IMMIGRATION DIRECTORATE INSTRUCTIONS

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PART 1 - GUIDANCE ON INTERPRETATION OF THE RULES

1. SERIOUS AND COMPELLING FAMILY OR OTHER CONSIDERATIONS

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

This paragraph relates to the considerations referred to in Paragraphs 297(i)(f), 298(i)(d), 301(i)(c), 310(i)f), 311(i)(d) and 314(i)(c) and 319X (ii) of the Immigration Rules.

The objective of this provision is to allow a child to join a parent or relative in this country ***only*** where that child could not be adequately cared for by his parents or relatives in his own country. It has never been the intention of the Rules that a child should be admitted here due to the wish of or for the benefit of other relatives in this country.

This approach is entirely consistent with the internationally accepted principle that a child should first and foremost be cared for by his natural parent(s) or, if this is not possible, by his natural relatives in the country in which he lives. Only if the parent(s) or relative(s) in his own country ***cannot*** care for him should consideration be given to him joining relatives in another country. It is also consistent with the provisions of the European Convention on Human Rights, and the resolution on the harmonization of family reunification agreed by EU Ministers in June 1993.

1.1. **The weight to be given to such considerations**

The degree to which these considerations should be taken into account, and whether they should solely relate to the child or include those of the sponsor will be determined by two factors. They are:

* whether the sponsor is a ***parent*** or ***other relative*** of the child; and

* whether or not the sponsor is settled here.

1.2. **Where the sponsor is <u>not</u> a parent**

If the sponsor is ***not*** a parent but another relative, eg an aunt or grandparent, the factors which are to be considered relate only ***to the child*** and the circumstances in which he lives or lived prior to travelling here. These circumstances should be exceptional in comparison with the ordinary circumstances of other children in his home country. It would not, for instance, be sufficient to show he would be better off here by being able to attend a state school. The circumstances relating to the sponsors here (eg. the fact that they are elderly or infirm and need caring for) are ***not*** to be taken into account.

1.3. **Where the sponsor <u>is</u> a parent**

If the sponsor here ***is*** one of the child's parents, consideration needs to be given as to whether or not he or she is settled here (or being admitted for settlement).

* If he or she is ***not***, then the relevant circumstances relate solely to the ***child*** (as detailed in 1.2. above).

* If the child's sponsor ***is*** one of his parents and ***is*** settled here (or being admitted for settlement), the considerations to be taken into account may relate ***either*** to the child and his circumstances in the country in which he lives or lived prior to travelling here, ***or*** to the parent who is settled here or being admitted for settlement. The circumstances surrounding the ***child*** must be exceptional in relation to those of other children living in that country, but in this case, circumstances relating to the ***parent*** here, both of an emotional and of a physical nature, may be taken into account. Such circumstances may include illness or infirmity which requires assistance.

2. CHILDREN WHO BECOME 18 BEFORE THEIR APPLICATION IS DECIDED

2.1. **Entry Clearance**

Under Paragraph 27 of the Immigration Rules, any application for entry clearance is to be decided in the light of the circumstances existing at the time of decision. The ***exception*** to this is where a child reaches the age of 18 ***after such an application has been lodged***, but ***before it has been decided***. In such situations, the application is to be decided in the same way ***as if the child was still under 18***.

2.2. **On entry**

As in all categories, a child who holds an entry clearance for settlement or limited leave in one of these categories may be refused leave to enter where the immigration officer is satisfied there has been a change of circumstances, since the entry clearance was issued, which has removed the child's claim to admission. However, refusal of entry in one of these categories is ***not*** appropriate where the change of circumstances amount ***solely*** to the child reaching 18 years of age before he travels here.

2.3. **After entry**

Although not specified in the Immigration Rules, applications for leave/further leave to ***remain*** made by or on behalf of children should also be decided in the light of the circumstances existing at the time of decision. Once again though, even where a child is over 18 at time of the ***decision***, if the application was ***lodged*** before he reached the age of 18, it should be decided as if he were still under 18.

