

MARRIAGE AND CHILDREN

Introduction

1. The attached instruction provides guidance on cases involving marriage and children, and takes into account the effect of the European Convention on Human Rights. Article 8 of the Convention guarantees the right to respect for family life and recent European Court cases have demonstrated that, however unmeritorious the applicant's immigration history, the Court is strongly disposed to find a breach of Article 8 where the effect of an immigration decision is to separate an applicant from his/her spouse or child.

2. The instruction is divided into two sections:

SECTION A: MARRIAGE POLICY

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3. The guidance on marriage policy in DP 4/88 and 5/90 is now superseded.

4. Any enquiries about this instruction should be addressed to the Enforcement Policy Group, Room 809 (Extensions 2600/2602).

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SECTION A: MARRIAGE POLICY

1. All deportation and illegal entry cases must be considered on their individual merits. Where enforcement action is under consideration or has been initiated and the offender is married a judgment will need to be reached on the weight to be attached to the marriage as a compassionate factor.

2. As a general rule deportation action under section 3(5)(a) or section 3(5)(b) (in non-criminal cases), or illegal entry action should not be initiated or pursued where the subject has a genuine and subsisting marriage to a person settled in the United Kingdom if:

- (a) the marriage pre-dates enforcement action; and
- (b) the marriage has lasted 2 years or more or, in the case of a common-law relationship (see paragraph 7 below), the couple have cohabited for 2 years or more. It does not automatically follow, however, that deportation/removal is the right course where this test is not met. Full account should be taken of any evidence that a strong relationship has existed for more than 2 years (this will include any reasons why the couple did not marry earlier, eg waiting for a divorce to be finalised, saving to buy their own home); or
- (c) the settled spouse has lived here from an early age or it is otherwise unreasonable to expect him/her to accompany on removal; or
- (d) one or more children of the marriage has the right of abode in the United Kingdom, most commonly as a result of having been born in the United Kingdom to a parent settled here. It should be noted that an illegitimate child born in the United Kingdom only obtains British citizenship under the British Nationality Act 1981 if the mother is a British citizen or is settled in the United Kingdom. Under the 1981 Act the status of the father of an illegitimate child has no bearing on the nationality of the child unless he subsequently marries the mother and legitimises the child.

Note:

(i) The subject's immigration history is of little relevance once it has been concluded that the marriage is genuine and subsisting.

(ii) Enforcement action may be inappropriate where the spouse or the foreign national is pregnant with a child who would have the right of abode here even if born outside the United Kingdom.

(iii) The presence of the settled spouse's children by a former relationship will also be an availing factor provided that the children have the right of abode in the United Kingdom, are still dependent and that we can be satisfied that they either live with or have frequent contact with the settled spouse.

3. In considering whether it is reasonable for a spouse to accompany on removal under paragraph 2(c) above, whilst the onus is on the United Kingdom settled spouse to make out a case for why it is unreasonable for him/her to join the family outside the United Kingdom, in general terms cases should be conceded if the United Kingdom settled spouse

- (a) has strong family ties in the United Kingdom; or
- (b) has lengthy residence in the United Kingdom; or
- (c) suffers from ill health such that his/her quality of life would be significantly impaired if he/she were to accompany his/her spouse on removal.

4. There will be a presumption to proceed with section 3(5)(a), 3(5)(b) (in non-criminal cases) or illegal entry action (subject to consideration of other relevant factors) in marriage cases where there are no children with the right of abode in the United Kingdom if:

- (a) neither partner is settled in the United Kingdom; or
- (b) the marriage is one of convenience: that is, the couple do not intend to live together permanently as husband and wife; or
- (c) the couple are separated.

Divorced or separated parents

5. The fact that the European Court is strongly disposed to find a breach of Article 8 of the European Convention where the effect of an immigration decision is to separate a parent from his/her child is also relevant in cases involving divorced or separated parents. Where one parent is settled in the United Kingdom and the removal of the other would result in deprivation of frequent and regular access currently enjoyed by either parent, section 3(5)(a), 3(5)(b) (in non-criminal cases) or illegal entry action should be abandoned. Reliance cannot be placed on the argument that the United Kingdom settled parent can travel abroad to continue access.

