

Immigration applications Article 8 (right to family life)

This fact sheet provides an overview of the main Immigration Rules and potential applications an individual can make on the basis of their family life. This includes applications based on family life within the UK and applications to join family members in the UK so that family life can be enjoyed.

This fact sheet is part of a series of three fact sheets on Article 8. For further information on Article 8 of the European Convention on Human Rights – the right to private life and long residence – go to www.coramchildrenslegalcentre.com/resources.

If you have any questions about this issue that relate to a refugee or migrant child, young person or family, you can call our Migrant Children's Project advice line on 0207 636 8505 or email mcp@coramclc.org.uk.

What are the current rules on the right to family life under Article 8?

On 9 July 2012 the government introduced changes to the Immigration Rules affecting family migration from outside the European Economic Area. Since then, the government has made further changes and amendments to the rules, including: changes to requirements for the evidence needed in support of applications, and payments to be made for the provision of certain health services.

The Home Office sets out what it considers to be the parameters of the right to family life within the UK Immigration Rules. This includes detailed consideration of what rules and requirements an individual must meet in order to be granted leave to enter or remain on the basis of family life.

Article 8 and the best interests of the child

An important consideration in all family life cases involving children will be what is in the best interests of that child or those children. The Home Office is under a duty to promote and safeguard the welfare of children in all immigration considerations and decisions. **[1]**

The Home Office has published detailed guidance on what they take into account when considering a child's best interests. **[2]** The principle of the best interests of the child as a primary consideration must be continually assessed throughout any immigration process, from making the application to the making of a decision. For further information on best interests considerations in cases involving children, see our fact sheet at www.coramchildrenslegalcentre.com/resources.

Family life within the Immigration Rules

Most of the rules and requirements for leave to remain or enter on the basis of family life are contained in Part 8 and Appendix FM of the Immigration Rules. **[3]** The Immigration Rules provide routes to join, and to remain in the UK with, family members as a:

- partner
- parent
- child, or
- adult dependant relative.

Part 8 of the Immigration Rules contains transitional rules on family life applications. It also contains rules relating to applications for children of settled parents and children born in the UK – these rules were not changed in 2012.

Appendix FM contains the majority of the rules and requirements relevant to most applications made on the basis of family life. They contain important requirements that need to be met in different types of applications. Appendix FM is extremely difficult to navigate and this fact sheet only intends to provide an overview and summary of the main provisions and requirements when making an application.

The requirements in Appendix FM most common to applications are suitability, English language, financial, immigration status, and relationship requirements.

Financial and relationship requirements will largely depend on the type of application being made.

Suitability

Suitability requirements are applicable in most applications and cover circumstances that the Home Office believe make an applicant unsuitable for leave to enter or remain. These requirements cover issues such as criminal offences, character, associations and failure to disclose evidence.

In order to qualify 'under the rules', the applicant must not fall under any of the general 'suitability' grounds for refusal. Examples include whether the applicant has committed a crime in the UK, whether they are subject to a deportation order, and whether the Secretary of State considers that their presence is 'not conducive to the public good' If any of these grounds apply, an application must be refused. The grounds include other considerations which may lead to an application being refused, such as whether the applicant has supplied false information and whether the applicant has outstanding charges for NHS treatment.

English Language

The English language requirement does not apply to those who are from a listed majority English speaking country, namely - 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; or the United States of America.

If the applicant is not a national of any of the countries above, they will have to show that they have

- passed an English language test in speaking and listening at a minimum of level A1 with a provider approved by the Home Office; or
- have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English.

Even if they cannot meet these requirements, they may be exempt in limited circumstances – if they are over 65; have a disability (physical or mental condition) which prevents them from meeting the requirement; or there are exceptional circumstances which prevent them from being able to meet the requirement prior to entry to the UK.

Immigration Status

If the applicant is applying for leave to remain from within the UK, then they will also need to meet immigration status requirements. The applicant must not be in the UK as a visitor or with leave for less than 6 months (unless that leave is in relation to family court/divorce proceedings). The applicant must also not be in the UK on temporary admission or be in breach of immigration laws (discounting overstaying for a period of 28 days or less).

Those making an application from within the UK for the first time will often not have any status and therefore will not be able to meet this requirement. Those applicants will normally have to rely on the exception rule discussed in detail below.

Parent of a child in the UK

There are rules within Appendix FM for a lone parent to apply for leave to enter or remain on the basis of a child who is living in the UK, under 18 and British or settled in the UK. This category is only for a parent who is no longer in a relationship with the other parent. The parent applying can be a stepfather, stepmother or adoptive parent. However, they must have sole parental responsibility, or be normally living with the child, or they must have direct contact with the child.

Sole responsibility is defined in the Home Office guidance as follows:

sole responsibility means that one parent has abdicated or abandoned parental responsibility and the remaining parent is instead exercising sole control in setting and providing the day to day direction for the child's welfare.

