Home Office

Safeguarding and establishing lawful residence (Immigration Enforcement)

Version 4.0

General instructions, immigration returns, enforcement and detention.

Contents

About this guidance

This guidance is intended for Immigration Enforcement staff who, at any point in their consideration of an individual's case, must be open to the possibility that there may be information yet to be discovered that supports a claim by that person to have a legal right of stay. It tells you how to seek evidence and evaluate it to ensure that no enforcement action is taken against a person who has, or may have, a potentially legitimate claim to be lawfully resident in the UK.

It tells you what to do if you:

- encounter a person who claims to be British or to have a right of abode or other claim to be exempt or lawfully resident but has no passport and there is no trace in Home Office records which verifies their claim
- have reasonable grounds to suspect that an individual may have a claim to be British or may be otherwise lawfully resident
- are asked to investigate the claim of a person claiming to be British, lawfully resident under section 1(2) of the Immigration Act 1971 or otherwise exempt from immigration control
- encounter an individual who has an outstanding application with, or has been refused by the Windrush Taskforce

In the context of this guidance deemed leave means that the individual has a legitimate claim to lawful, permanent residence. See Liability to enforcement action: claims to lawful residence.

This guidance does not provide information concerning foreign national offender returns cases that may be eligible for Windrush Taskforce consideration. See: Foreign national offender returns guidance.

NB: Although intended primarily as a source of information for Immigration Enforcement staff, this guidance is published both internally and externally and may be used as a reference by other Home Office staff and other bodies.

See also:

- Identity management (enforcement)
- Nationality and identity guide

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 Enforcement Policy inbox.

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.

Publication

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

- version **4.0**
- published for Home Office staff on **10 May 2024**

Changes from last version of this guidance

From 1 April 2024:

- individuals who were previously described as the IE operational grade of ‘Assistant Director’ will now be known as Grade 7 in this guidance
- individuals who were previously described as the IE operational grade of ‘Deputy Director’ will now be known as Grade 6 in this guidance - this is an equivalent title and there is no change to the grade level
- the IE operational grade equivalent of Grade 5 (SCS, Pay Band 1 (PB1)), will be referred to as Deputy Director (G5, SCS PB1)

Related content
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Liability to enforcement action: claims to lawful residence

This section tells you what you must do where a case is referred to you or if you encounter an individual who, although there is no evidence of their status in the UK, claims to be British, have a right of abode or other legal status in the UK. It provides information about how to consider cases where, at the outset, there may be little or no documentary evidence of the individuals status or nationality, and you need to establish whether the person has a well-founded claim to be British, or whether they are otherwise able to demonstrate their lawful residence.

In addition, it includes additional information about the procedures for individuals:

- to be referred into the Windrush Taskforce
- that are being considered by the Windrush Taskforce
- who have had their applications considered and refused by the Windrush Taskforce
- who may have been eligible for the EU Settlement Scheme (EUSS)

Whether a person is liable to immigration enforcement action, that is, action to secure their departure from the UK, is dependent on the guidance contained in: Initial consideration and assessment of liability to administrative removal and Enforced Removals – notice periods.

Lawful residence, in the context of this guidance, means a right to stay in the UK.

At all stages of planning, and progressing, enforcement action, you must consider whether there is reason to suspect that the individual may be lawfully resident. Consideration must be given during operational planning, in all cases where a suspected immigration offender is detected during visits and operations, or where a person has made a ‘human rights’, ‘no time limit’, or ‘returning resident’ visa application. You must consider whether there are grounds to suspect that the individual may be someone:

- with a claim to lawful residence, even where little evidence exists or they are unaware that they qualify
- whose case is being, or has been, considered as part of the Windrush scheme, see Checks during operational planning or initial encounter

Individuals encountered by, or notified to, Immigration Enforcement, or who have made an application to the Home Office for leave to remain or a ‘no time limit’, may claim to be British citizens, lawfully resident or otherwise exempt from immigration control, for instance, because they have been granted settlement. In most cases, evidence is available to corroborate or disprove the person’s claimed status but, in some circumstances, particularly those with very long residence, evidence may be more difficult to obtain. For further information about collating evidence of residence can see: Collating and considering further evidence of status.

Those who are unable to immediately provide proof of their status may not be able to do so for a variety of reasons. You must make a careful assessment to determine whether it is likely that the individual either:

- is attempting to conceal their actual status
- has a credible claim to be lawfully resident

In all cases, you must consider whether there are reasonable grounds to suspect that an individual may be a person who qualifies for lawful residence based on the provisions and concessions made at various times as immigration and nationality law evolved, see Reasonable grounds test. The fact that an individual may have applied for and been refused a status under the current immigration rules does not invalidate any pre-existing right that may exist. The individual may not have been aware of their entitlement when making their application.

