others:

- minor criminality falling below the thresholds set out in paragraph 398;
- a poor immigration history.

12. In considering whether refusal may be appropriate you would need to consider the impact on the child of any separation.

Parent being returned to a country inside the EU

13. In cases where the decision being taken would require the person with parental responsibility to return to a country **within the EU** it will potentially be possible to require the child to return there with the person in question. In such cases though consideration will need to be given to whether it would be reasonable for the child to leave the UK. This issue should be considered in accordance with the criteria in paragraph 14 below.

Where a non British citizen child has been in the UK for more than 7 years

14. The 7 year threshold recognises that over time children start to put down roots and integrate into life in the UK to the extent that being required to leave the UK may be unreasonable. You need to consider whether in the specific circumstances of the case it would be reasonable to expect the child to live in another country. You will need to consider the facts for each child within that family and for the family in the round. You should also engage with any issues explicitly raised by the family or by or behalf of each child. Relevant considerations are likely to include:

- i. whether there would be a significant risk to the child's health: For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment is not be available in the country of return;
- ii. whether the child would be leaving with its parent(s)? It is generally the case that it is in a child's best interests to remain with its parents. Unless specific factors apply it will generally not be unreasonable to expect a child to leave the country with its parents, particularly if the parents have no right to remain in the UK;
- iii. the extent of wider family ties in the UK – you should consider the extent to which the child is dependent on wider family members in the UK;
- iv. whether the child is likely to be able to (re)integrate readily into life in another country? Relevant factors weighing in favour of successful (re)integration include:
  - whether the parent(s) or child is a citizen of the country and so able to enjoy the full rights of being a citizen in that country;
  - whether the parents and/or child have lived in or visited the country before for periods of more than a few weeks – the question here is whether having visited or lived in the country before that the child would be able to adapt and/or the parents would be able to support the child in adapting to life in the country;
  - whether the child or parents have existing family or social ties with the country – a person who has extended family or networks of friends should be able to rely on them for support to help reintegrate on return;

- whether the child or parents have relevant cultural ties to the country – you should consider any evidence of exposure to and the level of understanding of the cultural norms in the country. For example, a period of time spent living mainly amongst a diaspora from the country may in of itself give a child an awareness of the culture in the country;
  - whether the child can speak, read and write in a language of that country; or is likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice.
  - whether the child has attended school in that country;
- v. any country specific risks (refer to relevant country guidance);
  - vi. other specific factors raised by or on behalf of the child.

15. Families or children may highlight the differences in quality of education, health and wider public services and economic or social opportunities between the UK and the country of origin and argue that these work against the best interests of the child. Other than in exceptional circumstances, this would not normally be regarded as a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education and training to provide for their family on return, or if AVR support is available.

### **Exceptional factors**

16. If EX1 does not apply the application/claim should normally be refused. However there may be exceptional factors which would make refusal unreasonable.

17. You should consider any other exceptional factors raised in relation to the child's best interests and consider whether refusal/return is still appropriate in light of those factors. In some cases it may be appropriate to grant leave on a short-term temporary basis to enable particular issues relating to the child's welfare to be addressed before return.

18. You should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. Furthermore, a case is not exceptional just because the exceptions to EX.1 have been missed by a small margin. Rather, the rules establish those thresholds as determining when leave would be appropriate bar other factors. However, in assessing exceptionality the matters identified in EX.1 need to be considered along with all other aspects of the case. The decision maker then needs to determine whether removal would have such severe consequences for the child that exceptionally refusal / return is not appropriate.

19. You should be prepared to take into account any order made by the Family Court but this is not determinative of the immigration decision.

## **Guidance on application of paragraph 399 – consideration of a child’s best interests in cases where there is CRIMINALITY**

1. The new rules set out the circumstances under which exceptions to deportation may apply – see rules 398 - 399. These are cases where a person is convicted of an offence and sentenced to between 12 and 48 months’ imprisonment or where, in the Secretary of State’s view, a person’s deportation is deemed conducive to the public good because his offending has caused serious harm or he/she is a persistent offender.

2. In these circumstances where there are children affected you must apply the tests set out under paragraph 399(a) in considering whether the exceptions to deportation apply. The criteria reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, as interpreted in recent case law, in particular, ZH(Tanzania).

