



Home Office

# Rights of appeal

Version 8.0

Guidance on when there is a right of appeal against decisions in immigration cases, including mechanisms to prevent repeat rights of appeal and prevent delay from appeals against unfounded claims.

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# About this guidance

This guidance tells you about rights of appeal.

This guidance provides information on situations when there is a right of appeal against decisions in immigration cases, including mechanisms to prevent repeat rights of appeal and prevent delay from appeals against unfounded claims.

It is based on the following legislation:

- Parts 5 and 6 of the [Nationality, Immigration and Asylum Act 2002 \(The 2002 act\) as amended](#)
- [Immigration \(European Economic Area\) Regulations 2016](#)

## 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 and publication

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

- version **8.0**
- published for Home Office staff on **31 January 2020**

## Changes from last version of this guidance

The guidance has been updated to reflect the rights of appeal against decisions made under the EU Settlement Scheme.

### Related content

[Contents](#)

### Related external links

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

[Immigration Act 2014](#)

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

# Summary of the rights of appeal guidance

This section is a summary of the guidance on rights of appeal.

This guidance is about appeal rights following implementation of the Immigration Act 2014. References to legislation are to the provisions as amended by the Immigration Act 2014 unless otherwise stated.

Rights of appeal exist against the following decisions:

- refusal of a human rights or protection claim and revocation of protection status - appeal rights are in Part 5 of the Nationality, Immigration and Asylum Act 2002 (the 2002 act)
- refusal of a visa and refusal to vary leave to remain, in some situations, where the application was made before the Immigration Act 2014 was in force
- refusal to issue a European Economic Area (EEA) family permit as well as certain other EEA decisions where appeal rights are in Regulation 36 of the Immigration (European Economic Area) Regulations 2016
- deprivation of citizenship whereby Section 40A of the British Nationality Act 1981 applies

Where there is no right of appeal, it may be possible for a person to apply for an administrative review of a refusal of an application if it is an eligible decision and it is alleged that a case working error has occurred. These concepts are defined in [Appendix AR of the Immigration Rules](#) and the guidance on Administrative review.

The appeals system contains a number of controls to prevent abuse of the system. In particular there are mechanisms to prevent repeat representations giving rise to repeat appeals, late claims giving rise to late appeals that delay removal and deportation, and unfounded claims giving rise to an appeal that delays removal.

Unless certified as a national security case under section 97 and 97A (when the right to appeal is to the Special Immigration Appeals Commission), appeals are made in the first instance to the First-tier Tribunal which can allow the appeal or dismiss it.

The grounds on which an appeal can be brought are set out in section 84 and in summary provide that the appeal can only consider the refusal of the claim made.

Section 85 sets out the matters the Tribunal can consider - see [Matters before the Tribunal](#). The Tribunal can only consider a new matter, which has not been considered by the Secretary of State (SSH), if the SSH has given the Tribunal consent to do so. A new matter should not be raised before the Tribunal unless the SSH has had a chance to consider the new matter.

Section 92 sets out where an appeal will take place. It should be read together with sections 94 and 94B which relate to certification when an appeal that would otherwise take place in the UK must be lodged after the appellant has left the UK.

Section 96 provides that where the refusal of a claim would ordinarily result in a right of appeal, there will be no right of appeal if the claim should have been made earlier. Section 96 works together with section 120 which imposes an ongoing duty on individuals to raise new matters with the SSHD as soon as reasonably practicable after they arise.

### **Related content**

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# Appeal rights

This section sets out all the circumstances in which a person can have a right of appeal under immigration legislation where the Immigration Act 2014 applies.

Under section 82 of the Nationality, Immigration and Asylum Act 2002 a person may appeal to the Tribunal where a decision has been made to either:

- refuse a protection claim
- refuse a human rights claim
- revoke protection status

See guidance for [transitional appeals](#) for details of cases where the Immigration Act 2014 does not apply on or after 6 April 2015.