In particular, you must be mindful that some people who have been long resident in the UK or who are descended from people born abroad with a claim to be British may have difficulty in demonstrating their lawful status in view of the complex changes that have occurred in UK nationality law and residence regulations. See Claims to long term residence.

If, following the preliminary assessment of all available evidence, there is some evidence or other 'reasonable grounds' to believe that the individual may lawfully have, or previously had, established ordinary residence, this must be fully investigated and the person's status considered in the light of the collation and assessment process described in Collating and considering further evidence of status.

If you encounter a case involving criminality and require further advice on whether it meets the auto-deport threshold, email Foreign National Offender Returns Command (FNORC) colleagues at FNORC Intake Team.

If you encounter someone who is being considered by the Windrush Taskforce or who has been refused by the Windrush Taskforce see:

- New enforcement action: identification of potential Windrush cases
- New enforcement action: previous / existing / pending application with Windrush Taskforce

Ordinary residence

The term ordinary or habitual residence is not defined in the Immigration Act 1971 except in the negative sense that a person is not to be treated as ordinarily resident if they are in breach of the immigration laws. The courts have interpreted ordinary residence as a regular habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences. Ordinary residence is established only if it is 'adopted voluntarily' for a settled purpose and provided it is lawful.

Ordinary residence: children

A child under the age of 16 shares the same place of ordinary residence as their parents. This was held to be the position in Re P(GE) (an infant) [1964] 3 All ER 977 even though the child in question was away at boarding school and later taken abroad by one of the parents without the consent of the other.

In Telles, (2695) the Immigration Appeal Tribunal held that a child did not cease to be ordinarily resident in the UK so long as their parents continued, despite temporary absences, to be ordinarily resident here.

The ordinary residence of older children, those whose parents are living apart and those who have been left in the care of other relatives may be more difficult to determine. If the child's age and means are such that they are capable of deciding for themselves where to live, their place of ordinary residence will be a separate consideration from their parents. Where a parent is no longer living with their child on a permanent basis you will still need to consider if there is sufficient contact for them to be considered as part of the same household. In such cases, it is more likely that the child will be ordinarily resident with the parent who is responsible for their day-to-day care.

For further advice on cases involving children, contact the Safeguarding Advice and Children's Champion (SACC).

Related content
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Claims to indefinite leave to remain or exemption from control

Claim to be exempt from control

Types of exemption

Any person with a right of abode (including all British citizens) as defined within the Immigration Act 1971 is exempt from immigration control. See Claim to British nationality or right of abode.

Other individuals may have a full or partial exemption from immigration control. Those with full exemption include diplomats. Those with partial exemption include members of NATO armed forces. Others may be subject to immigration control but exempt from the requirement to obtain permission to enter, for instance maritime and air crews.

See also IDI - persons exempt from control.

Exemption from deportation: certain Commonwealth citizens

In addition, under the provisions of section 7 of the Immigration Act 1971, a Commonwealth citizen, Pakistani national or a citizen of the Republic of Ireland who was ordinarily resident in the United Kingdom on 1 January 1973 (the date on which that Act came into force) may be exempt from deportation if they have been ordinarily resident for the 5 years before the deportation order came into force. When deciding whether a person is exempt from deportation, section 7(2) is relevant. The definition of ordinary residence contained in section 33(2) does not apply.

To benefit from this provision, the individual must be a Commonwealth citizen and have been a Commonwealth citizen on 1 January 1973.

See also:

- Claims to long term residence: Commonwealth citizens
- Commonwealth nations for details of membership and dates of membership
- Nationality policy: assessing ordinary residence

Claim to indefinite leave

Those who have been granted indefinite leave to remain (ILR) or ‘no time limit’ are subject to immigration control but do not require permission to enter. Whether an individual has a valid and continuing right to indefinite leave is dependent on whether they continue to meet the requirements of the Immigration Act 1971 in relation to their residence.

Article 13 of the Immigration (Leave to Enter and Remain) Order 2000 makes provision for certain types of leave to enter or remain not to lapse on leaving the common travel area, unless a person remains outside the UK for a continuous period of more than 2 years. This means that when a person with indefinite leave to enter or remain stays outside the UK for more than 2 continuous years, their leave automatically lapses as a matter of law. The exception to this was Commonwealth citizens settled in the UK when the Immigration Act 1971 came into force. Under section 1(5), they were protected from losing their indefinite leave from absences outside the UK until 1 August 1988 when section 1(5) was repealed. After this date, any ILR would be lost following an absence of 2 years or more. See Claims to long term residence: Commonwealth citizens.

However, provision is contained within the Immigration Rules for indefinite leave to be reinstated where a person can meet the requirements as a returning resident.