Where a child ***who was given leave to enter or remain with a view to settlement under Paragraph 302*** *and Paragraph 319XA* applies for settlement (or further leave to remain with a view to settlement) on the basis of his parents' or sponsors application/status, the fact that he has reached the age of 18 since being granted limited leave with a view to settlement is ***not*** a basis for refusing the application.

However, where a child was admitted ***in a temporary capacity, other than under Paragraph 302*** *or Paragraph 319XA* and was 18 at the time the application was made for settlement (or further leave to remain with a view to settlement), the application ***may*** be refused on those grounds under Paragraph 303 or 319XB of the Immigration Rules.

3. CHILD TO BE UNMARRIED, NOT LEADING AN INDEPENDENT LIFE, BE AND NOT HAVE FORMED AN INDEPENDENT FAMILY UNIT

To qualify under the Rules, at the time of application and decision, a child must:

- be unmarried, and not at any previous time have been married;
- not currently be in or have previously formed a relationship with another person (such as a common-law or homosexual relationship) which could be said to be the equivalent of being married, except for name and legal recognition;
- still be living with his parent(s) and any brothers and sisters who are living with their parent(s), (except where he is at boarding school as part of his full-time education);
- not be employed full-time or for a significant number of hours per week (although the obtaining of a "Saturday" job or a temporary job during his school holidays should not be counted against him); and

- be wholly or mainly dependent upon his parent(s), (or relative other than parents, if appropriate), for both his financial and emotional support.

Applications for settlement (or variation of leave to remain with a view to settlement) on the basis of the parents' application/status may be received from a child who has current limited leave, but who no longer meets the requirements of Paragraphs 301, 298, 319XA or 319Y (e.g. where he has married since first being granted limited leave). In such a case, his application should normally be refused. However, consideration should be given to whether his application meets the requirements of any other part of the Rules, (such as the marriage provisions), and if it does, leave should be granted on that basis.

4. SOLE RESPONSIBILITY - PARAGRAPHS 297(i)(e), 298(i)(c) & 301(i)(b)

Where a child's parents are not married, or his parents' marriage subsists but they do not live together, or where the parents' marriage has been dissolved, a child may qualify under these Paragraphs to join or remain with ***one*** parent, ***provided*** that parent has had "sole responsibility" for the child's upbringing.

The phrase "sole responsibility" is intended to reflect a situation where parental responsibility of a child, to all intents and purposes, rests chiefly with one parent. Such a situation is in contrast to the ordinary family unit where responsibility for a child's upbringing is shared between the two parents (although not necessarily equally).

4.1. Establishing that a parent has had "sole responsibility"

A parent claiming to have had "sole responsibility" for a child must satisfactorily demonstrate that he has, ***usually for a substantial period of time***, been the ***chief*** person exercising parental responsibility. For such an assertion to be accepted, it must be shown that he has had, and still has, the ultimate responsibility for the major decisions relating to the child's upbringing, and provides the child with the majority of the financial and emotional support he requires. It must also be shown that he has had and continues to have care and control of the child. For example:

- A non British citizen child born to a British citizen and a foreign national living abroad. The couple then separate and the UK national wishes to return to the United Kingdom to live with the child. The UK parent has chief responsibility for the child, and the foreign parent does not object to the child living in the United Kingdom. In such a case the UK parent could be considered to have sole responsibility.

- Two foreign nationals living abroad have a child, then separate. One parent comes to the United Kingdom and obtains settlement. The child remains with the parent abroad for several years, then at the age of 13+ wishes to join the parent in the United Kingdom to take advantage of the educational system. There is no reason why the child should not remain with the parent who lives abroad. In this case the parent who lives in the United Kingdom would not be considered to have sole responsibility.

