Children & Entry Clearance: Sole Responsibility, Serious & Compelling and Article 8

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Presenter

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Typical Scenario

A Jamaican woman with ILR (legacy grant) comes into your office tomorrow. She wants to apply for entry clearance for her 16 year old daughter. Daughter lives with her maternal aunt (mum's sister). Father is thought to be somewhere in Jamaica but has not contact.

The Sponsor came to the United Kingdom when her daughter was two and lives with her partner and British children here.

- What rule(s) are you going to apply under?
- What evidence would you be looking for?
- What are you are going to say about Article 8 and section 55 BCIA 2009.

Type your answers in the chat

Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

(a) both parents are present and settled in the United Kingdom; or

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are 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; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal.

Appendix FM: Entry Clearance as a Child of a Person with Limited Leave as a Partner or Parent

E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and

(a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or

(b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or

(c) there are 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.

Exceptional Circumstances

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, 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, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR.

GEN.3.3.(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, “relevant child” means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.

Sole Responsibility

Guidance and Key Case Law

Sole Responsibility

- How would you define sole responsibility?
- What evidence would you want to demonstrate sole responsibility?

Type your answers in the chat

Defining Sole Responsibility

The phrase 'sole responsibility' is intended to reflect a situation where the primary parental responsibility for the child's upbringing rests with one parent. The parent claiming sole responsibility must satisfactorily demonstrate that they have been the person exercising primary decision-making concerning the child's upbringing. Sole responsibility' is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had not assumed any responsibility for the child, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. Where both parents are involved in a child's upbringing, the assessment of sole responsibility is more difficult. **[11.102]**

Macdonald's Immigration Law and Practice > Chapter 11 Families, Partners and Children > Part 8 and Appendix FM Rules – Admission and stay of children

Family life (as a partner or parent) and exceptional circumstances Version 19.0 18th May 2023

Sole parental responsibility for the purpose of the Immigration Rules, must be interpreted as set out in this guidance.

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

In assessing whether the applicant has sole parental responsibility for a child, you must consider if evidence has been provided to show that:

- decisions have been taken and actions performed in relation to the upbringing of the child under the sole direction of the applicant, without the input of the other parent or any other person
- the applicant parent is responsible for the child's welfare and for what happens to them in key areas of the child's life, and that others do not share this responsibility for the child
- the applicant parent has exclusive responsibility for:
    - making decisions regarding the child's education, health and medical treatment, religion, residence, holidays and recreation
    - protecting the child and providing them with appropriate direction and guidance
    - the child's property
    - the child's legal representation In addition you should note that:
- sole parental responsibility is not the same as legal custody
- significant or even exclusive financial provision for a child does not in itself demonstrate sole parental responsibility
- where both parents are involved in the child's upbringing, it will be rare for one parent to establish sole parental responsibility
- sole parental responsibility can be recent or long-standing- any recent change of arrangements should be scrutinised to make sure this is genuine and not an attempt to circumvent immigration control

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It is unrealistic for a child to have contact with no other adult other than the parent exercising sole responsibility. We accept that the child will have contact with other adults, including relatives, and that these are likely to include some element of care towards the child, either generally or specifically such as taking the child to school. Actions of this kind that include looking after the child's welfare may be shared with others who are not parents, for example, relatives or friends, who are available in a practical sense, providing the applicant has overall responsibility, on their own, for the welfare of the child.

You are not considering whether the applicant (or anyone else) has day-to-day responsibility for the child, 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. If not, then they do not have sole parental responsibility for the child. You must carefully consider each application on a case-by-case basis. The burden of proof is on the applicant to provide satisfactory evidence. In some instances, it may be appropriate to interview an applicant to establish whether they have sole responsibility for the child, or to contact the other parent (with the consent of the applicant) in order to confirm they have no parental responsibility.

IMMIGRATION DIRECTORATE INSTRUCTIONS:
Ch 8 Section 5A Annex M Children/Ch 8 Section FM 3.2 Children

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:

IMMIGRATION DIRECTORATE INSTRUCTIONS:
Ch 8 Section 5A Annex M Children/Ch 8 Section FM 3.2 Children

- 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.

IMMIGRATION DIRECTORATE INSTRUCTIONS:
Ch 8 Section 5A Annex M Children/Ch 8 Section FM 3.2 Children

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.

TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049 (24 May 2006)

"Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".

https://www.bailii.org/uk/cases/UKIAT/2006/00049.html

TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049 (24 May 2006)

51. In reaching a decision on what is a fact-rich issue, it is important to take account of evidence of any contact between the parent and the carer in respect of important decisions to be taken about the child and its upbringing. The availability of modern communications technology may reduce the impact of distance alone on a UK parent's ability to be consulted (and therefore decide) about the child's upbringing in another country. The length, and cause, of the separation of parent and child and the reasons for its continuation may shed some light on the role played by the carer abroad. Likewise, it may be helpful to look at the financial support provided by the parent and, in particular, its absence may be very telling.

TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049 (24 May 2006)

Summary

52. Questions of "sole responsibility" under the immigration rules should be approached as follows:

i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.

ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.

iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.

iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049 (24 May 2006)

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

Nmaju & Ors v Entry Clearance Officer [2000] EWCA Civ 505 (31 July 2000)

The Court of Appeal held that previous cases were wrong to require a minimum period for the exercise of 'sole responsibility', such as 'a not inconsiderable' period of time. In the instant case, when the relative who had been caring for the child overseas died, the sponsor assumed sole responsibility. The few weeks for which this was exercised before an application was made for entry clearance were long enough to meet the requirements of para 297(i)(e). **Butterworths Immigration Law Service > Division IV Family Members > B Children**

23. Time cannot on its own be a conclusive factor. Consider a child of separated parents who agreed on separating that the mother abroad should have sole responsibility for the child's upbringing during her life but that if the mother became incapacitated or died then father in the United Kingdom would take over sole responsibility. Assume mother as a result of an accident becomes mentally incapacitated and there is no local carer interested in assuming responsibility beyond telephoning father to inform him of the situation. Assume father immediately takes sole responsibility and thereafter takes steps to apply for entry clearance for the child and pays for its fare. It seems to me that the case clearly falls within the subparagraph even if the entry clearance officer is faced with taking a decision within days of the advent of the mother's incapacity.

24. I accept that time may often be a relevant factor when deciding whether the facts as found lead to the conclusion that the United Kingdom parent was exercising sole responsibility for the child's upbringing. Consider the child of separated parents whose mother abroad has been looking after him for some years with no interest shown by the father. Mother suddenly become incapacitated when the child is nearly eighteen and father, on hearing this over the telephone, sends enough money to a local carer to pay for care for a few months and an application is made by or on behalf of the child for entry clearance. Certainly in the absence of any prospect of further education, it might well be found that the father had never assumed sole responsibility for the upbringing of the child but was merely reacting mercifully in an emergency. If on the other hand the mother had become incapacitated when the child was twelve and the father made arrangements at his sole expense for the next six years then it would be easier to come to the conclusion that he had assumed sole responsibility for the upbringing of the child.

Nmaju & Ors v Entry Clearance Officer [2000] EWCA Civ 505 (31 July 2000)

25.It is a mistake in my judgment to try and address the question of time on its own, asking questions such as were addressed to us in submissions "can two months be substantial?" The proper course is to address the question posed by the rules, namely, has the parent settled in the United Kingdom had sole responsibility for the upbringing of the child? One must bear in mind that the concept of upbringing can be wider than the mere provision of board and lodging and also that situations can arise where no one can be regarded as having had any responsibility for the upbringing of the child. It is an unfortunate commonplace that children do exist who have no parent who has accepted responsibility for their upbringing.

26.In the present case I consider that the Tribunal fell into error in treating the length of time for which the mother had accepted sole responsibility as being a disqualifying factor. The Tribunal found that the mother had had sole responsibility for the upbringing of the child. Having concluded that then, in my judgment, they were not at liberty under the rules to find that the child did not qualify for entry merely because that sole responsibility had not been assumed for a period in excess of much over two months. In those circumstances I would allow the appeal. Subject to further submissions by counsel as to the precise form of remedy, I would be minded to declare that the three children appellants qualify for admission for settlement to the United Kingdom.

