

UK Visa on basis of access to children

Jermaine, a Jamaican male, came to the UK as a dependant of his wife who has Indefinite Leave to Remain (ILR) in the UK. Jermaine was given 2 years leave to enter the UK and brought with him the couple's two minor children. The marriage failed during the two year probationary period due to the unreasonable behavior of the wife. Jermaine does not want to return to Jamaica and wants to know what his immigration options are.

When a spouse applies to join his settled sponsoring spouse in the UK, he will initially be given leave to enter the UK for a period of 2 years before he can apply for ILR. This period is called a probationary period. The justification for this concept is that one of the requirements for entry in order to permanently settle as a spouse is that the marriage must be subsisting and that the parties intend to live permanently with each other. A probationary period is therefore meant to test the intentions and resolve of the parties to live together. If the marriage fails, then the applicant would be unable to apply for ILR in the UK and ordinarily, should return to their country of origin.

Jermaine would therefore be unable to apply for ILR for this reason. But Jermaine might benefit through the children. The relevant paragraph is Rule 248A of the Immigration Rules.

Rule 248A came to being after the European Commission of Human Rights produced a report in the case of Hanna Yousef Abdulla, a Kuwaiti citizen, in which it stated that the UK government had breached Article 13 of the European Convention of Human Rights. Article 13 of the ECHR says:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Mr Abdulla had been refused a visa to enter the United Kingdom following the collapse of his marriage and, as a result, was unable to exercise rights of access to his child resident in the United Kingdom. There was no provision in the Rules at that time for the admission of divorced or legally separated parents to exercise access rights to their children. Mr Abdulla therefore had no effective legal redress or right of appeal against this anomaly and the UK were found to be in breach of Article 13 of the Convention. The United Kingdom was obliged to take measures and satisfy the Committee of Ministers that there would be no similar future breaches of Article 13 of the Convention.

The right of admission of divorced or legally separated parents to exercise rights of access to their children was therefore introduced into the Rules subject to a visa

requirement. Further, there is also now a right of appeal against a negative decision by an Entry Clearance Officer which constitutes an "effective remedy before a national authority".

Having created a Rule for parents to obtain a visa to exercise rights of access to a child resident in the United Kingdom, it became logical to also make provisions (effective from 2 October 2000) to allow parents already in the UK "leave to remain" in order to exercise rights of access and "indefinite leave to remain" on the basis of continuing rights of access.

Perhaps more importantly, these rights were also extended to apply to all parents, not just those who are divorced or legally separated. There is therefore provision now even for those parents who never married and who were living as unmarried partners prior to the relationship breakdown. This also covers civil partners and same-sex partners.

Prior to these changes, there were no provisions within the Rules for leave to remain and indefinite leave to remain applications on the basis of a parent exercising rights of access to a child. Applications for "further leave to remain" and "indefinite leave to remain" were considered on an exceptional basis outside the Immigration Rules.

Rule 248A therefore allows a parent to preserve and continue family life with his or her child, provided that the requirements of the Rules have been fulfilled. This is considered to be consistent with Article 8 of the European Convention for Human Rights which guarantees the right to the respect of a private and family life without unjustified interference by a public authority.

The requirements to be met by a parent applying for leave to remain are 10 in total, and among them the important requirement that the applicant must produce evidence that he has access rights to the child. This evidence can be in the form of:

- (a) a Residence Order or a Contact Order granted by a Court in the United Kingdom; or
- (b) a certificate issued by a district judge confirming the applicant's intention to maintain contact with the child; or
- (c) a statement from the child's other parent (or, if contact is supervised, from the supervisor) that the applicant is maintaining contact with the child;

These are meant to confirm the commitment of the parent and prevent applicants from attempting to enter or remain in the United Kingdom under false pretences.

Also note that there is a requirement that the other parent must either be a British citizen, or have indefinite leave to remain in the UK. Note also that to qualify for leave to remain under this provision, the applicant must already have existing leave in the UK. In our case, the two-year probationary period suffices. This ties in with the requirement that the Applicant must not have breached the immigration rules and/or has not been in the UK illegally prior to the application.

In exceptional circumstances and because this is an area involving children, there may be leeway to negotiate for discretion to be exercised by the Home Office. It is imperative in such cases to seek specialist legal advice prior to making any applications, particularly for those who have overstayed their leave or who are unlawfully in the United Kingdom.

Otherwise, the usual requirements to demonstrate ability for self-maintenance and accommodation without recourse to public funds apply for an ILR application.

Also note the additional requirement that Jermaine must show that there will be adequate accommodation for him and any dependants without recourse to public funds in accommodation which they own or occupy exclusively. This was the subject of a Tribunal decision which incidentally involved a Jamaican national, in the case of [*KJ \("Own or occupy exclusively"\) Jamaica vs SSHD \[2008\] UKAIT 00006 AIT*](#). The Tribunal had to decide on what is meant by "exclusively". It ruled that the requirement that the applicant "own or occupy exclusively" property does not carry any technical legal meaning of exclusive occupation. It said that what appears to be required is that there is somewhere that the person or people in question can describe as their own home.

Finally, it is important to note that at the end of just 12 months as a holder of this unique visa, Jermaine can apply for ILR under Rule 248D. He would need to demonstrate that he takes and intends to continue to take an active role in the child's upbringing; and that the child visits or stays with him on a frequent and regular basis and that he intends this to continue. The child has to be under 18 years of age. In addition, the ubiquitous requirement to have a sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom also applies in an application for ILR.

Anyone who thinks that their immigration status may be affected by this opinion should seek professional legal advice. At Genesis Law Associates, we specialise in all areas of immigration, asylum and nationality law.