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Claim to British nationality or right of abode

Further information about types of British nationality and when and why they were introduced is contained in the Nationality guidance.

Right of abode

Section 1(1) of the Immigration Act 1971 confers complete exemption from UK immigration control on persons with the right of abode, subject to proof of that right. All British citizens have a right of abode but not everyone with a right of abode is a British citizen.

The right of abode is a statutory right which a person either has or does not have - depending on whether the conditions in section 2 of the Immigration Act 1971 are satisfied and subject to possible exercise of the power to remove the right of abode in section 2A of the Immigration Act 1971.

Nationality: right of abode guidance provides information about how an individual qualifies for right of abode and the documents they must produce to prove their entitlement. The guidance details those that had right of abode before and after 1 January 1983.

Types of British nationality

Under the British Nationality Act 1948 most British passports were endorsed ‘British subject: citizen of the United Kingdom and Colonies (BS: CUKC)’. The British Nationality Act 1981, enacted on 1 January 1983, replaced this status with the following forms of citizenship, based on the level of the holder's links with the United Kingdom.

British citizens (BCs)

All British citizens have the right of abode in the United Kingdom.

See Nationality guidance: British citizenship.

British overseas territories citizens (BOTCs)

British overseas territories citizens (BOTCs), other than those with a connection with the sovereign base areas of Cyprus, also became British citizens on 21 May 2002 under the provisions of the British Overseas Territories Act 2002).

Prior to 01 January 1983, British mothers were unable to pass on their nationality to a child born outside the UK and Colonies. The Nationality and Borders Act 2022 (commenced on the 28 June 2022) provides registration provisions for children of

BOTC mothers who would have become BOTCs had women been able to pass on citizenship in the same way as men.

Similarly, children born to unmarried British fathers could not acquire British Citizenship before 01 July 2006. The Nationality and Borders Act 2022 includes provisions which enable people born on or after 01 July 2006 to register as a BOTC if their mother and father were not married at the time of their birth.

People may register as a BOTC and a British citizen at the same time.

There are around 250,000 people living within British overseas territories (BOT), these are: **Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, the sovereign base areas of Akrotiri and Dhekelia, and the Turks and Caicos Islands**.

See Nationality guidance: British overseas territories citizens.

British overseas citizens (BOCs)

British overseas citizens (BOCs), generally speaking, have no automatic right to reside unless they do not hold another nationality. They require leave to enter the United Kingdom.

A passport issued to a BOC may contain any of the endorsements below:

- the holder is entitled to readmission to the United Kingdom
- the holder is subject to control under the Immigration Act 1971
- the holder's status under the Immigration Act 1971 has not yet been determined

Under paragraph 17 of the Immigration Rules, a BOC who holds a United Kingdom passport, wherever it was issued, and who satisfies the immigration officer that they have, since 1 March 1968, been admitted for settlement will be given indefinite leave to enter. The limit of 2 years outside the United Kingdom, set out in paragraph 18 of the Immigration Rules, does not apply in such a case. This provision is extended outside the rules to British Subjects and British protected persons by virtue of section 30(a) of the British Nationality Act 1981.

See Nationality guidance: British overseas citizens.

British protected persons (BPPs)

British protected persons (BPPs) are from territories previously under British protection. BPPs are subject to the immigration laws and must therefore obtain leave to remain in an appropriate route if they want to reside, work or study in the UK.

See Nationality guidance: British protected persons.

British subjects (BSs)

Until 1949, nearly everyone with a close connection to the United Kingdom was called a ‘British subject’.

All citizens of Commonwealth countries were British subjects until January 1983.

Since 1983, very few people have qualified as British subjects.

See Nationality guidance: British subjects.

British nationals (overseas) (BN(O)s

British nationals (overseas) status was created by Article 4(1) of the Hong Kong (British Nationality) Order 1986 which came into effect on1 July 1987.

See Nationality guidance: British national overseas.

Related content
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Claims to long term residence: Commonwealth citizens

Any person of any nationality found to have lived in the UK since before 1973, may have an automatic right to residence under section 1(2) of the Immigration Act 1971 based on the law that applied before that time. The greatest care and discretion is required in assessing claims for lawful residence based on a claim to have been resident in the UK before 1 January 1973 or born in the UK before 1 January 1983.

This section concerns Commonwealth citizens where additional factors apply. Before 1962, all Commonwealth citizens were entitled to British passports that allowed them free access to the UK. Although the absolute right of entry was removed by the 1962 Act, control of Commonwealth citizens remained relatively unrestricted until the Immigration Act 1971 came into force on 1 January 1973.