Buydov v Entry Clearance Officer, Moscow [2012] EWCA Civ 1739 (20 December 2012)

14. The parties to this appeal both accept the authority of three decisions of this court concerning the expression "sole responsibility". In Ramos v Immigration Appeal Tribunal [1989] Imm AR 148, this court considered the predecessor of the modem rules, which was in similar terms. Dillon LJ (at 151-3) set out the general approach, in terms which have frequently been endorsed since:

"...the issue of sole responsibility for the child's upbringing is not to be decided only between the child's parents. There may be cases where the conclusion is that there has been a sharing of responsibility between the parent who is settled here and some other relative, or other person possibly, in the country where the child has been left when the parent came here. The second point which is also established is that the words "sole responsibility" have to carry some form of qualification in that the rule envisages that a parent who is settled in the United Kingdom will or may have had the sole responsibility for the child's upbringing in another country. Obviously there are matters of day to day decision in the upbringing of a child which are bound to be decided on the spot by whoever is looking after the child in the absence of the parent settled here, such as getting the child to school safely and on time, or putting the child to bed, or seeing what it has for breakfast or that it cleans its teeth or has enough clothing and so forth....the question must be a broad question....the decision that has to be made is the decision of the adjudicator. It is not for this court to make its own fresh decision of fact on the evidence as it appears from the papers... Each case must depend on its own facts considered broadly. Direction and control of upbringing are... factors which are part of the total pattern of fact on which the adjudicator had to make his decision. Another matter was of course the extent of contact that the mother had had with the child since the mother went to the United Kingdom..."

15. Citing and applying that passage in Nmaju v Entry Clearance Officer [2001] INLR 26 Schiemann LJ added this at [9]:

"While legal responsibility under the appropriate legal system will be a relevant consideration, it will not be a conclusive one.One must also look at what has actually been done in relation to the child's upbringing by whom and whether it has been done under the direction of the parent settled here."

Buydov v Entry Clearance Officer, Moscow [2012] EWCA Civ 1739 (20 December 2012)

16. Thirdly, in Cenir v Entry clearance Officer [2003] EWCA Civ 572 this court emphasised that the decision whether or not sole responsibility is established is one of fact. Buxton LJ observed at [6]:

"I would respectfully adopt the observation that the question is a factual one. Each case will depend on its own particular facts. The general guidance is to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent."

And at [26] he concluded:

"At the end of the day this was a question of fact and judgment for the adjudicator, who took a lot of trouble over this case. He was concerned about it, as anyone would be, because of the position of the mother and her history. But he made no error of law...and there was therefore no ground on which he should have been reversed by the Immigration Appeal Tribunal and no ground upon which this court can interfere."

It is interesting to observe that in that case the submission rejected was in effect the reverse of the argument advanced in the present appeal; it was that too much emphasis had been placed on the incidence of day to day control.

17. All three of these cases involved what is the normal or paradigm factual situation of a sponsoring parent who has settled in this country and a child who has been left behind in the country of origin. Moreover, all three were cases where the other parent had either wholly disappeared from the life of the child or took no part in it, so that there was no suggestion that he exercised any responsibility for the child's upbringing. They were all cases in which the issue was whether the *de facto* care given by a relative or some other person to the child left behind in the country of origin was given under the direction of the sponsoring parent in the UK, so as to justify the conclusion that the latter had had sole responsibility despite the geographical separation.

18. Additionally, the AIT reviewed a number of first instance decisions on this expression in TD (Paragraph 297(i)(e): "sole responsibility" (Yemen)) [2006] UKIAT 00049, under the presidency of the Deputy President, Mr Ockleton. All are **simply** applications of the principles set out above, but the cases reviewed included some where there were two parents whose positions fell to be considered. The Tribunal drew attention to the factual difference between one-parent and two-parent cases. It observed that in a one-parent case the starting point will generally be that it is the sole active parent who will be likely to have sole responsibility, and the issue will be whether s/he has exercised it despite the separation. On the other hand, in a two- parent case the usual starting point will be that both parents have responsibility for the upbringing of the child.

Buydov v Entry Clearance Officer, Moscow [2012] EWCA Civ 1739 (20 December 2012)

19. Neither party to this appeal before us has challenged any part of the approach chronicled by the AIT in TD, which is of course a decision of a court extremely experienced in this field. The existence of the distinction identified between one- parent and two-parent cases is a valid one, and it is consistent with the scheme of the Rules identified at [13] above. It is however important to remember that the question remains one of fact in each case, and not to elevate the distinction into a presumption of law. There might be some risk of misreading the distinction as such a presumption, or as importing some independent legal test of exceptionality, if one were to take out of context one part of the helpful summary contained at [52] of TD, which contains the following:

"(iv) Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility."