## Related content

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# Protection claim

This section explains what amounts to a protection claim.

The definition of a protection claim is a claim that removing the claimant from the UK would breach our obligations:

- under the Refugee Convention
- in relation to persons eligible for humanitarian protection

A protection claim includes asylum claims and claims from those who may fall outside the Refugee Convention but believe they qualify for humanitarian protection because, if removed from the UK, they would be at risk of serious harm as defined in paragraph 339C of the Immigration Rules.

A protection claim can be made while the applicant has leave under section 3C of the Immigration Act 1971 as a consequence of an ongoing appeal against the refusal of another application.

A person has protection status if they are granted leave to enter or remain in the UK as a refugee or as a person eligible for humanitarian protection.

The Asylum Policy instruction Assessing credibility and refugee status sets out that where a person does not qualify for refugee status, you must then consider whether the person qualifies for humanitarian protection. However, where an asylum claim is granted, you do not need to consider whether the person is eligible for humanitarian protection.

Where an asylum claim is refused but humanitarian protection is granted there is a right of appeal against the refusal of asylum on the basis that the person ought to have been granted refugee status. This recognises the fact that the grant of refugee status provides benefits to the applicant additional to those conferred by the grant of humanitarian protection.

Where an asylum claim results in a grant of refugee status, the protection claim has succeeded at its highest level and therefore there is no right of appeal on other protection grounds.

## Related content

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# What is a human rights claim?

This section explains what amounts to a human rights claim and how you identify and consider such claims.

## How to identify a human rights claim

### In the UK: application under the Immigration Rules

The applications listed in this section and made under the Immigration Rules are human rights applications and the starting position is that there is a right of appeal against refusal.

Where paragraph 353 (further submissions) applies and the further submissions do not amount to a fresh claim or where the claim is certified under section 96, there will be no right of appeal, and if certified under section 94 or 94B no right of appeal until the person has left the UK.

These applications can be made while the applicant has leave under section 3C of the Immigration Act 1971 as a consequence of an ongoing appeal against the refusal of another application.

No other applications under the rules other than those in this section can be made where the applicant has 3C leave. If the applicant withdraws their appeal, they will no longer be prevented from making any other application under the rules. Alternatively, the applicant may make an application once their appeal rights are exhausted.

The relevant applications are those made under:

- Paragraph 276B (long residence)
- Paragraphs 276ADE(1) or 276DE (private life)
- Paragraphs 276U and 276AA (partner or child of a member of HM Forces)
- Paragraphs 276AD and 276AG (partner or child of a member of HM Forces), where:
  - the sponsor is a foreign or Commonwealth member of HM Forces and has at least 4 years' reckonable service in HM Forces at the date of application
- Part 8 of these Rules (family members) where:
  - the sponsor is present and settled in the UK, **not** paragraphs 319AA to 319J (points-based system (PBS) dependents), paragraphs 284, 287, 295D or 295G (sponsor granted settlement as a PBS Migrant)
- Part 11 (asylum)
- Part 4 or Part 7 of Appendix Armed Forces (partner or child of a member of HM Forces) where:
  - the sponsor is a British Citizen or has at least 4 years' reckonable service in HM Forces at the date of application

- Appendix FM (family members), **not**: section BPILR (bereavement) or section DVILR (domestic violence)

### **Refusal notice to be served: Asylum (except in deportation cases)**

- ASL.0015.ACD.IA (refusal of protection with a right of appeal with section 96 option to certify)
- ASL.1000.IA (refusal of protection where the applicant failed to attend the screening interview – decision not certified)
- ASL.1006.IA (protection refusal of dependents with section 96 option)
- ASL.1956 (refusal of protection certified under section 94)
- ASL.2704. (rejection of further submissions under paragraph 353)

### **Refusal notice to be served: all other human rights applications**

- ICD.3050.IA (refusal with a right of appeal)
- ICD.1182.IA (refusal with section 94 certification)
- ICD.3051.IA (refusal with no appeal because not a fresh claim under paragraph Rule 353)
- ICD.3052.IA (refusal with no appeal because of section 96 certification)

## **In the UK: application outside the Immigration Rules**

Applications for leave to remain outside the rules on human rights grounds are made on forms FLR(O) for further leave to remain (LTR) and SET(O) for indefinite leave to remain (ILR).