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and
  - (i) the child is a British Citizen; or
  - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
    - (a) it would not be reasonable to expect the child to leave the UK; and
    - (b) there is no other family member who is able to care for the child in the UK;

### **Assessing whether the exceptions apply**

3. The decision maker should carefully consider all of the points raised by the person in relation to the application of any exceptions set out above as well as any exceptional issues raised. The decision maker should carefully assess the quality of any evidence provided. Decisions must not be taken on the basis of mere assertions about the best interests of the child. All factors need to be assessed in the round.

### **A genuine and subsisting relationship**

4. This is a key test under paragraph 399. There must be evidence that there is an active on-going relationship. In considering whether the relationship is genuine and subsisting the following factors are likely to be relevant:

#### **Does the applicant have a parental relationship with the child?**

- what is the relationship – biological, adopted, step child, legal guardian? Are they the child’s de facto primary carer?

#### **Is it a genuine and subsisting relationship? –**

- does the child live with the person?
- where does the applicant live in relation to the child?
- how regularly do they see one another?
- any relevant court orders governing access to the child?
- Is there any evidence or other relevant information provided within the application – for example, views of the child, other family members or from social work or other relevant professionals?
- to what extent is the applicant making an active contribution to the child’s life. Factors which might prompt closer scrutiny include:

- there is little or no contact with the child or contact is irregular
- any contact is only recent in nature
- support is only financial in nature, there is no contact or emotional or welfare support
- the child is largely independent of the person

**Is the child a British Citizen or have they been in the UK for a continuous period of 7 years?**

5. You should establish from the application or claim the age and nationality of each child affected by the decision and where they are foreign nationals their immigration history in the UK (e.g. how long have they lived in the UK and where did they live before?).

6. In establishing whether a non-British citizen child has been in the UK continuously for more than 7 years you should include time spent in the UK with and without valid leave.

7. Short periods outside the country – for example for holidays or family visits – would not count as a break in the 7 years required. However, where a child has spent more than 6 months out of the UK at any one time this should normally count as a break in continuous residence unless any exceptional factors apply.

**Would it be unreasonable to expect the child to leave the UK?**

British citizen children

8. The Supreme Court established in *ZH Tanzania* that particular weight must be given to British citizenship if the consequence of an immigration decision is that a British citizen child will have to leave the UK. This is because in so doing that child may lose out on the inherent advantages of being a British citizen growing up in the UK.

9. You need to consider whether in the specific circumstances of the case it would be reasonable to expect the British citizen child to live in another country. You will also need to consider the facts for each child within that family and for the family in the round. You should also engage with any issues explicitly raised by the family or by or on behalf of each child. Relevant considerations are likely to include:

- i. whether there would be a significant risk to the child's health: For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment is not be available in the country of return;
- ii. the extent of wider family ties in the UK – you should consider the extent to which the child is dependent on wider family members in the UK;
- iii. whether the country offers comparable protections and freedoms, access to public services, and opportunities to those available in the UK – for example, the answer is likely to be yes in the case of other EEA countries, the USA, Canada, New Zealand, Australia etc;
- iv. whether the child is likely to be able to (re)integrate readily into life in another country? Relevant factors weighing in favour of successful (re)integration include:

- whether the parent(s) is a citizen of the country and/or the child has dual nationality;
- whether the parents and/or child have lived in or visited the country before for periods of more than a few weeks – the question here is whether having visited or lived in the country before that the child would be able to adapt and/or the parents would be able to support the child in adapting to life in the country;
- whether the child or parents have existing family or social ties with the country – a person who has extended family or networks of friends should be able to rely on them for support to help reintegrate on return;
- whether the child or parents have relevant cultural ties to the country – you should consider any evidence of exposure to and the level of understanding of the cultural norms in the country. For example, a period of time spent living mainly amongst a diaspora from the country may in of itself give a child an awareness of the culture in the country;
- whether the child can speak, read and write in a language of that country; or is likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice.
- whether the child has attended school in that country;
- v. any country specific risks (refer to relevant country guidance);
- vi. other specific factors raised by or on behalf of the child.