4.2. Where the child and the parent claiming sole responsibility are separated

Where the child and parent are separated, the physical day to day care of the child must be entrusted to others, and it is expected that where the child is being looked after by relatives, they should be the relatives of the ***parent claiming "sole responsibility"*** rather than those of the other parent. Should this be the case, the parent claiming "sole responsibility" must still be able to show that he has retained the ***ultimate responsibility*** for the child's upbringing and provides the majority of the emotional and financial support needed.

If it is established that the child is being cared for by the relatives of the father but it is the mother who has applied for the child to join her in this country (or vice versa), the application should normally be refused.

4.3. Where it is not clear which parent has established "sole responsibility"

Cases may arise where even though one parent has taken no share of responsibility, or so small a share that it can effectively be disregarded, the other parent cannot claim to have had "sole responsibility". This may be where more than the day to day care and control of a child has been transferred to another person due, perhaps, to the sponsoring parent being in this country and not maintaining a close involvement in the child's upbringing etc.
There are a number of factors which should be taken into account when deciding whether, for the purpose of the Rules, a parent has established that he has had the "sole responsibility" for a child to the exclusion of the other parent or those who may have been looking after the child. These may include:

* the period for which the parent in the United Kingdom has been separated from the child;

* what the arrangements were for the care of the child before that parent migrated to this country;

* who has been entrusted with day to day care and control of the child since the sponsoring parent migrated here;

* who provides, and in what proportion, the financial support for the child's care and upbringing;

* who takes the important decisions about the child's upbringing, such as where and with whom the child lives, the choice of school, religious practice etc;

* the degree of contact that has been maintained between the child and the parent claiming "sole responsibility";

* what part in the child's care and upbringing is played by the parent not in the United Kingdom and his relatives.

4.4. Legal Custody

Under the Children Act 1989, Custody Orders have been replaced by **Residence** Orders. A residence order (or an existing custody order) should normally be accepted as evidence that the "sole responsibility" requirement of the Rules is met ***provided*** that it gives responsibility for the child to the parent who is settled here or being admitted for settlement.

The Child Abduction and Custody Act, 1985, makes provision for certain overseas custody orders to be recognised under United Kingdom law provided they have been registered with the courts here. Paragraph 4.5. (below) lists the countries whose custody orders the United Kingdom recognises upon registration. Due to the relative frequency with which this list is being updated, caseworkers who are considering an application involving a custody order from a country which is not on the list should check with IPD whether or not the country in question has since been added.

4.5. **List of countries whose custody orders may be recognised as valid in the United Kingdom upon registration here by virtue of the Child Abduction and Custody Act, 1985**

Argentina
Australia
Austria
Bahamas
Belgium
Belize
Bosnia Herzegovina
Burkina Faso
Canada
Chile
Columbia
Croatia
Cyprus- (but ***not*** the Turkish Republic of Northern Cyprus)
Denmark
Ecuador
Finland
France
Germany
Greece
Honduras
Hungary
Iceland
Republic of Ireland
Israel
Italy
Luxembourg
Macedonia
Mauritius
Mexico
Monaco
Netherlands
New Zealand
Norway
Panama
Poland
Portugal
Romania
Slovenia
Spain
Sweden
Switzerland
St Kitts & Nevis
Federal Republic -
-of Yugoslavia
USA
Venezuela
Zimbabwe

PART 2 - OTHER CONSIDERATIONS

5. CHILD ARRIVING AT PORT WITH ENTRY CLEARANCE "JOINING/ACCOMPANYING PARENT", WHERE PARENT IS ABSENT

Where an entry clearance is endorsed to the effect that a child is accompanying or joining a parent (or other relative) and, on arrival, it is established that he is not accompanied by that person or that the person detailed is not in the United Kingdom, leave to enter should normally be refused. However, if it is clear that there has been no attempt at deception, nor any significant change of circumstances (for example, the

child has not travelled with his parent(s) because of booking difficulties and the parent is due to arrive very shortly), the child may be served with form IS 81 and given temporary admission pending the arrival of the parent.

