



Home Office

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

Version 2.0

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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About this guidance

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 of that claim.

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 **2.0**
- published for Home Office staff on **12 June 2020**

Changes from last version of this guidance

The sections on the exercise of discretion have been expanded to provide greater clarity on the relevant considerations.

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Related external links

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

[Immigration Act 2014](#)

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

Certification under section 96

This section explains when a claim can be certified under [section 96 of the 2002 Act](#), which will mean there is no right of appeal against refusal of the claim.

[Section 96 of the Nationality, Immigration and Asylum Act 2002](#) removes the right of appeal against a refusal of a protection or human rights claim that could have been made earlier. Section 96 is intended to prevent claimants raising matters at the last minute to frustrate removal.

A claim 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.

Note that you must not consider certification of a late claim under section 96 until you have considered the substantive merits of the claim and decided to refuse it. This is the case even where the claimant was shown to have lied or given an incomplete version of their story at their first appeal.

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

This section explains how to consider whether a claim that should have been raised at an earlier appeal can be certified under [section 96\(1\)](#). You should not consider certification under section 96 unless and until you have decided to refuse the claim on its merits

Process for considering certification

Section 96 provides four steps when considering whether a claim should be certified under section 96(1):

1. Was the claimant notified of a right of appeal under section 82 of the 2002 Act against a previous decision to refuse a claim?
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 certify the claim?

Step 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 or not the claimant chose to exercise the right of appeal.

Step 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 ground could not have been raised at that appeal. For example, where the new claim relies on Article 8 ECHR (right to respect for private and 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, for example there was family life at the earlier appeal but the claim is based on developments since that appeal, 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 (such as the fact of the family life) whereas others may not have (such as that a child of the family has developed a serious medical condition).

You need to assess whether there has been any 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.

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

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

If you are minded to certify that the claim is late, you must check that the claimant has been given the chance to explain why it was not raised sooner. For example, if there has been an interview concerning the new claim then any reasons for lateness should have been explored then. If the claimant has not had the chance to explain, you must write to them. In your letter, you must explain why you are minded to certify that their claim is late and invite them to respond. You must give them a reasonable time in which to do so and, if they wish, to provide evidence that they could not have raised the new grounds in the previous appeal. A period of 14 calendar days is likely to be enough time for a response to your letter, although this may vary depending on the individual circumstances.

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 is not in itself decisive. You must also consider whether there is a satisfactory reason for the lie or omission.

You must consider any explanation given by the claimant in the context of the new claim, and again you must ensure that the claimant has had the chance to explain. For example if the claimant says that they didn't mention at their asylum appeal that they had previously been tortured because they forgot, but this is inconsistent with the determination which shows that the claimant did give evidence about mistreatment at their appeal, it may not be regarded as a satisfactory reason as it is unlikely that in describing their mistreatment they would forget to say that they had been tortured.

Contrast this with the case where the claimant provides medical evidence that explains they did not mention they had been tortured at the earlier appeal because they were too traumatised at the time to discuss it. Whether the explanation is a satisfactory reason will depend on the circumstances of the particular case, but you could conclude that it is.

If a decision is made to certify, the decision must set out the factors that were taken into consideration when deciding to certify and the reasons for concluding that there was no satisfactory reason why the ground was not raised earlier.

A useful way to consider whether you have properly considered whether there are satisfactory reasons why the ground was not raised earlier is to ask yourself whether

anyone looking at your decision would understand your reasons for finding that the claim was made late and there was no satisfactory reason for the delay.

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.

Step 4. Having regard to all relevant factors, is it appropriate to certify the claim?

Even if the criteria in section 96(1) are met, you are not obliged to certify the claim. 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 claim is certified. The decision 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:

- merits of the underlying claim
- prospect of success at appeal: a claim that raises protection issues and has a realistic prospect of success (see [further submissions](#)) should not normally be certified
- 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, which should be taken into account but is not necessarily determinative

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Certification under section 96(2) – section 120 notices

This section 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\(2\)](#). You should not consider certification under section 96 unless and until you have decided to refuse the claim on its merits.

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 when the claim is refused it 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 of the Immigration Act 1971](#).

Process for considering certification

There are four steps to considering whether a claim should be certified under section 96(2):

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?

Step 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 mean that a section 120 notice should be served in every case at some point but you will need to check the casework system as the onus is on us to prove this.

Step 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 ground 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 ground 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.

Step 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, including any explanation offered by the claimant.

If you are minded to certify that the claim is late, you must check that the claimant has been given the chance to explain why it was not raised sooner. For example, if there has been an interview concerning the new claim then any reasons for lateness should have been explored then. If the claimant has not had the chance to explain, you must write to them. In your letter, you must explain why you are minded to certify that their claim is late and invite them to respond. You must give them a reasonable time in which to do so and, if they wish, to provide evidence that it would not have been reasonably practicable to raise the new grounds sooner. A period of 14 calendar days is likely to be enough time for a response to your letter, although this may vary depending on the individual circumstances.

What does 'as soon as reasonably practicable' mean?

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

For an individual who needs assistance with understanding English 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 being obtained before the new ground was raised, you should consider on the facts whether it was reasonable to seek legal advice in order to make the claim, which it usually would be, and whether the delay caused by seeking that advice was reasonable.

If 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 a claimant received a section 120 notice and was clearly aware of the new ground at that time but failed to raise it, you are entitled to question why the ground was not raised at that point, 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.

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 important to distract the individual from complying with their statutory obligation under section 120 and, if so, for how long.

You must take into account all the facts and circumstances of the individual and the ground raised before reaching a conclusion on whether there is a satisfactory reason for any delay. 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.

Step 4. Having regard to all relevant factors, is it appropriate to certify the claim?

See [the guidance for section 96\(1\)](#) for how to consider discretion.

In addition, when considering certification under section 96(2) the extent of any delay and the context of any delay will be relevant. For example, where a person says they were seeking legal advice but made the claim within a week of receipt of the section 120 notice, it may not be appropriate to certify, but where a person who is detained for removal and served with a section 120 notice does not make a claim until they are on the steps of the plane it may be appropriate to certify.

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

This section 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 (currently on the Document Generator)
- in protection cases, 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 four steps in the certification process.

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