Between 1 January 1973 and 1 January 1983, when the British Nationality Act 1981 came into force, anyone born in the UK automatically acquired British citizenship. Children born to parents who were foreign nationals in the UK on a temporary basis (for example as students) may have returned back to their parent's home country but remained entitled to British citizenship.

See also:

- Exemption from deportation: certain Commonwealth citizens
- Commonwealth nations

Those settled on or before 1 January 1973

Those Commonwealth citizens present and ordinarily resident in the UK on 1 January 1973 are deemed to have settled status unless they either:

- were exempt from immigration control on this date
- had the right of abode

Some of these individuals were granted leave to enter at the border as children, often in line with their parents. These cases pre-date our records and it may be difficult to establish that they entered the UK legally and have been given permission.

Arrivals after 1 January 1973

Those who arrived here between 1973-1988 may be able to produce evidence in the form of previous passport endorsements or may otherwise qualify for leave to remain based on their family and private life in the UK, given that they have lived here for over 20 years.

Individuals who entered the UK after 1 January 1973 will not have deemed leave, that is, a legitimate claim to lawful permanent residence granted under statute, and, if there is no other evidence of them being settled here or otherwise having leave, they must apply for status.

Given they have resided in the UK for over 20 years they may, subject to an assessment of their suitability, qualify for leave to remain based on their family and private life in the UK if evidence of this can be established. See Establishing lawful residence.

Related content
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Checks during operational planning or initial encounter

See also Enforcement Planning Assessments.

In all cases, comprehensive checks must be made on available IT systems and other records to establish the status of the individual.

See also Collating and considering further evidence of status.

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Reasonable grounds test

In the context of this guidance, if there are ‘reasonable grounds’ to believe that there is a credible but unsubstantiated claim to lawful residence, no action may be taken to remove the individual while that claim is investigated.

Reasonable in law means fair, proper or moderate having regard for the circumstances, in this case including your knowledge and training. It is an objective test combined with grounds of ‘suspicion’ or ‘belief’. Decisions must be based on facts that other people (such as a court of law or your supervisors) could evaluate.

Reasonable grounds can only be provided by a general assessment of the known facts, the situation, as it is known at the time and a reasonable conclusion drawn

from the many possible circumstances that exist. Guesses, hunches and gut feelings are not considered to be reasonable.

What can be considered reasonable requires an objective assessment of:

- the circumstances in which the individual was encountered
- their actions (or unexplained failure to act)
- any supporting evidence available from Home Office databases or other records
- whether their statements are consistent with the descriptions of British status Commonwealth exemptions described in Claim to British nationality or right of abode or to have deemed leave under section 1(2) of the Immigration Act 1971
- the strength of available documentary evidence
- the degree to which any statements can be corroborated by family members, employers or other sources

Any information must be considered very carefully on its own merits and not dismissed on the basis of related criminality, fraud or evasion.

If, on the balance of probabilities, you consider that the person has given a credible account that requires further examination then you must not take any action to enforce their departure while that investigation continues.

New enforcement action: identification of potential Windrush cases

This section tells about actions in relation to individuals who are, or may be, having their cases considered in relation to the Windrush scheme.

Where a case has been investigated and there are no reasonable grounds to believe there is a credible, but as yet, unsubstantiated claim to lawful residence, a record of the case being considered for referral to the Windrush Taskforce, and the decision not to refer the case must be made on CID notes. This must include a brief summary of when and how the case was identified, the action taken, and the reasons by the decision maker for concluding that it is not a potential Windrush case.

When in doubt, you must escalate the case to your Grade 7 who will decide whether to refer the case to the Windrush Taskforce. You must refer out of hours decisions to the Immigration Enforcement duty Grade 5, SCS PB1.

See Referral to Windrush Taskforce.

If, following a preliminary assessment of available evidence, there is some evidence or other ‘reasonable grounds’ to believe that an individual may be lawfully present, this must be fully investigated and the person’s status considered in the light of all available evidence.

Where the individual appears to fall within the Windrush Scheme criteria set out below, you must escalate the case up your line management chain before taking any action.

The Windrush Scheme applies to Commonwealth citizens as defined within this document who:

- were settled in the UK before 1 January 1973 and have lived continuously in the UK since their arrival
- were settled in the UK before 1 January 1973 whose settled status has lapsed
- have right of abode (ROA) in the UK, and were ordinarily resident on 1 January 1973

The Windrush Scheme also applies to:

- a child of a Commonwealth citizen (including one who has a right of abode) who was settled in the UK before 1 January 1973, where the child was born in the UK or arrived in the UK before the age of 18, and has lived continuously in the UK since their arrival
- a person of any nationality, who arrived in the UK before 31 December 1988 and who has indefinite leave to remain

In all cases, the existence of a CID special condition flag relating to that individual indicates that their case is being considered as part of the Windrush scheme and that **no further enforcement action must be taken, except for those whose criminality reaches the auto-deport threshold or who entered the UK in breach of an extant deportation order**. In such cases, enforcement action may only proceed where there is a clear indicator that consideration by the Windrush Taskforce has been concluded and no leave has been granted, and the 90-day grace period has lapsed.