6. CHILDREN IN THE ABSENCE OF PARENTS - GENERAL PRINCIPLES

Cases involving children here without their parents and with no apparent claim to remain under the Rules can arise in a variety of ways. For example:

* the child may have been abandoned here by his parents and taken into care by the local authority;

* he may have been placed in private foster care; or

* he may have been refused leave to remain but still remains in the United Kingdom because enforcement action against children and young persons under the age of 16 who are on their own in the United Kingdom is normally only contemplated when the child's voluntary departure cannot be arranged.

Each case must be treated on its merits. The following guidance merely suggests ways in which enquiries might proceed. The guidance does not relate to:

* children who are the subjects of residence orders made in a court in the United Kingdom;

* adopted children; or

* children who are living with a relative or relatives other than parents.

6.1. Welfare of the child

Our aim will normally be that the child should return to his parents and/or country of origin. However, because we are dealing with children, it is important to take account of the welfare considerations, which may take precedence over the immigration implications of allowing a child to remain here. The welfare considerations carry more weight in relation to younger children. Where a child's parents may abuse the control by leaving a child here, the child cannot always be held responsible for this predicament.

Nevertheless, the fact that a child may be "better off" remaining in the United Kingdom is not grounds on its own for allowing that child to stay here. If a parent or relative is able to care for him in his own country or the relevant authorities in his own country have agreed to make any necessary welfare arrangements for him and the care would not be substantially below that normally expected in the country concerned, refusal (and eventual removal) should be considered.

Where the advice of local authority social services is available, it can be valuable in assessing the welfare considerations of a case.

7. CHILDREN IN THE ABSENCE OF PARENTS - GUIDELINES ON HANDLING INDIVIDUAL CASES

7.1. Preliminary action and enquiries

Attempts should be made to deal with cases ***swiftly*** and efficiently, as the longer a child remains the more upsetting it is likely to be if he is required to leave.

If there is no evidence that the local authority social services department are already involved, caseworkers should notify them of the child's situation as soon as possible, as they are responsible for the welfare of children. ***The AEAD Management Unit holds a copy of the Social Services Year Book which gives the addresses and telephone numbers of all the local authority social services departments.***

Where the social services are already involved, or become involved, their views should be taken into account. However, it will not always be right to act on their recommendation, particularly if there is independent evidence to justify proceeding with refusal and removal.

A decision at SEO level or above must be made as soon as possible on whether or not to pursue a case. Caseworkers may find the following questions useful:

* how did the child come to be in the United Kingdom?

* who looks after the child here, what arrangements have they made with the child's family; for how long do they expect the arrangement to continue?

* where do(es) the child's parent(s) or guardian(s) live and what is their occupation?

* what are the child's parents'/guardians' long-term plans for the child? Is it intended that the child should return to his family abroad? If so, when? If not, why not and what would happen if the child had to leave the United Kingdom?

* What is the family's income, what sort of accommodation do they occupy, how many children do they have, who looked after the child before he came to be without them in the United Kingdom, who looks after his siblings (if applicable) now and where are they?

* If the child is old enough (normally age 7+) to express an opinion, what does he feel about the situation and where does he consider that his future lies?

7.2. Deciding whether or not to pursue a case

When deciding whether or not to pursue a case, the following points should be borne in mind:

* ***the age of the child***. Generally, it will be more difficult to achieve the return of a younger child to family abroad. However, with children approaching 16, primary immigration may be a factor, and there may be grounds for considering deportation action. Advice on the practicability of such a course of action may be sought from Immigration Service (Enforcement).

* ***the length of the child's stay in the United Kingdom***. The longer a child has been here, the more settled he is likely to be. It will also be more disturbing for him if he is required to leave, particularly if he is young and/or has spent most of his formative years here.

