



Home Office

# Late claims: certification under section 96 of the Nationality, Immigration and Asylum Act 2002

Version 1

Guidance on when claims that could have been made earlier can be certified under section 96 of the Nationality, Immigration and Asylum Act 2002.

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## **Late claims: certification under section 96 of the Nationality, Immigration and Asylum Act 2002**

This guidance tells you about when a protection or human rights claim that could have been made earlier, either at an appeal or in response to a section 120 notice, can be certified under section 96 of the Nationality, Immigration and Asylum Act 2002 so that there is no right of appeal against refusal.

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## Version control and contacts

This page tells you about the current version of the late claims: certification under section 96 of the Nationality, Immigration and Asylum Act 2002 and who to contact if you have any queries.

### Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email the appeals policy team.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the guidance rules and forms team.

### Clearance

Below is information on when this version of the guidance was cleared:

- version 1.0
- valid from 7 April 2014
- this version approved by Sally Weston, Deputy Director, Immigration and Border Policy Directorate Team
- approved on 27 March 2015

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[Nationality, Immigration and Asylum Act 2002](#)

[Immigration Act 2014](#)

[Keeling Schedule showing amended Nationality, Immigration and Asylum Act 2002](#)

## **Certification under section 96**

This page explains when section 96 of the 2002 Act can be used to prevent a right of appeal arising.

Section 96 of the Nationality, Immigration and Asylum Act 2002 removes the right of appeal against a refusal where the refusal was of a claim that could have been made earlier. Section 96 is intended to prevent claimants raising matters at the last minute to frustrate removal.

A case can be certified under section 96 (if the conditions are met to do so) regardless of whether the right of appeal notified or the section 120 notice served was under the 2002 Act before its amendment by the Immigration Act 2014 or after its amendment.

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## **Certification under section 96(1) – earlier rights of appeal**

This page explains how to consider whether a claim that should have been raised at an earlier appeal can be certified under section 96(1).

Section 96(1) of the 2002 Act states:

“(1) A person may not bring an appeal under section 82 against a decision (‘the new decision’) if the Secretary of State or an immigration officer certifies —

(a) that the person was notified of a right of appeal under that section against another decision (‘the old decision’) (whether or not an appeal was brought and whether or not any appeal brought has been determined)

(b) that the claim or application to which the new decision relates relies on a ground that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision.”

### **Process for considering certification**

There are four stages to considering whether a claim can be certified under section 96(1):

1. Was the claimant notified of a right of appeal under section 82 against a previous decision?
2. Does the new claim rely on a ground that could have been raised at the appeal against the earlier refusal?
3. Is there a satisfactory reason why the ground was not raised earlier?
4. Having regard to all relevant factors, is it appropriate to exercise discretion in favour of certification?

#### **1. Was the claimant notified of a right of appeal against a previous decision under section 82?**

This is a question of fact.

It is not relevant whether the claimant chose to exercise the right of appeal.

#### **2. Does the new claim rely on a ground that could have been raised at the appeal against the earlier refusal?**

If the facts or circumstances which form the basis of the new claim did not exist at the time the appeal against the previous claim was notified or heard, that claim could not have been raised at that appeal. For example, where the new claim relies on Article 8 family life following the birth of a child, if that child was not conceived when the appeal against the previous decision was notified or heard then it would not have been possible to raise that ground at that appeal.

In claims that evolve over time, such as a developing family life, some of the facts which form the basis of the new claim may have been in existence at the time the

appeal against the previous claim was notified or heard whereas others may not have.

You need to assess whether there has been a material change in the individual's circumstances since the time of the earlier appeal with that material change being something that could not have been raised earlier because it did not exist at the time. Where family life develops significantly, for example where the new claim relies on an established marriage or the birth of children who were not conceived at the time of the earlier appeal it may not be appropriate to certify. However, where the individual's circumstances have not changed except that time has passed, certification may be appropriate.

### **3. Is there a satisfactory reason why the ground was not raised earlier?**

A new claim cannot be certified just because it could have been raised earlier. If the ground could have been raised earlier, you must go on to consider the reasons why the matter was not raised at the earlier appeal, taking into account all relevant information, and whether any explanation provided is satisfactory.