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Logging cases: service of notices
Cases warranting further investigation and referral to the Windrush Taskforce must not be issued with a Notice of Liability to Remove or other enforcement notice.

Cases that do not warrant further investigation can be issued with the relevant notice as per normal procedures. See: Initial consideration and assessment of liability to administrative removal guidance and Enforced removals – notice periods guidance.

Fingerprints must be checked in all cases **but not enrolled on to IABS**. This can help to establish identity and prevent fraud. Officers must explain the reasons for checking the fingerprints. See Identity management (enforcement).

Referral to Windrush Taskforce

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You must refer all cases to the Windrush Taskforce that meet the Windrush criteria. However, you must not contact the Windrush Taskforce to seek advice on progress of the application or seek information about the case consideration.

See Checking for completion of Windrush Taskforce consideration for further information on seeking advice.

New enforcement action: previous / existing / pending application with Windrush Taskforce

The Windrush Taskforce will not share information with Immigration Enforcement about those that apply for consideration of residence status. This includes those that contact the Windrush Taskforce speculatively but are found not to meet the published criteria for consideration. In these cases, no information of the contact with the Windrush Taskforce will be noted on CID or otherwise referred to Immigration Enforcement. Individuals encountered by Immigration Enforcement, (or who are referred to Immigration Enforcement by other government departments and agencies), whose initial approach to the Windrush Taskforce has been rejected are liable to normal consideration of enforcement action **provided that no further application to the Windrush Taskforce has been made**.

See also:

- Checking for completion of Windrush Taskforce consideration.
- Access to CID: Windrush Taskforce cases

Existing enforcement cases already under consideration by Windrush Taskforce

CID/Atlas checks must be made:

- as part of operational planning, see Enforcement planning assessments
- in all cases where a person encountered in the field is to be arrested or as soon as practically possible thereafter

This may apply in cases where, ordinarily, there is a presumption of arrest and detention, for instance, in what are apparently high harm cases or, more generally, cases where individuals are previously known to Immigration Enforcement. The existence of an extant Windrush flag on CID is an indicator that the individual has been screened for consideration under the Windrush criteria. All relevant circumstances are considered during the initial assessment including the individual's criminal record and history of immigration compliance.

Suspension of Immigration Enforcement action

Suspension of enforcement action

Except for those whose criminality reaches the auto-deport threshold or who entered the UK in breach of extant deportation order, enforcement action must cease when an individual is referred to the Windrush Taskforce by Immigration Enforcement, or when Immigration Enforcement has been notified by the Windrush Taskforce that an individual has approached them directly to apply under the scheme. You must not take further action on the case until it is tasked to you in line with existing business processes.

‘Enforcement action’ in the context of this guidance includes:

- a requirement to attend a reporting event
- serving a BAIL 201, removal notices, deportation orders, and refusal, cancellation or revocation decisions
- detain on reporting event and Immigration Compliance and Enforcement (ICE) team enforcement, compliance or reconnaissance visits
- absconder action, including tracing checks and sharing information with OGDs
- conducting an emergency travel document (ETD) interview or any other returns related interview

When you stop enforcement action, you must:

1. Contact the relevant Removal and Offender Management (ROM) team and cancel all planned reporting events, and if applicable, withdraw any taskings for emergency travel document (ETD) interviews or Detain on Reporting.
2. If applicable, withdraw any taskings to ICE teams for enforcement activity.
3. Close the open CID case type.
4. Record a summary of the action taken in CID notes.

You must check CID for all of these categories to ensure that no outstanding actions remain.

Suspension of civil penalty action

Notices of liability to a civil penalty issued to a landlord or employer prior to an application or referral to the Windrush Taskforce will remain in force pending a decision by the Windrush Taskforce. However, any decision to issue a civil penalty notice and demand for payment must not be issued pending a Windrush Taskforce decision. Where an individual is granted leave or residence rights by the Windrush Taskforce any outstanding civil penalty notice must be rescinded.

Resumption of Immigration Enforcement action

Checking for completion of Windrush Taskforce consideration

Case information relating to Windrush Taskforce applications will not be shared with Immigration Enforcement.

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Any data relating to the application beyond that stating whether the application has been concluded, will be removed from the case database once a decision is reached and before the access restriction is lifted.

