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**CHAPTER 7 SECTION 1
PERSONS EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT
IN THE UNITED KINGDOM**

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ANNEXES

A. BACKGROUND NOTE

B. REFUSAL FORMULAE

- ◆ the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

** We have received legal advice that the requirement at Paragraph 246(iii)(b) of the Rules is now impossible to fulfil. Until such time as it is possible to amend the Rule, caseworkers and Entry Clearance Officers may accept in place of this option, a sworn affidavit from the non-applicant parent, (i.e. the U.K. resident parent or carer of the child), confirming that the applicant parent can have access to the child, and describing in detail the arrangements made to allow for this. If contact is supervised, then the statement must be sworn by the supervisor.

Please note that this is not the same option as exists at Para 248A(iii)(c) of the Rules for in-country cases. In the case of Para 246 cases, (i.e. those made at Posts abroad), this statement must be sworn before and attested by a legal officer.

2.2 The main points on which the immigration officer needs to be satisfied are that:

- ◆ a passenger who wishes to exercise access rights holds a valid entry clearance for this purpose;
- ◆ there is no reason to believe that false representations were made in order to obtain the entry clearance or that circumstances have changed since its issue; and
- ◆ refusal is not justified on the grounds of restricted returnability, medical grounds, grounds of criminal record, or that the person is the subject of a deportation order or that his exclusion is conducive to the public good.

2.3. Further guidance

The immigration officer will need to examine the passenger in the light of *all* the provisions of the Rules in this category where facts have come to light which may not have been available to the entry clearance officer, or there has been a change of circumstances and it is necessary to establish whether or not the entry clearance has been rendered invalid.

ANNEX A (below) provides background information about the introduction of this category into the Rules.

2.4. Granting leave to enter

Where a passenger holds a valid entry clearance for this purpose leave to enter should be granted for up to a maximum of 12 months on Code 1 (i.e.; the passenger should have sufficient time here to allow him to exercise access rights within or up to the maximum period allowed under the Rules).

2.5. INDECS

- O Other person on limited leave to enter

2.6. Refusal of leave to enter

- * Where a *non-visa national* seeks entry in this capacity without a valid United Kingdom entry clearance issued for this purpose, he should normally be refused entry under Paragraph 248 of HC 395.
- * A *visa national* seeking entry without a valid United Kingdom visa falls to be refused under Paragraph 320(5). See *Chapter 9, Section 2* to these instructions.
- * Where a passenger seeking entry in this capacity holds an entry clearance for this purpose, refusal may only be considered under Paragraph 321 (See *Chapter 9, Section 3* to these instructions).
- * In the case of a person returning to the United Kingdom from a temporary absence abroad, within a period for which he was previously given leave, reference *must* be made, before refusal, to *Chapter 1, Section 9, "Persons returning to resume previous leave"* of these instructions.

ANNEX B (below) provides examples of refusal formulae.

2.7. On entry refusal codes

- E4 Lack of required non-settlement entry clearance, including those set aside on grounds of misrepresentation, forgery, failure to disclose material facts or where a change of circumstances has removed the basis of claim to admission.
- Z1 Other reasons

2.8. Right of appeal and corresponding refusal form

There is no right of appeal against refusal of leave to enter in this category where no entry clearance is held [Section 60 (2) of the Immigration and Asylum Act 1999].

Form IS 82D should therefore be used.

The *"Port Instructions for on-entry asylum applications"* provides details of the appropriate forms to use in mixed asylum/non-asylum cases.

3. LEAVE TO REMAIN AS A PERSON EXERCISING RIGHTS OF ACCESS

The requirements to be met by a person seeking leave to remain in order to exercise access rights are set out in Paragraph 248A-F in Statement of Changes to Immigration Rules Cm4851 Sept 2000 and *must* be referred to when reading the following advice.

3.1. Key points

The main points on which the caseworker needs to be satisfied are that:

- ◆ (i) the applicant is the parent of a child who is resident in the United Kingdom; and
- ◆ (ii) the parent or carer with whom the child permanently resides is resident in the United Kingdom; and
- ◆ (iii) the applicant produces evidence that he has access rights to the child 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; and
- ◆ (iv) the applicant takes and intends to continue to take an active role in the child's upbringing; and
- ◆ (v) the child visits or stays with the applicant on a frequent and regular basis and the applicant intends this to continue; and
- ◆ (vi) the child is under the age of 18; and
- ◆ (vii) the applicant has limited leave to remain in the United Kingdom as the spouse or unmarried partner of a person present and settled in the United Kingdom who is the other parent of the child; and
- ◆ (viii) the applicant has not remained in breach of the immigration laws; and
- ◆ (ix) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and
- ◆ (x) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds.

3.2. Further guidance

ANNEX A provides background information about the introduction of this category into the Rules.

3.3. Granting leave to remain

A person who came here with a valid entry clearance for this purpose will have been granted leave to enter for a sufficient period (up to and including the 12 months maximum allowed) to enable him to exercise access rights.