It is important to note that these forms are only to be used for human rights applications where there is no specific form available. For example, neither the FLR(O) nor the SET(O) should be used for applications under Appendix FM or on the private life route under paragraphs 276ADE and 276DE. Where the applicant uses the wrong form, you must reject the application as invalid under paragraph 34 Immigration Rules.

These forms are multi-purpose and not all applications made on these forms are human rights claims.

The FLR(O) and SET(O) forms require the applicant to tick a box indicating which application they are using the form for. Only one box may be ticked.

It is only where the applicant ticks the box 'Other purposes or reasons not covered by other application forms' that it should be treated as a human rights claim. Though even if this box is ticked, the application may not be a human rights claim.

In order to decide whether the application is one for a human rights claim, you should consider the following questions:

- does the application say that it is a human rights claim?

- does the application raise issues that may amount to a human rights claim even though it does not expressly refer to human rights or a human rights claim?
- are the matters raised capable of engaging human rights?

## Determining if a human rights claim has been made

For the purposes of Part 5 of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims), a human rights claim is defined as a claim made by a person that to remove them from or require them to leave the UK or to refuse him entry into the UK would be unlawful under section 6 of the Human Rights Act 1998.

The form does not ask the applicant to indicate whether the claim being made is a human rights claim. You will need to identify whether a human rights claim is being made so that you know whether to serve a section 120 notice on receipt of the application and whether a refusal will attract a right of appeal.

Does the application say this is a human rights claim? If so, does the application set out why this is a human rights claim? An application may say no more than:

- I am making a human rights claim
- it is a breach of my rights under Article 8 not to grant me ILR

The claim needs to be particularised in order to be considered. If nothing more is provided than a bare statement of this sort, it is not a human rights claim and should be refused with no right of appeal.

In order for an application to raise human rights, it is not necessary for the application form to say so. If the application does not state that it is a human rights claim you will need to consider what the applicant's reasons are for wanting to remain in the UK and decide whether those reasons amount to a human rights claim.

For example, an applicant seeks leave to remain on medical grounds, to receive medical treatment or has a fear of return or of an undignified death because medical facilities in their home country are unavailable, unaffordable, inaccessible or of a lower standard than the UK. This should be considered as an Article 3 and Article 8 medical claim. For further guidance see related link: [Recognising an implied claim](#).

A further example would be where an applicant states that they are engaged in court proceedings and need to remain in the UK in order to conduct them or to appear as a witness. This should be considered as an Article 6 claim.

It is not possible to give a full list of the facts that may amount to a human rights claim as individuals may raise any facts in any combination. Considering human rights claims provides a list of all human rights.

You should ask yourself whether, having regard to the human rights protected by the European Convention on Human Rights (ECHR), is it obvious that the application

relates to one of those rights. If it is obvious that the application relates to one of these rights, a human rights claim may have been made.

## Determining if human rights are engaged

If the claim raises human rights, consider whether the claim made is capable of engaging the human right relied on. This will involve examination of the merits of the claim.

You should refer to considering human rights guidance which sets out how to undertake a substantive examination of the merits of human rights claims.

If no human rights claim has been made, the application should be refused with no right of appeal and no right to seek administrative review. You should serve notice ICD.4985.

It is not generally possible to make a human rights claim as part of an application made under the Immigration Rules except where the application is deemed to be a human rights claim, or the claim is made in a section of the application seeking further grounds to enter or remain in UK. See the section on [how to identify a human rights claim](#) for more information.