Immigration Enforcement officers must not seek information concerning the detail of Windrush Taskforce applications by any means. Information disclosed in error must not be used for enforcement purposes or otherwise recorded in enforcement records. Officers are reminded that accessing data where there is no legitimate business need or accessing data that has been specifically proscribed as above, is potentially a breach of data privacy.

See also Data protection policy.

Resumption following Windrush Taskforce refusal

Immigration Enforcement may consider an individual's liability to be removed in cases whose applications have been refused by the Windrush Taskforce where they have not previously been subject of enforcement action **provided that the 90-day period following the refusal has elapsed, the individual has not sought a reconsideration and the restrictions have been lifted on CID**.

Immigration Enforcement may resume enforcement action 90 calendar days after the refusal of an application to the Windrush Taskforce (or 90 calendar days after the refusal of a reconsideration request) where a Notice of Liability to Remove was previously served.

The 90-day 'grace' period does not apply if the individual expresses their wish to make a voluntary return and registers their informed consent on form IS.101. See Voluntary departures.

Resumption where no application to the Windrush Taskforce is made

Cases referred by Immigration Enforcement to the Windrush Taskforce will be noted with a temporary CID special condition pending receipt of an application. If no application is received by the Windrush Taskforce within 90 days, enforcement consideration may resume. However, such cases must be treated with sensitivity. Where practical and possible, the individual must be asked to clarify why an application was not made and whether they understand the possible consequences of this.

Related content
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Collating and considering further evidence of status

Establishing lawful residence

In all cases where individuals claim to be exempt from immigration control and/or to have lawful immigration status the evidence must be considered with great care and consideration and every effort made to collate and fully assess all available records.

You must record all investigations made to confirm that all reasonable efforts have been made to establish the individual's immigration status. You must review all the available evidence and assess whether, when considered in the round, it is more likely than not that the person has right of abode or has been ordinarily resident to the extent necessary to satisfy the general considerations described in Liability to enforcement action: claims to lawful residence.

The onus of proof rests with the individual to prove their entitlement. This is the position in law, however, we have a duty to act fairly and proportionately. This means that to make an informed decision we actively pursue the information we need, as far as is reasonable and practicable. As well as asking individuals to provide evidence and information it may also be appropriate for us to pro-actively check any sources of information that mean we can establish the truth of a person's claim. This section also provides you with advice on the checks that can be made and other steps that might be considered to collate evidence.

See also Right of abode concerning required proof of right of abode.

Onus of proof

Section 3(8) of the Immigration Act 1971 states that:

> 'When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is.'

Although the onus is on the individual to prove they are British as claimed, where they have a passport, but we have doubts that they are the rightful holder we must undertake checks to confirm that they are British and have a valid claim to be exempt from immigration control. A decision to take enforcement action against an individual must be based on reasonable grounds to believe they are subject to immigration control and liable to removal if they have no basis of stay. For more information see: Initial consideration and assessment of liability to administrative removal.

In the case of a person claiming to be exempt from control, 'reasonable grounds' cannot be established unless all reasonable steps have been taken to examine the veracity of the claim. See Considering evidence.

Collating and considering further evidence of status provides information on the checks and enquiries that can be made or documents that may be helpful in establishing the person's status.

Balance of probability

The balance of probabilities is the civil standard of proof. It requires that the decision maker reaches the conclusion that it is more likely than not that a particular event occurred.

Lord Nicholls in re H (Minors) [1996] AC 563 at 586:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….. the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

In Selamolele v Makhado 1988 (2) SA 372 (V) at 374J–375B the approach to the question whether the onus has been discharged was dealt with as follows:

> "Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

Further investigation of immigration status

It is recognised that some people may have one or more protected characteristics as detailed within the Equality Act 2010. In particular, it is possible that some people with long residence may be elderly with associated physical and/or mental health issues. See Identifying people at risk.

The caseworker may consider at any stage whether further interview is necessary and must minute the case file detailing all investigations made, to confirm that all reasonable efforts have been made to establish the individual's immigration status and method of entry. They must review all the available evidence, including any non-co-operation by the individual. See Considering evidence.

Where the person has been served with notice of liability to removal, is not detained, and the investigator cannot determine the person's lawful entry, they may, in the first

instance, invite the person to complete an Immigration Status Questionnaire (ASL.1944). This must be sent to the person with accompanying guidance notes (ASL.1945) and a covering letter requiring the individual to complete detailing their entry into the UK.

These forms must not be used for those referred for consideration by the Windrush Taskforce.