Section 96 is not a means of punishing individuals by exposing them to a real risk of persecution, death or torture just because they may lie or give an incomplete version of their story at their first appeal if there was a satisfactory reason for them doing so.

The fact that an individual has lied or omitted to give information previously should be taken into account when deciding whether there is a satisfactory reason for not raising the ground earlier but it does not decide the issue. You must also consider whether there is a satisfactory reason for the lie or omission.

If a decision is made to certify, the decision letter must set out the factors that were taken into consideration and the reasons for concluding that there was no satisfactory reason for failing to raise the ground earlier.

You must consider the impact the explanation has on the credibility of the new claim. For example, in an asylum claim an explanation on reasonable but very weak grounds is given. If the weak explanation is inconsistent with a genuine fear of persecution you are entitled to conclude that the explanation was not satisfactory. For example if an individual said that they didn't raise Article 3 at their appeal because they forgot, this is a reasonable explanation but is inconsistent with someone who claims to be in fear of torture on return as it is unlikely that they would forget to raise that issue at appeal.

Contrast this with an explanation given in an asylum claim on reasonable but more substantial grounds where an individual did not raise certain issues at his appeal because he was too traumatised at the time to discuss them. The reason given for not raising the grounds earlier also supports the asylum/human rights claim. You are entitled to conclude that the explanation is satisfactory.

The failure to give any explanation or a satisfactory explanation does not mean that the case must be certified. You must proceed to the next step, the exercise of discretion, before reaching a conclusion on certification.

#### **4. Having regard to all relevant factors, is it appropriate to exercise the discretion in favour of certification?**

It is important to remember that even if the criteria in section 96(1)(a) to (c) are met, you are not obliged to certify the case. Certification is a discretionary power that should only be used where it is right to do so, having regard to all the facts of the case.

It is not sufficient just to say that consideration has been given to the exercise of discretion and the outcome of that consideration is that the case is certified. The decision letter must set out the factors taken into account when deciding whether to exercise the discretion to certify and the basis on which you concluded that that it was right to certify in that case.

Factors to be considered are the:

- prospects of success at appeal for the underlying claim, particularly where asylum and Article 3 issues are raised
- reason why the claim was not advanced in the original appeal
- impact of that explanation on the credibility of the new claim
- fact that a claimant may have lied previously should be taken into account but is not necessarily determinative

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## **Certification under section 96(2) – section 120 notices**

This page explains how to consider whether a claim that should have been raised in response to a section 120 notice can be certified under section 96(2).

Section 96(2) of the Nationality, Immigration and Asylum Act 2002 states:

“(2) A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies—

(a) that the person has received a notice under section 120(2),

(b) that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in a statement under section 120(2) or (5).

(4) In subsection (1) 'notified' means notified in accordance with regulations under section 105.

(5) Subsections (1) and (2) apply to prevent a person's right of appeal whether or not he has been outside the United Kingdom since an earlier right of appeal arose or since a requirement under section 120 was imposed.

(6) In this section a reference to an appeal under section 82(1) includes a reference to an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c 68) which is or could be brought by reference to an appeal under section 82(1).

(7) A certificate under subsection (1) or (2) shall have no effect in relation to an appeal instituted before the certificate is issued.”

### **Effect of amendments made by the Immigration Act 2014**

The effect of the amendments to sections 96 and 120 under the Immigration Act 2014, is that where a person has been served a section 120 notice, they have an ongoing duty to inform the Secretary of State as soon as reasonably practicable of any new or additional reasons to remain in the UK and if this is not done the claim may be certified under section 96(2).

The duty to inform the Secretary of State of any new reasons applies to anyone who needs leave to be in the UK but does not have it or anyone whose only leave in the UK is as a result of section 3C or section 3D of the Immigration Act 1971.

