

**CHAPTER 7  
SECTION 1****PERSONS EXERCISING RIGHTS OF ACCESS  
TO A CHILD RESIDENT IN THE UK****BACKGROUND NOTE**

The inclusion of the leave to enter provision in the Rules became necessary following a report by the European Commission of Human Rights that in the case of HANNA YOUSEF ABDULLA, a Kuwaiti citizen, the United Kingdom had breached Article 13 of the European Convention of Human Rights. Article 13 of the Convention 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 was refused leave to enter the United Kingdom following the breakdown of his marriage and, as a result, was unable to exercise rights of access to his child resident in the United Kingdom. As there was no provision in the Rules for the admission of divorced or legally separated parents to exercise access rights to their children Mr Abdulla had no effective legal redress or right of appeal against our preventing him from exercising his access rights. The United Kingdom were found to be in breach of Article 13 of the Convention because there was no effective domestic remedy before a national authority for Mr Abdulla's application to be resolved.

To avoid a violation of the Convention the United Kingdom had to provide just satisfaction to the Committee of Ministers by taking measures to prevent any similar future breach of Article 13 of the Convention.

The admission of divorced or legally separated parents exercising rights of access to their children was therefore introduced into the Rules subject to an entry clearance requirement. ***In the event that the entry clearance is refused this will attract a right of appeal which, for the purposes of the Convention, will constitute an "effective remedy before a national authority"***.

Having created a Rule for parents to obtain "leave to enter" to exercise rights of access to a child resident in the United Kingdom, provisions were also made (effective from 2 October 2000) to allow parents "leave to remain" to exercise rights of access and "indefinite leave to remain" on the basis of continuing rights of access. The leave to enter provision was also extended to apply to all parents, not just those who are divorced or legally separated. This position was consistent with Article 8 of the European Convention of Human Rights (Right to respect for private and family life), which states that:

*"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in*

*a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Prior to the "leave to remain" and "indefinite leave to remain" provisions being incorporated into the Rules, any applications for "further leave to remain" and "indefinite leave to remain" were considered on an **exceptional basis outside the Immigration Rules**. No provisions existed within the Rules for indefinite leave to remain on the basis of a parent exercising rights of access to a child. The inclusion of the requirements for leave to remain and indefinite leave to remain will allow parents wishing to exercise rights of access to a child, to do so with the principles of the European Convention of Human Rights in mind. To this effect, a parent will be allowed to preserve and continue family life with a child, provided that the requirements of the Rules have been fulfilled.

A parent applying for leave to enter in order to exercise rights of access to a child resident in the United Kingdom must be able to prove that they have been given rights of access to that child. Residence orders or Contact orders granted by UK Courts, or 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 access, are taken as suitable evidence of access rights. (If contact is supervised, then the statement must be sworn by the supervisor). N.B. The Rule at Paragraph 246(iii)(b) continues to offer certificates issued by district judges confirming the applicant's intention to maintain contact with the child as an option, but legal advice is that this is now impossible. Therefore, until such time as the Rule can be amended, the sworn statement can be accepted instead. It is reasonable to expect parents to obtain such documents to prove that their intention is to enter the United Kingdom on the basis of exercising rights of access. This would confirm the commitment of the parent and prevent applicants from attempting to enter the United Kingdom under false pretences.

Similarly, a parent applying for leave to remain in order to exercise rights of access to a child resident in the United Kingdom must be able to prove that they have been given rights of access to that child. Residence orders and Contact orders granted by UK Courts are taken as suitable evidence of rights of access. (As stated above, the option mentioned in the Rules for providing a certificate issued by a district judge confirming the applicant's intention to maintain contact with the child is no longer possible. The Rule will be amended when time allows.) To qualify for leave to remain under this provision, a parent must have existing leave to enter or remain as a spouse, civil partner or unmarried partner. Because of this, such a person may also prove their rights of access by way of a written statement from their former partner, (the other parent of the child and the person who habitually cares for it), confirming that they are exercising access rights. If the contact is supervised, then a written statement from the supervisor confirming contact should be obtained by the applicant and provided to the BIA caseworker. Unlike the entry provision at Para. 246(iii)(b), there is no need for this statement to be sworn. It is reasonable to expect parents to obtain such documents to prove that their intention is to remain in the United Kingdom on the basis of exercising rights of access. This would confirm the commitment of the parent and prevent applicants from attempting to remain in the United Kingdom under false pretences.

Occasions may arise where referred cases involve an applicant who claims to have a foreign custody order, entitling that applicant to exercise rights of access in the United Kingdom. In

such instances, courts in the United Kingdom are not obliged to recognise foreign custody arrangements if it is not in the best interests of the child. The rules for such situations are complicated and depend on precisely which international conventions the state in question has signed up to. The requirement for the documents mentioned above to have been granted by UK Courts avoids such difficulties. Any parent who seeks to enter or remain in the UK on the basis of a foreign custody order should be advised to seek an order from an UK court.

A parent applying for indefinite leave to remain as a person exercising rights of access to a child resident in the United Kingdom must have been admitted to, or granted leave to remain in, the United Kingdom for 12 months in order to exercise access rights; and have completed a period of 12 months in that capacity. Evidence must be provided that the applicant is taking and continues to take, an active role in the child's upbringing and that the child stays with the applicant on a frequent and regular basis and that this will continue.

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