The interview or questionnaire seeks to obtain some or all the following information:

- personal details including nicknames, aliases, birth details, schools, adoptive or foster parents' details
- details of parents and/or guardians, mother's maiden name, how long parents stayed in UK, why were they in UK
- how long the individual remained in UK, details of embarkation
- details of siblings, their whereabouts, date and place of birth, whether and if so where they have lived whilst in the UK
- educational history, schools attended, exams, dates of attendance
- employment history, including any casual or unpaid work
- full postal addresses, past and present, of person and family members, phone numbers, email addresses for family to check information
- details of entry to and periods of time in the UK including flight, passport, visa details:
  - obtain as many details about passports as possible including place of issue and process followed to obtain the documents
- the last arrival in UK, whether travelling alone, route taken, airline, what happened on arrival, customs cleared
- to where they went on return to UK
- addresses of, for example, doctor, dentist, bank, building societies, dates of registration or applications
- how they obtained the birth certificate produced now as evidence (if applicable)
- names of individuals who may be able to provide evidence to help prove their identity including private foster carers, medical professionals, teachers, religious leaders, previous employers, managers or work colleagues
- whether their description of entry to the UK is consistent with UK immigration law and practice during the stated period

To help further with identification, if notice of liability to removal is served and the person is detained under paragraph 18(2) of schedule 2 to the Immigration Act 1971 take:

- photographs
- fingerprints
- exact height
- distinguishing marks and/or features

Evidential searches: disputed residence cases

Where the individual has been arrested on suspicion of being an immigration offender:

- you may conduct a home search for any documents:
  - although the police have the power for this under section 44 or 45 of the UK Borders Act 2007 their own powers only allow them to search for evidence of offence
- check all property listed on custody record
- check details of anyone notified of arrest, this may give you a clue to other identities or nationalities

See also Search and seizure.

Considering evidence

See also reasonable grounds test.

When considering documents presented in respect of identity and nationality, officers must first consider whether the document can prove nationality, residence or right of abode. If an officer has doubts as to the authenticity of documentation, they must first refer the document to their local forgery officer or forgery team, which is usually located in the local Immigration Compliance and Enforcement (ICE) team. If circumstances exist where the local ICE team does not have a forgery officer, the document must be sent to the National Document Fraud Unit (NDFU). Even if a document is genuine, it may have been improperly obtained or issued. Particular attention must therefore be paid to both the authenticity of the documents and the circumstances in which they were issued and obtained.

Consideration must be given to the level of reliance that can be placed on the evidence. The principles outlined in the case of Tanveer Ahmed [2002] UKIAT 00439 must be applied in determining whether reliance can properly be placed on any documentary evidence. The Tribunal ruled that the burden of proof is on the applicant to show that documentary evidence submitted can be relied upon.

However, it is for the decision maker to consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. There may be occasions when the applicant holds conflicting documentary evidence of nationality, for example an identity card for one nationality and a passport for another. After examination, if the most recently issued document is found to be reliable, then this would normally be considered strong and significant evidence to establish nationality, but all relevant facts must still be taken into account and looked at in the round on a case by case basis.

The evidence must, on the balance of probabilities, provide either:

- direct evidence of right of abode or lawful, ordinary residence during the period

- a weight of combined circumstantial evidence, including documents and statements, that makes it more likely than not the individual was ordinarily resident in the UK during the relevant period
- a combination of these

The following lists are intended to provide examples of what types of evidence might be obtained and the weight to give them. The lists are not intended to be either prescriptive or comprehensive.

Direct evidence

Direct evidence, in the context of this assessment, includes official records and original documents:

- expired and valid passports or other national identity documents
- birth certificates issued by UK or other country
- Home Office letters and forms with original HO reference
- entry clearance documents
- officially issued UK identity documents including driving licences
- National Insurance card
- dated correspondence with other government departments and local government offices containing verifiable reference numbers
- licences, notifications and orders issued by a court, prison or parole authority
- corroborative data sources such as Police National Computer (PNC) or Home Office legacy systems
- electoral roll and council tax archives
- medical records that show registration and attendance with GP

Circumstantial evidence

Circumstantial evidence in this context includes things that tend to corroborate or give more weight to the person’s account:

- photographic evidence
- witness statements corroborating the claim to unbroken residence provided by a person with an established personal or official connection during the relevant periods
- school records, including reports and registers
- employment records, including pay slips, contracts of employment or other verifiable records
- travel ticket to the UK confirming previous in-bound travel
- housing records, including records of tenancy agreements, rent paid, maintenance contracts
- bills, including utilities and telephone
- financial records including bank statements showing a record of in-country transactions, HMRC statements of national insurance paid, P60s

It is not possible to itemise types of evidence that may singularly or collectively meet the necessary proof of residence and legal status. Some examples of direct evidence may alone provide strong evidence that the individual has been legally and normally resident during one of the periods under examination. However, for practical purposes, it is likely that no one document or statement will provide all necessary proof. Assessors must seek to establish that a pattern of evidence exists to support the claim. This will normally require that evidence from different sources and periods appear to corroborate the claim to the necessary standard.