### **Process for considering certification**

There are four stages to considering whether a claim can be certified under section 96(1):

1. Did the claimant receive a section 120 notice in relation to an earlier application or claim?

2. Does the new claim rely on a ground that should have been, but was not, raised in response to that notice?
3. Is there a satisfactory reason why the ground was not raised earlier?
4. Having regard to all relevant factors, is it appropriate to exercise discretion in favour of certification?

### **1. Did the claimant receive a section 120 notice in relation to an earlier application or claim?**

This is a question of fact. The appeals and enforcement processes implemented under the Immigration Act 2014 mean that a section 120 notice should be served in every case at some point.

### **2. Does the new claim rely on a ground that should have been, but was not, raised in response to that notice?**

You should consider the same factors as set out in the guidance to certification under section 96(1) to identify whether the matter should have been raised earlier.

You will need to identify when the section 120 notice was served, when the ground raised in the new claim arose and when the ground was raised with the Secretary of State.

If there is a gap in time between the new claim arising and it being raised with the Secretary of State, you will need to proceed to the next step to consider whether it was raised 'as soon as reasonably practicable' and, if not, whether there was a satisfactory reason for failing to do so.

### **3. Is there a satisfactory reason for the ground not being raised as soon as reasonably practicable in response to the section 120 notice?**

There is no specific time limit within which a ground must be raised. If there is a gap in time between the new ground arising and it being raised with the Secretary of State, you will need to consider all the circumstances of the case to decide whether the delay was too long to be reasonable.

Where an individual is reporting regularly, it would be reasonable for the individual to wait until their next reporting event to raise a new ground.

If the individual is in detention it would be reasonable to expect the new ground to be raised promptly, having regard to all other circumstances.

### **What does 'as soon as reasonably practicable' mean?**

This depends on the individual's circumstances and the nature of the ground.

For an individual who needs assistance with understanding English documents and is raising a new ground based on English documents, a slightly longer period for raising the ground may be reasonable than for someone who is fluent in English.

If the reason given for the delay is that the individual says legal advice was needed before the new ground could be raised, you should consider on the facts whether it was reasonable to seek legal advice in order to make the claim and whether the delay caused was reasonable.

### **Did the individual delay before raising the new ground?**

The factors to be considered when deciding whether the ground was raised as soon as reasonably practicable will determine whether there was in the Secretary of State's opinion a delay in raising the ground. If it is considered that there was a delay, you must go on to consider whether a satisfactory reason has been given for the delay.

### **Was there a satisfactory reason for the delay?**

Where an claimant received a section 120 notice and was clearly aware of the new ground at that time but failed to disclose it, you are entitled to certify under section 96 if submissions are raised later that rely on that ground unless a satisfactory reason is given for the delay.

There is some overlap with the factors to be considered when deciding whether there has been a delay and establishing whether a satisfactory reason has been given for the delay.

For example, if the delay was caused by the need to seek legal advice and the explanation given is that the individual is not legally qualified, when considered on the facts it was reasonable to seek legal advice and the legal advice was given promptly, that is likely to be considered a satisfactory reason.

If an individual stated that they had delayed in raising their new ground because they were too busy with other matters, you would need to consider what those matters were and reach a conclusion on whether they were sufficiently serious to distract the individual from complying with their statutory obligation under section 120.

You must take into account all the facts and circumstances of the individual and the ground raised before reaching a conclusion on whether a satisfactory reason has been given. Matters such as personal or family illness or personal difficulty such as homelessness or lack of funds may amount to a satisfactory reason for a delay or may support an otherwise unsatisfactory reason such that it becomes satisfactory.

### **4. Having regard to all relevant factors, is it appropriate to exercise discretion in favour of certification?**

See the guidance above for section 96(1) for how to exercise discretion.

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## **Implementing a decision certified under section 96(1) or 96(2)**

This page tells you how to implement a refusal decision which is certified under section 96(1) or 96(2).

You must take the following action to implement a decision certified under section 96:

- draft a response using the appropriate refusal letter template on Doc.Gen
- follow instructions on minute sheet ASL.2899 – Asylum Claim (Refuse Outright)
- make sure that relevant computer systems are updated

A decision letter which certifies a claim under section 96(1) or 96(2) must address all 4 stages of the certification process.

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