The IAT clearly did not mean to impose a legal test. Its review of the cases is predicated on the fundamental proposition that the issue of sole responsibility is one of fact. It was doing no more than identifying where the necessary factual enquiry is likely in most two-parent cases to lead, and as such the proposition is accurate. The application of the factual test to two-parent cases is well illustrated by some of the decisions reviewed in TD. In SSHD v Pusey [1972] Imm AR 240, discussed at [35], the sponsoring parent in the UK was Father, and the child had lived for twelve years with her grandmother and mother in the country of origin. Although Father shouldered the main responsibility, the close contact of mother meant that he did not have sole responsibility. Eugene v ECO Bridgetown [1975] Imm AR 111, discussed at [36] was a similar case, as were Martin v SSHD [1972] Imm AR 71, discussed at [11], ECO, Accra v Otou-Acheampong [2002] UKIAT 06687, discussed at [37] and R (Philippines) v SSHD [2003] UKIAT 00109, discussed at [38]. On the other side of the factual dividing line was Alagon v ECO, Manila [1993] Imm AR 336, discussed at [39]. There the parent remaining in the country of origin, although he occupied the same house as the child, which belonged to the sponsoring mother, was divorced from Mother, made no financial contribution and took no part in the child's life. Mother was held to have had sole responsibility. That illustrates the factual nature of the enquiry and the proposition that even where there is a second parent in close physical proximity to the child, s/he may not be taking any responsibility for him.

https://www.bailii.org/ew/cases/EWCA/Civ/2012/1739.html

DN v Secretary of State for the Home Department [2017] CSOH 144

[11.103]

The Court of Session has recognised that, in any situation where a child is left in a country different from that in which her only parent is living, there will inevitably be some degree of delegation of day to day responsibility for the care and education of the child. It will occur, for example, when a child is attending a boarding school. The teachers and other staff there will have day to day responsibility for those matters. There may be others, outwith the school, who provide accommodation during holiday times, or provide other forms of assistance to the child. Such delegation, however, will not in all cases necessarily mean that the parent has not had sole responsibility for bringing up the child. A parent may in a variety of circumstances fulfil their responsibility for the upbringing of a child by delegating certain matters to other carers, paid or unpaid. Whether a parent 'has had sole responsibility' is a question which will turn on the facts of a particular case. Careful fact finding will be required in every case as to the circumstances which tend to support or undermine a contention that a parent has had sole responsibility, while bearing in mind that delegation of some aspects of care will not necessarily exclude such responsibility.

Macdonald's Immigration Law and Practice > Chapter 11 Families, Partners and Children > Part 8 and Appendix FM Rules – Admission and stay of children

Free Movement on Sole Responsibility

It is the concept of “authority” or “control” over a child’s upbringing which is important. Whilst others (for example, relatives) may, look after a child, it may be that they are doing so only on behalf of the child’s parent.

A really key issue will be the evidence of contact between the applicant parent and the carer on important decisions to be taken about the child and his or her upbringing.

In situations where only one parent is in the picture, if that parent can show that he or she has control over the major decisions that affect a child’s life, even from afar, then this will be strong evidence to suggest that they meet the “sole” responsibility test.

The courts suggest it may also be helpful to look at the financial support (or lack of it) provided by the parent to the child or the carers of the child for the purposes of his or her upbringing. The courts specifically mention that its absence may be telling, so this issue should be highlighted — either confirming financial support is given and providing evidence of this, or explaining that it is not and explaining why not.

https://freemovement.org.uk/sole-responsibility-and-exclusion-undesirable/

Serious and Compelling

Guidance & Key Case Law

Serious and Compelling

- How you you define serious and compelling circumstances?

- What evidence would you want to demonstrate it?

Type your answers in the chat

IMMIGRATION DIRECTORATE INSTRUCTIONS:
Ch 8 Section 5A Annex M Children/Ch 8 Section FM 3.2 Children

1. SERIOUS AND COMPELLING FAMILY OR OTHER CONSIDERATIONS

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.

IMMIGRATION DIRECTORATE INSTRUCTIONS:
Ch 8 Section 5A Annex M Children/Ch 8 Section FM 3.2 Children

1.2. Where the sponsor is not 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 is 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.

Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 88 (IAC) (26 February 2013)

i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.

ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".

iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.

iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-

a there is evidence of neglect or abuse;

b. there are unmet needs that should be catered for;

c. there are stable arrangements for the child's physical care;

The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.

v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939 .

https://www.bailii.org/uk/cases/UKUT/IAC/2013/00088_ukut_iac_2013_lm_drcongo.html

Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 88 (IAC) (26 February 2013)

34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.

35. The terms of s.55(1) and the decision of the Upper Tribunal in *T (s.55 BCIA 2009 – entry clearance)* Jamaica [2011] UKUT 483 (IAC) [2012] Imm AR 346, made it clear that s.55 only applies to children who are in the United Kingdom. The requirement therefore in the IDIs we have quoted above that officers must not apply actions set out in the instruction without having regard to s.55 inaccurately states the legal position, although as the Tribunal noted at [18] that the statutory guidance asks "staff working overseas to adhere to the spirit if the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention" .

36. The exercise of the duty by the Entry Clearance Officer to assess the application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration". Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.

Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 88 (IAC) (26 February 2013)

37. Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come into play where there are other aspects of a child's life that are serious and compelling - for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve inquiry as to whether:-

(i) there is evidence of neglect or abuse;

(ii) there are unmet needs that should be catered for;

(iii) there are stable arrangements for the child's physical care.

The assessment involves consideration as to whether the combination of circumstances sufficiently serious and compelling to require admission.

38. As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also *SG (child of a polygamous marriage) Nepal* [2012] UKUT 265 (IAC); [2012] Imm AR 939.

SG (child of polygamous marriage) Nepal [2012] UKUT 265 (IAC) (9 July 2012)

i) Educational advantages and economic betterment, which might be enjoyed by a child, if admitted to the United Kingdom, are not compelling considerations to make that child's exclusion undesirable, where the biological mother has cared for the child, and will continue to do so, in the country of origin.

ii) There is a legitimate aim in excluding from admission to the United Kingdom a woman who is a party to an actually polygamous marriage and that aim justifies the indirect effect of that exclusion on the child of such a marriage, in that it will be more difficult for the child to satisfy the immigration rules relating to sole responsibility and circumstances making exclusion of the child undesirable.

iii) The policies adopted by the Secretary of State to facilitate admission of Ghurkha former soldiers and their dependants were not intended to give more favourable treatment to children born of an actually polygamous marriage.

iv) Paragraph 296 of HC 395, as presently applied, does not prevent the admission of such children and would probably be contrary to Articles 8 and 14 ECHR if it did.

v) In these circumstances it is not unreasonable to expect a sponsor to choose between coming to the United Kingdom with part of his family or remaining in Nepal with all its members, where there has been no previous residence and establishing of family life in the United Kingdom.

vi) The wishes of the child and both parents are relevant to ascertaining what her best interests are in the context of an application for admission to the United Kingdom but are not decisive of the proportionality balance.

vii) The proportionality balance in such cases is a fact sensitive one rather than determined by the rules.

https://www.bailii.org/uk/cases/UKUT/IAC/2012/00265_ukut_iac_2012_sg_nepal.html

Macdonald's Immigration Law and Practice > Chapter 11 Families, Partners and Children > Part 8 and Appendix FM Rules – Admission and stay of children

[11.114] In *Secretary of State for the Home Department v Campbell* it was said that when considering family or other considerations, the conditions under which the child is living in the home country are not to be weighed against the conditions available for the child in the UK. Conditions in this country are only to be considered if conditions in the overseas country show that exclusion is undesirable. This dictum requires to be reconsidered by reference to the *Mundeba* guidance – which included consideration of the children's best interests. In *Entry Clearance Officer, Kingston v Holmes* the test was satisfied where the child was living in poverty and overcrowded conditions and, importantly, her mother who had been looking after her was about to emigrate to Canada and would not be able to take the child with her. The Tribunal has also considered the death of the carer as being capable of amounting to a compelling and compassionate circumstance. The fact that there are far worse conditions elsewhere in the country is not relevant. Bad conditions are not made better by the existence of worse ones. However, it has also been held that if there is overcrowding it must be shown to be unavoidable. Initially, the Tribunal set a high standard of 'intolerable' conditions but in *Rudolph (Dilkish Antoinette Hayley) v Entry Clearance Officer, Colombo* the Tribunal rejected the 'intolerable conditions' test, pointing out that the underlying purpose of the Immigration Rules is to unite families and not divide them and holding that where a father was incapable of caring for a child, that in itself would be grounds for deeming exclusion undesirable. Voluntary abandonment may make the circumstances compelling. Relevant factors to be weighed may include the willingness and ability of the overseas adult to look after the child; the living conditions available for the child; the greater vulnerability of small children; and the importance of family unity. Children or young adults who do not qualify under these rules may succeed in showing that the refusal of entry clearance or leave to remain is in breach of their Article 8 rights.