3.4. EU/EEA Nationals and their Dependents

This section refers to non-EU/EEA Spouses, Civil Partners and Unmarried Partners of Settled EU/EEA Nationals, who are in the U.K. by virtue of a family permit and whose relationship with the EU/EEA National has broken down and who would not meet the requirements of 248A (vii) solely because they were admitted to the U.K. under European Treaty Law rather than under the Immigration Rules.

Where an EU/EEA National who is settled in the United Kingdom is residing here with their non-EU/EEA spouse, civil partner or unmarried partner, (hereafter all three categories will be referred to as “spouse” for the remainder of this sub-paragraph), and their spouse is in the United Kingdom by virtue of a European family permit and where the couple have a child & the relationship subsequently breaks down, caseworkers should ensure that when assessing any application by that spouse to remain in the United Kingdom in order to exercise access rights to the children of the marriage/civil/unmarried partnership by virtue of paragraph 248A, that they do not treat the spouse in a less advantageous way than they would have been treated had that spouse been admitted to the United Kingdom as a spouse under the Immigration Rules rather than under Treaty Law.

An example of this would be where an EU/EEA National is settled in the United Kingdom. S/he marries, undertakes a civil partnership or forms an unmarried partnership with a non-EU/EEA National & their spouse enters the United Kingdom by virtue of a European family permit. The union produces children and subsequently the relationship ends. Under the Immigration Rules, where the relationship ends before the end of the probationary period, (2 years for marriage, civil or Unmarried Partners), i.e. prior to there being any grant of ILR on the basis of the relationship, and the spouse applies for Leave to Remain in order to exercise access rights to the child(ren) under paragraph 248A, they would meet the requirement at Para 248A (vii), i.e. that they have limited leave as a spouse. However, people in identical circumstances but who have been admitted as spouses, civil or unmarried partners with a European family permit will not meet the requirement at para. 248A (vii) because of the exempt status of those residing in the United Kingdom by virtue of European Treaty Law. Therefore, for the purposes of applications made under 248A,

caseworkers should treat those who have been admitted to the United Kingdom with a European family permit on the basis of a marriage, civil or unmarried partnership with an EU/EEA National who is settled here, as fulfilling the requirement at 248A (vii). This does not exempt such a person from the need to fulfil all of the other requirements of para. 248A.

3.5. INDECS

X3 Extension - other reasons

3.6. Refusal of leave to remain

Chapter 9, Section 1 "Adverse decisions - General Guidance" provides important advice about the decision making process and should be consulted whenever an application falls to be refused.

If the applicant entered the United Kingdom with a valid entry clearance but no longer meets each of the requirements of Paragraph 246 of HC395 as amended by Cm 4851, the application will fall to be refused.

Refusal will be under Paragraph 248C of HC395 as amended by Cm 4851 with reference to paragraph 248A.

ANNEX B provides examples of refusal formulae.

3.7. INDECS

X6 Refusal - Other reasons

4. SETTLEMENT

4.1. Key points

The main points on which the caseworker needs to be satisfied are that:

- ◆ (i) the applicant was admitted to the United Kingdom or granted leave to remain in the United Kingdom for a period of 12 months as a person exercising rights of access to a child and has completed a period of 12 months as a person exercising rights of access to a child; and
- ◆ (ii) the applicant takes and intends to continue to take an active role in the child's upbringing; and

- ◆ (iii) the child visits or stays with the applicant on a frequent and regular basis and the applicant intends this to continue; and
- ◆ (iv) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and
- ◆ (v) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds; and
- ◆ (vi) the child is under 18 years of age.

4.2 **Further guidance**

ANNEX A provides background information about the introduction of this category into the Rules.

All applicants in this category must have completed a "probationary" period of one year as a person exercising rights of access to a child resident in the United Kingdom prior to consideration for settlement under the Rules. It is not envisaged that any circumstances should arise to allow an applicant to qualify for indefinite leave to remain as a person exercising rights of access within the Rules where the applicant has not completed this probationary period. Any cases where this arises should be referred to MMSR for advice.

4.3 **Granting indefinite leave to remain**

An applicant may be granted settlement in this category provided that all of the requirements of Paragraph 248D of HC 395 as amended by Cm 4851 are met. See Para 3.4 (above) regarding the position of EU/EEA Nationals.

4.4. **INDECS**

CODE..... - Settlement -

4.5. **Refusal of leave to remain**

Chapter 9, Section 1 "Adverse decisions - General Guidance", provides important advice about the decision making process and should be consulted whenever an application falls to be refused.

Refusal of indefinite leave to remain in this capacity is under Paragraph 248F of HC 395 on the grounds that each of the provisions of Paragraph 248D as amended is not met.

Caseworkers should remember that if it is decided to refuse an application for indefinite leave to remain in this capacity, the file must be referred to MSD OPU to note before the decision is finalised.

ANNEX B provides examples of refusal formulae.

4.6. **INDECS**

CODE..... - Refusal -