The guidance further states that when the Home Office is considering whether the applicant meets this requirement, it:

is not considering whether the applicant (or anyone else) has day-to-day responsibility, but whether the applicant has continuing sole control and direction of the child's upbringing including making all the important decisions in the child's life. [4]

In relation to direct access, the guidance provides that the parent must prove they have direct access 'in person' by submitting evidence. Examples include a residence order or contact order; a child arrangements order; a letter or sworn affidavit from the UK-resident parent or carer of the child; or evidence from a contact centre detailing contact arrangements. However, the applicant parent must also show they are currently taking an active role in the child's upbringing and will continue to do so.

The most important requirement to be met by the parent is the active relationship that they have with a child. However, to be eligible in this category, the applicant parent must also prove that they are able to adequately provide maintenance and accommodation for themselves, the child and any other children that they care for.

Grants of leave to enter or remain will be 33 months or 30 months respectively. If the parent relies on the exception, they will be on a 10 year route to settlement. If they do not and are able to meet all the requirements, they will be on a 5 year route to settlement. They will still need to meet all the requirements when making a further application at the end of the first grant of leave.

Exception to eligibility requirements

Some individuals, applying as a partner or parent, will be able to rely on the exception rule under Appendix FM of the Immigration Rules. The exception applies if:

- the applicant has a genuine and subsisting parental relationship with a child who is

1. under 18 years old (or was under 18 years when the applicant was first granted leave);
2. is in the UK;
3. is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ; and where
4. it would not be reasonable to expect the child to leave the UK;

- Or, the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

If an individual met one of the exceptions, they would be exempt from some of the requirements under the Immigration Rules outlined above. In particular, the financial, English language and most of the immigration status requirements would not apply.

If relying on this exception, the applicant parent is expected to show that it would not be reasonable to expect the child to leave the UK. Reasonableness in this context will depend on a number of factors, including the child's age; family ties in the UK and in the country of origin; and social, cultural and educational ties.

Where the child in question is a British national child, it is likely to be much more difficult for the Home Office to argue that the parent and child should return to the parent's country of origin if that parent is the sole carer. The Home Office guidance on the parent route states that:

“save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to

leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.” [5]

Furthermore, in the recent case of *SF and others (Guidance, post-2014 Act)* [2017] UKUT 120 (IAC), it has been confirmed that it is Home Office policy that a decision maker must not make a decision in relation to a parent/carer which would lead to the British child leaving the UK. [6]

Children of Settled Parent(s)

Part 8 of the Immigration Rules sets out the requirements for granting indefinite leave to enter for a child outside the UK, or indefinite leave to remain for a child within the UK, where that child has a settled parent or parents.

The requirements to be met by the child and parents are set out in paragraphs 297-300. The parent(s) must be present and settled in the UK or must be being admitted to the UK for settlement. The child should be under 18 and should not be living an independent life. The child must also be able to be cared-for and accommodated adequately by the parent, without recourse to public funds.

If one of the parents is outside of the UK, the child would only succeed in such an application if the settled parent in the UK had sole responsibility for the child **or** there were *“serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child’s care.”*

Evidence of sole responsibility will need to be presented in support of an application where the parent is living in the UK – examples of how the parent is exercising care and responsibility from afar will be important. This could include the following:

- evidence of financial support;
- evidence of calls/messages/letters;
- details of who provides day to day care; and

- evidence that the control and decisions relating to the child are in the hands of the settled parent.

It would also be important to show the role, or lack of role, the non-UK parent played in the child’s life and why they did/do not exercise responsibility.

In relation to “serious and compelling circumstances making exclusion undesirable”, factors to argue in favour of making exclusion undesirable could include:

- the age of the child;
- the nature and stability of the care of the child in the overseas country;
- living conditions;
- emotional connection to the settled parent; and
- health and education factors.

Family life as a partner

Appendix FM covers applications for leave to enter, leave to remain and indefinite leave to remain for spouses, civil partners, engaged partners/proposed civil partners and other partners.

The minimum income threshold

The income requirements mean that a UK citizen or settled person (i.e. one with indefinite leave to remain) must earn at least £18,600 in order to sponsor their spouse/partner from outside the European Economic Area to come to the UK. This rises to £22,400 (an additional £3,800) if the person wishes to sponsor a child under 18 to come with the spouse/partner. The threshold rises by an additional £2,400 for each further child.

The minimum income threshold must be met at the point of applying for a visa and must still be met subsequently when an application is made for further leave. It must then be met again after five years if an application is made for indefinite leave to remain. At the initial stage of applying for a visa, only the earnings of the sponsor (the British citizen or settled person) count towards the requirement. The spouse/partner's

overseas earnings will not be taken into account at this stage. In some circumstances, savings held by both the sponsor and the sponsored applicant can be considered but the savings threshold is very high. When applying for further leave, the earnings of both partners in the UK count towards the requirement.