What about Article 8 & Best Interests?

Children, Entry Clearance, Article 8 & Section 55

A Quote from Free Movement

Too often, immigration cases for or about children are still devoid of real evidence from or concerning the child. What does the child think of moving country, leaving everything he or she knows behind him or her and joining a hitherto absent parent? Is it exciting and will it fill an emotional hole in their life to be with the parent, or are they scared at the prospect of the unknown? Or both? Quite often, we simply don't know. Or should we simply accept that parents know what is best for the children and should be permitted to make decisions about their country of residence?

The 'sole responsibility' test in particular is a distraction from what should, if a genuinely child centred approach were followed, be the real relevant considerations. It diverts Entry Clearance Officers, immigration lawyers and judges from looking at the situation of the child and causes focus on the situation of the parent. It is almost as if being reunited with one's child is a reward for taking a long distance interest in their upbringing. The right approach is surely to examine the case from the child's perspective — it is the child's appeal after all — and consider what is best for that child.

In almost all circumstances it is axiomatic that it will be best for a child to live with his or her parent. If the child is currently living with a carer or a relative other than a parent and the other parent is not able or willing to provide care, there is a very strong argument that the child should be admitted to the UK on the same basis as other children without additional hurdles being imposed.

https://freemovement.org.uk/sole-responsibility-and-exclusion-undesirable/

Family life (as a partner or parent) and exceptional circumstances Version 19.0 18th May 2023

Decision to grant leave to remain on the basis of exceptional circumstances under GEN.3.2. of Appendix FM

Where an application made or considered under Appendix FM does not otherwise meet the relevant requirements of that Appendix or of Part 9 of the rules, but it is considered, under paragraph GEN.3.2., that there are exceptional circumstance which would render refusal a breach of ECHR Article 8 (because it would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from the information provided by the applicant would be affected), leave to remain should be granted in accordance with paragraph GEN.3.2. under the most relevant decision paragraph under Appendix FM. The applicant will normally be granted leave to remain for a period of 30 months, with scope to qualify for settlement as a partner or parent (or as their child) after 10 years.

Under paragraph GEN.1.11. and GEN.1.11A, this grant of leave will normally be subject to a condition of no recourse to public funds, unless the applicant has provided you with satisfactory evidence that they are destitute or at risk of destitution, or there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing the condition of or there are exceptional circumstances relating to the applicant's financial circumstances which, in your view, requires you not to impose a condition of no recourse to public funds. For further guidance on the policy see the following section of this guidance: recourse to public funds.

The applicant should be advised that, where eligible, they should make an appropriate valid application for further leave to remain no more than 28 days before their extant leave is due to expire, or no more than 28 days before they have completed 30 months in the UK with such leave.

Family life (as a partner or parent) and exceptional circumstances Version 19.0 18th May 2023

Compelling compassionate factors

This section tells you about compassionate factors.

Where circumstances do not warrant a grant of leave on the basis of Article 8, you must consider if a grant of leave outside the rules is warranted on compelling compassionate grounds.

Compelling compassionate factors are, broadly speaking, exceptional circumstances that warrant a period of leave for a non-Article 8 reason. An example might be where an applicant or family member has suffered a bereavement and requests a period of stay to deal with their loss or to make funeral arrangements.

In considering compassionate factors, you must consider all relevant factors raised by the applicant.

If any compassionate factors are raised in the application, you should consult the following leave outside the rules guidance:

- Leave outside the rules (LOTR) (internal)
- Leave outside the rules (LOTR) (external)

You should ensure that where an applicant is granted limited leave to remain on the basis of compassionate factors, the decision letter must clearly show that the grant has been given outside the Immigration Rules on the basis of compassionate factors, and is not being made on the basis of their Article 8 family or private life.