Circumstantial evidence is less likely to provide strong evidence when considered in isolation, but multiple examples may together provide a convincing pattern of normal residence.

Some documents have little value in themselves as evidence to establish identity but may, when taken together, provide strong circumstantial evidence that proves an individual was normally resident during the relevant period. However, note that:

- birth certificates are not identity documents:
  - their value in establishing the individual's legitimate residence is enhanced where it is the original certificate rather than a copy
- driving licences do not prove nationality or status:
  - however, old driving licences may be useful in corroborating previous addresses
- National Insurance cards do not prove nationality or status:
  - however, the issue date may be a useful indicator if it was issued at age 16 and matches other records indicating age

Negative evidence

We may reasonably expect any individual to cooperate with enquiries that are designed to verify their claim. See Onus of proof. A refusal to cooperate or engage with the process does not in itself prove that the individual has no rights as claimed but may be considered a significant factor when considering all available information.

Negative evidence may be given more weight where there is no reasonable explanation for the absence of documents or witnesses.

Other examples of negative evidence that might be considered significant when considered in relation to other factors include:

- lack of credibility caused by contradictory statements
- deception employed other than for immigration purposes, for example by giving false details to the police about their ID or address
- documentary evidence that is believed to be altered or counterfeit
- discrepancies in information relating to key life events

It must however be noted that the individual's motives for employing deception may not be fully understood and that evident dishonesty does not mean it can be automatically assumed they have no legitimate right to residence or citizenship.

Related content
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Extant enforcement action: non-Windrush, disputed residence cases

This section concerns cases where enforcement action has been initiated, there are no grounds to believe the individual meets the Windrush scheme criteria but there is a subsequent claim to be lawfully resident.

See also Existing enforcement cases already under consideration by Windrush Taskforce.

Suspected identity fraud in disputed residence cases

Some individuals who are actually immigration offenders may claim to have been born in the United Kingdom before 1 January 1983 and that they are therefore entitled to British nationality. Commonly, such individuals will present a British birth certificate but are then unable or unwilling to provide any further evidence of UK residence, UK contacts or any other corroborative evidence. The individual may have fraudulently used the ID of another person (living or deceased).

Nothing in this guidance is intended to limit the proper investigation of identity fraud including the misappropriation of identity documents. In some cases, there may be reasonable grounds to suspect that the claim is vexatious and intended to conceal the individual's lack of legitimate status. An individual who is unable to provide evidence of their lawful entry to the UK may reasonably be suspected to be in breach of immigration law and liable to be detained and removed. **Evidence of document fraud is a strong indication that the individual has no legitimate claim to be resident but must not be treated as conclusive proof.** In all cases where the person claims they have a valid right to be considered legally resident, or there is other reasons to believe that they may have such a right, this must be fully investigated. See Establishing lawful residence. It is vital to establish to a high degree of probability that any claim is without foundation.

Detention: disputed residence cases

The absence of material evidence to make a positive identification of the person and/or their nationality, the date and method of their entry to the UK means that the most careful consideration must be given as to whether it is right to detain them under paragraph 16(2) of schedule 2 to the Immigration Act 1971 or section 62 of the Nationality, Immigration and Asylum Act 2002 while the investigation into their status continues.

Detention in such cases must be approved and reviewed in accordance with Detention - general guidance. Further consideration of whether to proceed with removal rests with National Returns Command (NRC). However, where there remains reasonable doubt as to whether the individual has a credible claim to lawful residence, the case must be treated as an ongoing investigation and the originating

Immigration Compliance and Enforcement (ICE) team must provide continuing support to NRC in Collating and considering further evidence of status.

Evidential enquiries: disputed residence cases

Where an individual is served with a notice of liability to removal and subsequently claims to have a right of residence or right of abode, an assessment must be made of whether there the reasonable grounds test considers it to be a credible claim.

Gathering evidence systematically and in accordance with good practice for interviewing and evidence gathering is vital to assist further action by other law enforcement agencies who may have an interest in the individual.

Authority to remove in disputed residence claims

Unless a voluntary departure disclaimer is signed and there is sufficient evidence to show that the person is acceptable to the country they wish to return to, authority to remove the individual must be sought from an Immigration Enforcement Deputy Director (Grade 5, SCS PB1).

In legacy cases, where a notice of liability to removal has been served without an interview, the case must be fully reviewed before removal directions are set to verify that no new information has come to light since the service of the notice and that there are no compassionate circumstances or other factors that might mitigate against removal. Where new evidence or facts have emerged that were not known at the time of the original decision or the grounds for treating the person as an illegal entrant are being challenged, then the person must be interviewed and the case reviewed to decide whether the person remains liable to removal.

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