* ***the type of care the child has here***. A child is more likely to have settled down if he is an integral member of a family here. However, if he is in local authority or temporary foster care he may not yet have become too settled for it to be disturbing for him to return abroad.

* ***the circumstances abroad***. Account must be taken of whether the care to be provided for the child in the country concerned would be substantially below that normally expected.

* ***the child's own feelings***. If the child is old enough (normally 7+) to express an opinion, this should be taken into account.

The above points are ***guidelines only***. Each case must be considered on its individual merits and in the light of all the available information. There may be cases where there are other overriding factors, eg. a serious illness or a mental or physical handicap.

After consideration of all the above factors, if it is decided that it is appropriate to refuse an application, then the application should be refused and caseworkers should advise those responsible for the child that arrangements should be made for the child's return to his country of origin, failing which the Secretary of State may make arrangements.

7.3. Action where attempts to return the child to his country of origin are unsuccessful

Where an application has been refused, the child has not left voluntarily and attempts by Immigration Service (Enforcement) to return the child to his country of origin have been unsuccessful, consideration should be given to granting the child leave to remain.

If there is a realistic possibility of the child returning to his parent(s) and/or country of origin in the future, the child may be granted limited leave for periods of 12 months on Code 1.

Where there is no prospect of the child leaving, the child may be granted leave to remain for 4 years on Code 1. In both cases, after 4 years of limited leave to remain, if there is no prospect of removal, indefinite leave to remain may be granted.

8. CHILDREN IN CARE

Decisions about the future of children in the care of the local authority should be left primarily in the hands of their social services department as they will be best placed to act in the child's best interests.

While the local authority may look into the possibility of arranging the repatriation of a child in their care, such action will only be taken if it is in the child's best interests.

Where they consider it may be in the child's best interests to be repatriated, they will normally make full enquiries to ensure that suitable arrangements are made for the child's care and to satisfy themselves that repatriation is indeed in the child's best interests. We should ask to be kept informed of developments.

If the social services advise that it would be appropriate for the child to remain in the United Kingdom, consideration should be given to granting the child leave to remain.

If there is a realistic possibility of the child returning to his parent(s) and/or country of origin in the future, the child may be granted limited leave for periods of 12 months on Code 1. Where there is no prospect of the child leaving, the child may be granted leave to remain for 4 years on Code 1. In both cases, after 4 years of limited leave to remain, if there is no prospect of removal, indefinite leave to remain may be granted.

9. CHILDREN WHO ARE SUBJECTS OF COURT ORDERS MADE IN THE UNITED KINGDOM

Children who are subjects of court orders made under the Children's Act 1989 in the United Kingdom, may still be removed or deported from the United Kingdom. However, the existence of any such order is a factor which should be taken into account.

10. DIFFICULT CASES

Because of their nature, cases of this sort are not easy to resolve. It will therefore be appropriate to refer difficult cases to SEO level for a final decision. Where the difficulty concerns some aspect of policy which is unclear, the file should be referred to Immigration Policy Directorate Section 1 through an SEO with a minute setting out a clear account of the views taken by Group and the point(s) on which advice is sought.

11. CHILDREN OF POLYGAMOUS WIVES

A polygamous marriage is one where a partner (nearly always the husband) is married to more than one person at the same time and therefore has more than one spouse.

Under Paragraph 296 of the Immigration Rules a child is to be refused entry clearance, or leave to enter or remain, if his mother is party to a polygamous marriage ***and*** she would be refused admission or leave to remain herself for the purposes of settlement or with a view to settlement under Paragraph 278.

Paragraph 296 overrides ***all*** other provisions in the Rules relating to children seeking entry clearance, admission, leave to remain or variation of leave for settlement or with a view to settlement. It equally overrides ***all*** consideration given to applications from or on behalf of children which fall for consideration exceptionally outside the Rules. Such a child ***may*** be able to show, however, that he is either a ***British citizen*** through descent from his father, or has the ***Right of Abode*** here. If this proves to be the case, he should be treated as such. These enquires should be addressed to Nationality Directorate, Right of Abode Unit (see paragraph 11.3. below).