The period during which a spouse/partner is in the UK with limited leave (without recourse to public funds) is five years. This is a probationary period after which the applicant will be able to apply for settlement (indefinite leave). Individual grants of leave are for 30 months each so the applicant will need to make an initial application, an extension application and finally an application for settlement. There is a fee for each application, the immigration health surcharge will be payable and the income requirements must continue to be met. The partner must also meet the requirements outlined above under application as a parent of a child in the UK, including the English language and immigration requirements, unless exempt from these under the exception outlined above.

Significant numbers of UK citizens and those with indefinite leave are excluded from bringing their family members to the UK because they do not meet the minimum income threshold. Over the last 4 years this has had the effect of preventing a large number of people from enjoying their right to family life.

There has been a recent challenge to the rules that was heard at the Supreme Court. [7] Although the court held that the rules relating to partners were lawful in principle, the rules and policy surrounding the rules unlawfully failed to take into account the best interests of the child.

Applications for family life outside the rules

Although the Home Office considers Article 8 to be covered under the Immigration Rules, the Home Office guidance does acknowledge that there will be times where a negative decision under the Immigration Rules would still lead to a breach of Article 8. In those cases, the Home Office guidance states that it will consider whether there are any exceptional circumstances that should lead to the grant of leave outside of the Immigration rules. "Exceptional circumstances" are

interpreted by the Home Office as not simply unusual or unique, but rather circumstances in which refusal would result in unjustifiably harsh consequences that would not be proportionate. It is further noted that this is likely to be the case only rarely.

However, the case law on Article 8 establishes that if the rules are not met, an immigration judge must undertake a proportionality assessment when deciding the appeal. Please see our general Article 8 fact sheet for further information on previous and current case law on appeals relating to family life outside of the rules, at: <http://bit.ly/1GIDeJ5>.

The case of *Regina (Razgar) v Secretary of State for the Home Department [2004] 2 A.C. 368* sets out the five questions to be answered by the courts when considering whether Article 8 will be interfered with and whether this interference is proportionate:

- Is there interference?
- If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
- If so, is such interference in accordance with the law?
- If so, is such interference necessary in a democratic society in the interests of national security; public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; or for the protection of the rights and freedoms of others?
- If so, is such interference proportionate to the legitimate public end sought to be achieved?

Unfortunately, a recent court decision, *SSHD –v- SS Congo*, has suggested that there would have to be "compelling circumstances" identified to succeed in an application outside of the rules. [7] It was also further held that there is no "near-miss" rule (nearly meeting the requirements within the rule), although this can be

taken into account when balancing different countervailing factors.

However, the case of *MM (Lebanon)* – referred to above and at endnote 7 – held that Home Office policy around alternative sources of funding (such as the spouse's earnings and third party support) should be clearer for those cases outside of the rules. The court held that the policy required amendment to allow consideration of those alternative sources of funding.

When working with a child or family making an application outside of the rules, you may be able to provide evidence to show that family life has been established in the UK and reasons why it would be disproportionate to remove the family from the UK. Evidence that may be useful to making such an application includes:

- Extended family ties within the UK;
- Lack of family ties in the country of origin;
- Evidence of a child's education, healthcare and general welfare needs; and
- Ability, or inability, of the child and/or family to reintegrate into the country of origin.

Grants of leave to remain and longer periods of leave to remain

Most grants of leave to remain under family life will be subject to a 'no recourse to public funds' (NRPF) condition. However, if it is shown that someone is likely to be destitute should a NRPF condition be applied, the Home Office may not make such a condition. Please see our fact sheet on NRPF for further information, at: <http://bit.ly/1GIDeJ5>.

With regard to leave to remain for children, it may be argued that it is in the best interests of a child, or the parent/carer of the child, to be granted either a longer period of leave to remain or settlement. For more information, please see our fact sheet on best interests and in particular, the section "Best interests in

applications for leave to remain and indefinite leave to remain", at: <http://bit.ly/21rigRw>.

NOTES

- [1] Section 55, Borders, Citizenship and Immigration Act 2009
<http://www.legislation.gov.uk/ukpga/2009/11/section/55>
- [2] Home Office, Section 55 Guidance
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431346/Section_55_v12.pdf
- [3] Home Office, Part 8 & Appendix FM, Immigration Rules
<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-8-family-members>
<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members>
- [4] Home Office Guidance, Paragraph 7.2.3.2, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10 year routes
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10_year_routes_guidance_August_2015.pdf
- [5] Home Office Guidance, Paragraph 11 – Best interests, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10 year routes
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10_year_routes_guidance_August_2015.pdf
- [6] Page 55, Home Office, Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10_year_routes_guidance_August_2015.pdf For further analysis – see Free Movement blog post - <https://www.freemovement.org.uk/reasonable-require-british-citizen-children-leave-britain/>
- [7] *R (MM) (Lebanon) v Secretary of State for the Home Department*, & or cases [2017] UKSC 10
<https://www.supremecourt.uk/cases/docs/uksc-2015-0011-press-summary.pdf>
- [8] *SSHD v SS (Congo) and others* [2015] EWCA Civ 387
<http://www.bailii.org/ew/cases/EWCA/Civ/2015/387.html>

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line.
Call 0207 636 8505 or email
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