It is unlikely that leave will be granted for a period of 30 months, but instead should be a short period of leave to remain to reflect the individual circumstances of the application. For example, it may be appropriate to grant a period of 6 months' leave to enable completion of final examinations taking place within 4 months, to allow for the examinations and to arrange travel.

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 (1 February 2011)

23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. "This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

T (entry clearance - s.55 BCIA 2009) Jamaica [2011] UKUT 483 (IAC) (16 December 2011)

(i) Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom.

(ii) Where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the "exclusion undesirable" provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken into account by the ECO at first instance and the judge on appeal.

(iii) When the interests of the child are under consideration in an entry clearance case, it may be necessary to make investigations, and where appropriate having regard to age, the child herself may need to be interviewed.

(iv) Where the appeal can be fairly determined on the merits by the judge, it is inappropriate to allow it without substantive consideration simply for a decision to be made in accordance with the law.

(v) It is difficult to contemplate a scenario where a s. 55 duty is material to an immigration decision and indicates a certain outcome but Article 8 does not.

https://www.bailii.org/uk/cases/UKUT/IAC/2011/00483_ukut_iac_2011_t_jamaica.html

T (entry clearance - s.55 BCIA 2009) Jamaica [2011] UKUT 483 (IAC) (16 December 2011)

27.There is obviously family life enjoyed between T and C as mother and teenage daughter. The question is whether the notion of respect for such family life requires her admission under Article 8(1). In making any such assessment, T's best interests are a primary consideration (see the sequence of decisions in Strasbourg and the higher courts to this effect applying Article 3 of the UN Convention on the Rights of the Child to all administrative decision making: see Singh v Entry Clearance Officer, New Delhi [2004] EWCA Civ 1075, 30 July 2004; Tuquabo-Tekle v the Netherlands (Application no. 60665/00) [2005] ECHR 803 (1 December 2005); Uner v the Netherlands (Application no. 46410/99) [2006] ECHR 873 (18 October 2006); Maslov v Austria (Application no. 1638/03) [2008] ECHR 546 (23 June 2008) and ZH (Tanzania) [2011] UKSC 4.

28. These duties can be directly enforced by Tribunal judges in determining appeals. It is for the judge to decide on all the relevant evidence what the best interests of the child are in the particular circumstances of the case, whether there are compelling circumstances requiring admission, and whether if the case fails under the Immigration Rules, there remains a lack of respect for family life Article 8(1)).

Every Child Matters, Change for Children

2.34 *'The statutory duty in section 55 of the 2009 Act does not apply in relation to children who are outside the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention. In some instances international or local agreements are in place that permit or require children to be referred to the authorities of other countries and UK Border Agency staff will abide by these.'*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf

Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 (27 November 2013)

10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely ZH (Tanzania) (above), H v Lord Advocate 2012 SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

11. These principles arise from the United Kingdom's international obligations under the United Nations Convention on the Rights of the Child, and in particular article 3.1 which provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."That general principle of international law has influenced the way in which the Strasbourg court has interpreted the ECHR: Neulinger v Switzerland (2010) 28 BHRC 706, para 131.

Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) (6 March 2015)

16. Mr Jarvis could not argue against the suggestion that excluding the claimant interfered with his and his wife's right to respect for family life. We regard it as settled law that in an Article 8 balancing exercise the rights of all those closely affected, not only those of the claimant, have to be considered. It is our view that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. Undoubtedly the paradigm Article 8 entry clearance case concerns applicants seeking to join close family members for the purposes of settlement. However it cannot be excluded that where one party to a marriage is entitled to be in the United Kingdom a qualified obligation to facilitate spousal unification for the limited purpose of a short visit and sojourn may arise and does arise here. Mrs El-Sheikh wanted to return to her country of nationality (the United Kingdom) for a time and her husband wanted to be with her, not with a view to settlement but so that he could share her life and relationships in the United Kingdom. The refusal decision had a material impact on their right to enjoy family life. He did not want to settle but to visit her, and subject to permissible qualifications, he should be entitled to do that. Whilst it would almost certainly be proportionate to refuse him entry clearance if he did not comply with the rules his, and his wife's, desire to be together in her home area, albeit for purposes of a visit, are very human and understandable. Preventing that would not be a "technical or inconsequential interference" (see Sedley LJ in VW (Uganda) [2009] EWCA Civ 5) and should be permitted, subject to the proportionate requirements of immigration control.

