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A parent living abroad with a child who is a British Citizen, settled in the UK or who has limited leave under Appendix EU. Applications for Entry Clearance under Appendix FM.

Agnes Lai considers the difference in approach under Appendix FM Parent of a Child route between in-country applicants and applicants from abroad.

Introduction:

Section EC- PT Appendix FM to the Immigration Rules provides for the parent of a child who is a British Citizen, settled in the UK or who has limited leave under Appendix EU, to apply for entry clearance from abroad to enter the UK on this basis.

To be granted entry clearance under Section EC- PT, an applicant must fulfil the suitability requirements, the relationship requirements, the adequacy of maintenance requirements and the English language requirements. For the relationship requirements, the child of the applicant must be

- a) Under the age of 18 years at the date of application
- b) Living in the UK and
- c) A British Citizen, settled in the UK or in the UK with limited leave under Appendix EU

The child must be living in the UK at the date of application

A requirement of Section EC-PT Appendix FM is that the child of the applicant must be living in the UK at the date of application. This means that a parent living abroad with a child who is a British Citizen,

settled in the UK or who has limited leave under Appendix EU are excluded from Section EC-PT. They must instead rely on GEN 3.2 Exceptional Circumstances for their entry clearance applications, even if they have sole responsibility for the child.

This contrasts the position of a parent living in the UK with a child who is (i) a British Citizen or (ii) who is settled in the UK or (iii) in the UK with limited leave under Appendix EU. They are able to apply for limited leave to remain under Section R-LTRPT on the basis that the child normally lives with them and not the other parent, provided the other parent is a British Citizen, a person who is settled in the UK or in the UK with limited leave under Appendix EU. The requirements of Section R-LTRPT are more certain and straightforward than GEN 3.2 Exceptional Circumstances.

A parent living in the UK with the child will be granted limited leave to remain under Appendix FM 5 year route if they fulfil all the requirements of Section R-LTRPT. They will be able to apply for indefinite leave to remain after 5 years. However, a parent living abroad with the child will only be granted leave to enter the UK under Appendix FM 10 year route, even if they fulfil the requirements of GEN 3.2 Exceptional Circumstances. This means they will only be eligible to apply for indefinite leave to remain after 10 years. It is possible for the parent to apply to switch into Appendix FM 5 Year route after entering the UK. However, this will involve further expense and payment of the Home Office fees.

M is a national of Nigeria. Her daughter A is aged 8. A was born in the UK and is a British Citizen, by reason that her father was a British Citizen when she was born. The family moved back to live in Nigeria after she was born. A's father passed away recently. M now wishes to move back to the UK with her daughter and to educate her in the UK. As A is living with M in Nigeria, M will not succeed in an

application for entry clearance under Section EC-PT, as A is not living in the UK. Despite having sole responsibility for her daughter, M will need to rely on GEN 3.2 Exceptional Circumstances in her entry clearance application.

The Uncertain Nature of GEN 3.2 Exceptional Circumstances:

Under GEN 3.2, where an application for entry clearance does not meet the requirements of Appendix FM, the decision maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 of the European Convention of Human Rights. This may be where such a refusal would result in unjustifiably harsh consequences for the applicant and a relevant child whose Article 8 rights, as evident from the information, would be affected by a decision to refuse the application.

A relevant child is defined as a child under the age of 18 who would be affected by a decision to refuse the application.

In conducting the assessment, the decision maker must take into account, as primary consideration, the best interests of any relevant child affected by the decision (GEN3.3). Particular importance must be accorded to British citizenship where this is applicable to the child [Home Office, Family Policy. Family Life (as a partner or parent) private life and exceptional circumstances Version 16.0 7 Dec 2021 Page 70 and Page 79].

Regard must also be given to all information and evidence provided by the applicant and the particular circumstances of the case. All relevant factors must be taken into account [Home Office, Family

Policy. Family Life (as a partner or parent) private life and exceptional circumstances Version 16.0 7 Dec 2021 Page 70 and Page 73].

Despite this, it is an uncertain test and not an easy one to fulfil. The Home Office Family Policy says that it is a test with a 'high threshold' (Page 73). In an entry clearance context, a key question in the assessment, taking into account as a primary consideration the best interests of any relevant child, is whether family life can be maintained with the applicant overseas (Page 73). Considerations which could count against the existence of exceptional circumstances include (Page 72 -80):

- i) The ability to lawfully remain in or enter another country in entry clearance cases. A mere wish, desire or preference to live in the UK is not sufficient.
- ii) Whether the family have previously lived together overseas.
- iii) Any reason why the situation could not continue.
- iv) The child's current country of residence and the length of residence there.
- v) How long the child has been in education and what stage their education has reached.
- vi) The child's connection with the country outside the UK.
- vii) The reasons for the child being overseas.
- viii) Whether the child has siblings under the age of 18 overseas.
- ix) Whether the child has previously visited or lived in the UK.

Examples of circumstances in which unjustifiably harsh consequences are not likely to arise include:

- i) A lack of knowledge of a language spoken in a country in which the family would be required to continue living.
- ii) Being separated from extended family members in the UK.
- iii) A material change in the quality of life for the family in the country in which they would be required to continue living.

Potentially Discriminatory and Contrary to the Best Interests of the Child

British Citizen children, children who are settled in the UK or who have limited leave under Appendix EU living with a parent in the UK are in an analogous position to the same group of children living with a parent abroad. Whilst Section R-LTRP provides for a parent living with these children in the UK to apply for an extension of stay [see section E-LTRP2.3], there is no equivalent provision under Section EC-PT in entry clearance cases for a parent living with the same group of children abroad. Instead, a parent in this position must rely on the more uncertain provision of GEN 3.2 Exceptional Circumstances in their entry clearance applications. There does not appear to be any justifications for the distinction in approach. This difference in treatment is potentially discriminatory under Article 14 in conjunction with Article 8. Further, the more uncertain provision of GEN 3.2 Exceptional Circumstances, together with the grant of leave under the 10 year route even if successful in the entry clearance application, increases the precariousness of status of the parent, and is not in the child's best interests. It is hoped that this anomaly in Appendix FM will be corrected soon.

Agnes Lai (Principal – Solicitor)



If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

agnes.lai@just-immigration.co.uk

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