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## Children's Best Interests 3

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On 9 July 2012, the Immigration Rules (“the Rules”) changed. More information about these changes is provided by the “Family Migration – Change to Immigration Rules” information sheets [<http://tinyurl.com/blz7zg6>] and [<http://tinyurl.com/bluv mew>]. The Government has made clear its intention that, other than in exceptional cases, the best interests of a child will no longer provide a basis for a person to be permitted to come to or stay in the UK if the requirements of the new Rules are not met. This information sheet provides information about this intention. ILPA does not consider that the new Rules can lawfully achieve this intention.

### Government statements on the new Immigration Rules

When the new Rules were published, an Explanatory Memorandum (a short statement explaining the rules, which is not legally binding) was also published. That Memorandum stated:

*“The new Immigration Rules... reflect the duty on the Secretary of State under section 55 of the Borders, Citizenship and Immigration Act 2009 to ensure that immigration decisions are made having regard to the need to safeguard and promote the welfare of children who are in the UK. The assessment of the ‘best interests of the child’... has also been incorporated into the Immigration Rules.”* (paragraph 7.4)

On 19 June 2012, Damian Green MP, Minister for Immigration, said about the new Immigration Rules:

*“...we have reinforced our approach by bringing a consideration of the welfare or the best interest of children into the new immigration rules. In assessing that best interest, the primary question in immigration cases involving removal is whether it is reasonable to expect the child to leave the UK. The best interests of the child will normally be met by their remaining with their parents... I make the point that in these rules, exceptional factors are allowed for.”* (Hansard HC, 19 Jun 2012 : Column 822)

### Do the Rules reflect or incorporate children's best interests?

The Rules do not reflect children's best interests. The Rules set out particular thresholds and requirements, which if met may permit a child or parent to come to or stay in the UK. However, whether or not these thresholds and requirements are met in any particular case cannot of itself determine a child's best interests. For example, the Rules introduce the following thresholds and requirements:

- Where a child has lived continuously in the UK for at least seven years, the Rules state this may provide a basis on which he or she may be granted leave to remain (see the “Long Residence Rules 2” information sheet [<http://tinyurl.com/d7jz34y>]). Where a child has lived in the UK for at least the last seven years (or the child is British), the Rules state that this may provide a basis to permit the child's parent to remain in the UK (even where the parent cannot meet all the other requirements of the Rules), if it would not be reasonable to expect

the child to leave the UK.

- Where a child has lived continuously in the UK for at least seven years (or the child is a British citizen), the Rules state this may provide a basis not to deport his or her parent (where that parent has received a prison sentence of less than four years) if it would not be reasonable to expect the child to leave the UK and there is no other family member able to care for the child in the UK (see this month's "Deportation" information sheet).
- Where a child offender has lived at least half of his or her life in the UK, the Rules state this may provide a basis not to deport him or her (where he or she has received a prison sentence of less than four years) if he or she has no ties to the country to which he or she would otherwise be deported (see this month's "Deportation" information sheet).

However:

- The interests of a child who has been in the UK for less than seven years in one case may point more strongly to enabling that child to remain in the UK than the interests of a child, in another case, who has been in the UK for a longer period.
- The separation, possibly permanently, of a child from his or her parent is likely to be a matter of considerable importance, whether or not there is another family member able to care for the child, and whatever the length of any prison sentence.
- That a child offender has some ties to the country to which he or she may be deported, does not mean that country is a suitable place for him or her to go.

Thus, these thresholds and requirements of themselves have no regard to several relevant matters, such as the strength of children's ties to the UK, their educational and social development, and the importance of their family and wider relationships.

Where the requirements of the Rules are not met, the Government's position is that it may still be decided not to exclude a child or his or her parent from, or require them to leave, the UK. However, the Government has said that where the requirements are not met it will only be in 'exceptional' cases that Article 8 or the best interests of children will mean that a claim to come to or stay in the UK will be successful. However, in the words of Lady Hale in the Supreme Court, "*Exceptionality is a prediction, ... and not a test.*" (See this month's "Children's Best Interests 2" information sheet, see link below.) The duty upon the UK Border Agency, tribunals and courts, to consider the best interests of children in immigration cases is not reduced by the new Rules. Whether or not the Government's prediction (i.e. that it will be exceptional for a case to succeed where the requirements in the new Rules are not met) is correct should depend on the factual circumstances established in each case where the requirements in the Rules are not met, and not on the mistaken application of any 'exceptionality' test.

### **Are the Rules incompatible with children's best interests?**

This will likely be tested in court. However, any fixed rule is likely to be, if taken by itself, incompatible with children's best interests. A fixed rule cannot have regard to the wide variety of differing factors that may be relevant in any particular case. It remains important, therefore, that the UK Border Agency is able to make decisions outside the Rules where the best interests of children require this. However, the new Rules also establish much longer periods of uncertainty as to the future of family life in the UK (see the "Family Migration – Changes to Immigration Rules 2" information sheet). If the Rules are not met, the period of uncertainty will be even longer still. Extended periods of uncertainty are not in children's best interests.

### **Further information**

More information about children's best interests is available from this month's "Children's Best Interests 2" [<http://tinyurl.com/dyzqcrx>], the January 2011 "Children's Best Interests" [<http://tinyurl.com/cmkt55>] and February 2011 "ZH (Tanzania) Supreme Court Judgment" [<http://tinyurl.com/clalnal>] information sheets. More information about Article 8 is available from the "Article 8 No. 2" information sheet [<http://tinyurl.com/cezhxjh>].