11.1. Consideration of an application

While an application for settlement or with a view to settlement may be received solely from or on behalf of a child to accompany, join or remain with his ***father*** who is present and settled here or being admitted for settlement, consideration will need to be given to whether the child's ***mother*** is party to a polygamous marriage with the child's ***father***. If she is, further consideration will then be needed to establish whether she could be granted entry clearance, admission, leave to remain or variation of leave for settlement or with a view to settlement as the wife of the child's father.

For advice on considering cases involving possible polygamous marriages and the provisions of Paragraph 278 of the Immigration Rules see ***Section 1, ANNEX E*** to this chapter ***"Polygamous and potentially polygamous marriages"***.

11.2. Where the polygamous wife dies

Where a mother who was party to a polygamous marriage dies, and the father, who was the male party to the polygamous marriage, is settled here, her children may qualify for admission or leave to remain for settlement or with a view to settlement in the normal way. They will, however, have to satisfy ***all*** the appropriate requirements relating to children joining ***two*** parents (the stepmother becoming, for the purposes of the Rules, the mother of the children upon the death of the natural mother).

11.3. Children who may be British Citizens

Under Section 1 of the Legitimacy Act 1976, as amended by the Family Law Reform Act 1987, some children of void marriages are able to claim British citizenship. Ultimately, only a court can decide whether a marriage is valid under United Kingdom law but a marriage should be treated as void if, at the time it took place, it was actually polygamous and either party was at that time domiciled in the United Kingdom. (See ***Section 1, ANNEX F*** to this chapter, ***"Domicile"***)

11.4. The operation of Section 1 of the Legitimacy Act 1976 as amended

It is a question of law whether the children of polygamous marriages which are void in this country on account of the father's domicile in England and Wales at the time the marriage took place, are to be treated as legitimate. Section 1 of this Act provides that the child of a void marriage shall be treated as the ***legitimate*** child of the parents if:

* at the time of the conception (or insemination) resulting in the birth of the child, or

* at the time of the celebration of the marriage, if later,

either or both of the parents ***reasonably believed*** themselves to be ***validly*** married and the father was domiciled in England and Wales.

11.5. The test of reasonable belief

If the marriage is void, it should be determined whether the parents reasonably believed it to be valid. A woman married in a country whose law permits polygamy (e.g Pakistan, Bangladesh, Nigeria), will normally have no reason to suppose that her marriage to a man in that country would be invalid in our law. In such circumstances, unless we have ***reason to doubt*** that both parents believed that the marriage was valid, we should, in practice, presume that they believed it to be so. There would, of course, be reason to doubt the existence of such a belief if, for example, the couple had been told that we could not regard the marriage as valid before the conception of the child took place.

11.6. Children whose fathers are registered or naturalised as British citizens

If a child may be treated as legitimate under the Legitimacy Act 1976, where the father has been registered or naturalised as a British citizen (or, before 1 January 1983, a Citizen of the United Kingdom and Colonies) before the child's birth, the child will have a claim to British citizenship by descent.

11.7. Effect of legitimacy of children of polygamous marriages upon the mother

The fact that a child is a British citizen by descent from his father through the operation of Section 1 of the Legitimacy Act 1976, as amended, gives him right of abode here. However, he must demonstrate his status by either a certificate of entitlement or a British passport. ***His*** status does not of itself make ***his mother*** admissible as a "wife" either where the marriage is obviously void or the marriage is ***valid*** but the mother is excluded by either Paragraph 278 of the Rules or by Section 2 of the 1988 Act (ie where there is another woman living who has already been admitted as the sponsor's wife).

12. THE UNDER 12 CONCESSION

The concession in relation to children under the age of 12 years old was withdrawn with effect from the 29th March 2003. No applications citing the concession should be accepted after that date.