17. We have no hesitation in saying that on the facts of this case the decision to refuse the claimant entry clearance interferes with his and his wife's private and family lives and the interference is of sufficient gravity potentially to engage the operation of Article 8. None of this was seriously disputed before us.

https://www.bailii.org/uk/cases/UKUT/IAC/2015/112.html

Quila & Anor, R (on the application of) v Secretary of State for the Home Department [2011] UKSC 45 (12 October 2011)

40. Third, *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798. A mother, father and their three sons were of Eritrean ethnicity but lived in the Netherlands and had acquired Dutch citizenship. When leaving Eritrea in 1989, the mother had left behind a daughter, then aged eight. When she was aged 15, an application was made for her to be allowed to enter the Netherlands in order to live with the family; but it was refused. The court held that, by the refusal, the state had violated the rights under article 8 of all six of its members. The court observed, at para 41 and para 42, that the asserted obligation of the state was positive, that "the boundaries between the state's positive and negative obligations under this provision do not lend themselves to precise definition" and that "the applicable principles are, nonetheless, similar". The minority view in *Gül* had become that of the majority. The court did not tarry to consider interference: it moved straight to justification.

…

43. Having duly taken account of the decision in *Abdulaziz* pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, in particular *Boultif* and *Tuquabo-Tekle*, are inconsistent with it. There is no "clear and consistent jurisprudence" of the ECtHR which our courts ought to follow: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at para 26, per Lord Slynn. The court in *Abdulaziz* was in particular exercised by the fact that the asserted obligation was positive. Since then, however, the ECtHR has recognised that the often elusive distinction between positive and negative obligations should not, in this context, generate a different outcome. The area of engagement of article 8 - in this limited context - is, or should be, wider now. In that in *Tuquabo-Tekle* the state's refusal to admit the 15-year-old daughter of the mother, in circumstances in which they had not seen each other for seven years, represented an interference with respect for their family life, the refusals of the Secretary of State in the present case to allow the foreign spouses to reside in the UK with the British citizens with whom they had so recently entered into a consensual marriage must a fortiori represent such an interference. The only sensible enquiry can be into whether the refusals were justified.

https://www.bailii.org/uk/cases/UKSC/2011/45.html

SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43 (IAC) (23 January 2020)

1. British citizenship is a relevant factor when assessing the best interests of the child.

2. British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up.

3. There is no equivalent to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in any provision of law or policy relating to entry clearance applicants.

4. In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.

5. When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality.

https://www.bailii.org/uk/cases/UKUT/IAC/2020/43.html

SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43 (IAC) (23 January 2020)

44. Mr Lindsay accepts that s.55 considerations are "capable in principle of forming a factor relevant to proportionality." In point of fact, it can be seen from GEN.3.1-GEN. 3.3 (cited above), that it is now [3] *part* of the Immigration Rules that "[i]n considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.3.1 or GEN.3.2. applies, the decision-maker *must* take into account, as a primary consideration, the best interests of any relevant child." (emphasis added). GEN.3.3.2 defines 'relevant child' to mean a person who is under 18 at the date of application and "(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application." Reflecting that these mandatory provisions have been put into practice, we note that the ECO refusal decision in this case states in its third paragraph that "[t]his decision takes into account as a primary consideration the best interests of any relevant child in line with section 55 of the Borders, Citizenship and Immigration Act 2009."

45. GEN. 3.3 (1)(b) and GEN. 3.2(2) clarify that the exceptional circumstances at issue relate to those which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights.

46. Moreover, even before the change to the Rules made in August 2017, it was well-settled that for the purposes of entry clearance decision-making, the best interests of the children were still be taken into account: see, e.g. *SM(Algeria)(Appellant) v Entry Clearance Officer, UK Visa Section* (Respondent) [2018] UKSC 9 at [19]; *MM(Lebanon*) at [109]; *Mundeba* [2013] UKUT 88 (IAC); *T (s.55 BCIA 2009 - entry clearance*) Jamaica [2011] UKUT 483(IAC).

Questions?

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