6. Cases will arise where a person to be deported/removed has custody of a child with the right of abode in the United Kingdom by a previous partner who is no longer in contact with the child. Here, the crucial question is whether it is reasonable for the child to accompany the parent to live abroad. The factors to be considered are:

- (a) the age of the child (in most cases a pre-school age child could reasonably be expected to adapt to life abroad);
- (b) the strength of the child's ties with the United Kingdom, including other United Kingdom resident family members;
- (c) any medical conditions which would be better treated here;

- (d) the standard of living (including educational facilities) in the country to which the parent is being removed.

Common-law relationships

7. Where there is conclusive evidence that a genuine and subsisting common-law relationship akin to marriage exists, it should be considered under this instruction as if it were a marriage. The onus rests firmly on the individual who seeks to benefit to provide conclusive evidence of the nature of the relationship.

Criminal convictions

8. The test in cases where someone liable to immigration control has family ties here which would normally benefit him/her under paragraphs 1-6 above yet has criminal convictions is whether removal can be justified as "necessary in the interests of a democratic society". This is usually interpreted by the European Court as serious crime punished with imprisonment (for example, crimes of violence, drug offences (other than possession), murder, terrorism) but minor offences (even where the individual has a long criminal record) or a poor immigration history do not carry much weight. What is reasonable in any particular case will depend not only on the nature of the offence but also on the settled spouse's strength of ties with the United Kingdom. Where action is deemed to be in the interests of a democratic society it would normally be capable of being taken under section 3(5)(b) or 3(6) deportation powers.

Marriages of convenience to EC nationals

9. Foreign nationals who contract a valid marriage to an EC national exercising Treaty rights in the United Kingdom (for example by working) have hitherto been accepted as benefiting from the provisions of Community law in line with his/her spouse, effectively preventing enforcement action (barring serious criminal convictions) at least while the spouse continues to exercise Treaty rights. It has become clear, however, that immigration offenders can exploit this approach by entering into marriages of convenience with EC nationals.

10. Current legal advice is that the removal of a person who has married an EC national exercising Treaty rights may be justified where there are exceptionally strong grounds for suspicion that the marriage is one of convenience, ie that the couple do not intend to live together permanently as man and wife and the marriage was contracted for immigration purposes.

SECTION B: CHILDREN

Part 1: Adoption, wardship, custodianship and residence orders

11. This part of the instruction provides guidance on handling cases where there is reason to believe that the purpose of

adoption, custodianship, wardship or residence order proceedings is to frustrate enforcement action.

Definitions

12. Adoption: A child adopted by order of a court in the United Kingdom is a British citizen (and thus not liable to immigration control) from the date of the order if an adoptive parent is a British citizen at that date. An adoption by order of a foreign court may not be recognised in United Kingdom law: in such cases advice should be sought from B2 Division.

Custodianship: This represents a less final relationship than adoption and vests legal custody of the child in the adult(s) caring for him/her. Where a custodianship order is made the child's immigration status is unchanged but he/she should not be removed from the jurisdiction of the court while the order remains in force.

Wardship: Children who are wards of court should not be removed from the United Kingdom without the court's leave.

Residence Orders: Residence orders are very similar in effect to wardship and children subject to residence orders should not be removed from the United Kingdom without the leave of the court.

Intervention

13. The Family Court will generally attach much more weight to the child's welfare than to irregularities surrounding the immigration status of the child or a parent. Where however it is clear that the court proceedings are designed purely to enable the child or the parent to evade immigration control consideration may be given to instructing the Treasury Solicitor with a view to intervention in the proceedings. There must be evidence, not just a suspicion, that there has been a serious attempt to circumvent the immigration control and decisions to intervene must be taken at not less than SEO level.

14. Where intervention has been agreed the papers should be copied to the Treasury Solicitor's office as soon as possible. Their normal practice is then to apply for the Secretary of State to be joined as a respondent, and to file an affidavit setting out the child's and/or parents' immigration history and the Secretary of State's objections.

Part 2: Abandoned children

15. Enforcement action against children and young persons under the age of 16 who are on their own in the United Kingdom should

only be contemplated when the child's voluntary departure cannot be arranged. In all cases removal must not be enforced unless we are satisfied that the child will be met on arrival in his/her home country and that care arrangements are in place thereafter. To this end, caseworkers should contact the Welfare Section of the appropriate Embassy or High Commission as well as the local Social Services Department. If there is evidence, not just a suspicion, that the care arrangements are seriously below the standard normally provided in the country concerned or that they are so inadequate that the child would face a serious risk of harm if returned, consideration should be given to abandoning enforcement action.

16. Where deportation or removal remains the right course, consideration will need to be given to whether an escort is necessary on the journey.

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