Where a non British citizen child has been in the UK for more than 7 years

10. You need to consider whether in the specific circumstances of the case it would be reasonable to expect the child to live in another country. You will need to consider the facts for each child within that family and for the family in the round. You should also engage with any issues explicitly raised by the family or by or on behalf of each child. Relevant considerations are likely to include:

- i. whether there would be a significant risk to the child's health: For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment is not be available in the country of return;
- ii. whether the child would be leaving with its parent(s)? It is generally the case that it is in a child's best interests to remain with its parents. Unless specific factors apply it will generally not be unreasonable to expect a child to leave the country with its parents, particularly if the parents have no right to remain in the UK;
- iii. the extent of wider family ties in the UK – you should consider the extent to which the child is dependent on wider family members in the UK;
- iv. whether the child is likely to be able to (re)integrate readily into life in another country? Relevant factors weighing in favour of successful (re)integration include:
  - whether the parent(s) or child is a citizen of the country and so able to enjoy the full rights of being a citizen in that country;

- whether the parents and/or child have lived in or visited the country before for periods of more than a few weeks – the question here is whether having visited or lived in the country before that the child would be able to adapt and/or the parents would be able to support the child in adapting to life in the country;
- whether the child or parents have existing family or social ties with the country – a person who has extended family or networks of friends should be able to rely on them for support to help reintegrate on return;
- whether the child or parents have relevant cultural ties to the country – you should consider any evidence of exposure to and the level of understanding of the cultural norms in the country. For example, a period of time spent living mainly amongst a diaspora from the country may in of itself give a child an awareness of the culture in the country;
- whether the child can speak, read and write in a language of that country; or is likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice.
- whether the child has attended school in that country;
- v. any country specific risks (refer to relevant country guidance);
- vi. other specific factors raised by or on behalf of the child.

11. Families or children may highlight the differences in quality of education, health and wider public services and economic or social opportunities between the UK and the country of origin and argue that these work against the best interests of the child. Other than in exceptional circumstances, this would not normally be regarded as a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education and training to provide for their family on return, or if AVR support is available.

### **Is there another family member who is able to care for the child in the UK?**

12. For the purposes of this test ‘family member’ means parent, aunt or uncle, grandparent or adult sibling or legal guardian.

13. You should consider whether there is another family member able to care for the child in the UK and the impact on the child’s best interests of any separation. Relevant factors include:

- i. the nature of the relationship between the person you are proposing to deport and the child – for example, is the person the child’s primary carer (i.e. the person who would normally have day-to-day care and wider welfare and developmental responsibilities for the child) or would have done so if they hadn’t been in prison?
- ii. who has been looking after the child while the parent has been in prison?
- iii. are both parents and the child a functioning family unit or are the parents separated?
- iv. Is there a wider support network? Are the wider family close?



- v. who would look after the child if the person was removed and whether they are able to care for the child? Relevant factors here include:
  - could they reasonably be expected to fulfil the role of primary carer? For example, have they fulfilled that role in the past? Are they physically able to care for the child?
  - what contact has the child had with the family member before and what is the nature of the existing relationship?
  - any other factors which undermine the ability of that individual to act as the primary carer of the child or would suggest they are unsuitable (e.g. previous convictions, immigration status etc);
  - you should be prepared to take account of the person's willingness to look after the child but would need to consider whether this is genuine in light of their wider circumstances;
- vi. supporting evidence from other family members / social services etc or relevant court orders; and
- vii. the views of the child as expressed by the child or on their behalf.

14. Where a child is older or otherwise semi-independent of the parent and there is evidence that they are by being looked after through other arrangements (for example, with local authority or wider community support) it may be possible to remove the parent and allow the child to stay in the UK

### **Exceptional factors**

15. If para 399(a) does not apply the application/claim should normally be refused. However there may be exceptional factors which would make refusal unreasonable.

16. You should consider any other exceptional factors raised in relation to the child's best interests and consider whether refusal/return is still appropriate in light of those factors. In some cases it may be appropriate to grant leave on a short-term temporary basis to enable particular issues relating to the child's welfare to be addressed before return.

17. You should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. Furthermore, a case is not exceptional just because the exceptions in para 399a have been missed by a small margin. Rather, the rules establish those thresholds as determining when leave would be appropriate bar other factors. However, in assessing exceptionality the matters identified in para 399a need to be considered along with all other aspects of the case. The decision maker then needs to determine whether removal would have such severe consequences for the child that exceptionally refusal / return is not appropriate.

18. You should be prepared to take into account any order made by the Family Court but this is not determinative of the immigration decision.

### **Seeking the views of children**

19. In deportation cases where the consequence of the decision may be to separate a child from a parent, when assessing the best interests of the child you must be prepared to discover the views of any affected children. These may already available or known from information and representations already supplied. If not available, and reasons are not provided for their non-availability consideration should be given to obtaining them by means of a request in writing to a parent or legal advisor or other suitable adult (e.g. social worker or other family member). You should be prepared to consider hearing the views of the child directly if requested or deemed necessary.