### Notices to be served

If the claim made does engage the human right relied upon, a human rights claim has been made. If the claim is refused, the appropriate notice from the following list should be served (except in deportation cases):

- ICD.3050.IA (refusal with a right of appeal)
- ICD.1182.IA (refusal with section 94 certification)
- ICD.3051.IA (refusal with no right of appeal because not a fresh claim under paragraph 353)
- ICD.3052.IA (refusal with no right of appeal because of section 96 certification)

## In the UK: applicant is detained

Any human rights claim must be made direct to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention. See [paragraph GEN.1.9 Appendix FM](#), of the Immigration Rules.

There is no requirement to complete a specific form or follow a specific process. Where removal is imminent, it is more likely that the applicant will not be required to follow a formal process to make a claim.

The individual to whom the claim is made should pass the submissions made to a member of Home Office staff to consider the questions in [Determining if a human rights claim has been made](#) to establish whether a human rights claim has been made.

## Notices to be served

If a human rights claim has been made, its refusal will attract an appeal right. If removal is imminent, consideration should be given to certification of the claim under section 94 (clearly unfounded) or section 96 (late claim). The appropriate notice from the following should be served (except in deportation cases):

- ICD.3050.IA (refusal with a right of appeal)
- ICD.1182.IA (refusal with section 94 certification)
- ICD.3051.IA (refusal with no right of appeal because not a fresh claim under paragraph 353)
- ICD.3052.IA (refusal with no right of appeal because of section 96 certification)

## Overseas: applications under the Immigration Rules

The following claims made under the Immigration Rules are human rights applications and attract a right of appeal against refusal:

- Paragraphs 276U and 276AA (partner or child of a member of HM Forces)
- Paragraphs 276AD and 276AG (partner or child of a member of HM Forces) where the sponsor:
  - is a foreign or Commonwealth member of HM Forces
  - has at least 4 years' reckonable service in HM Forces at the date of application
- Part 8 of these Rules (family members) where the sponsor:
  - is present and settled in the UK
  - has refugee or humanitarian protection status in the UK, but not under paragraphs 319AA to 319J (points-based system (PBS) dependents), paragraphs (281-283), (sponsor granted settlement as a PBS Migrant)
- Part 4 or Part 7 of Appendix Armed Forces (partner or child of a member of HM Forces) where:
  - the sponsor is a British Citizen or has at least 4 years' reckonable service in HM Forces at the date of application
- Appendix FM (family members), but not section BPILR (bereavement) or section DVILR (domestic violence)

Where a human rights claim has been made and there is a right of appeal serve refusal notice GV51 (refusal with right of appeal).

This guidance does not cover decision-making where the application is made under one of these routes. Entry clearance officers (ECO) should refer to Appendix FM guidance, family applications transitional cases (Part 8) guidance or armed forces guidance.

## Overseas: applications outside the Immigration Rules

Outside the UK, applications based on a human rights claim outside the Immigration Rules must form part of a valid application for entry clearance.

The list under section [overseas: application under the Immigration Rules](#) gives the forms available for human rights applications under the rules. Where applicants cannot find an appropriate form or believe that they cannot meet the requirements of the Immigration Rules, they must contact their local visa application centre.

If the applicant cannot meet the requirements of the rules, the local visa application centre should tell them to complete the visitor form (VAF1 A to K).

Part 9 of a visitor form allows the applicant to set out any other information that should be considered as part of the application. This can include a human rights claim that leave should be granted outside the rules.

## Decision making process

When a visitor application is received in which Part 9 has been completed, you must first consider whether a human rights claim has been made. Guidance on identifying whether such a claim has been made is set out in this section.

If a human rights claim has been made, you must go on to consider it substantively and decide whether it is to be refused or granted. The answer to this question will determine whether the application can be dealt with at the visa application centre or whether it must be referred to the Referred Cases Unit (RCU).

Where the application obviously falls for refusal, it can be dealt with at the visa application centre. An Entry Clearance Officer (ECO) can refuse an application outside the Immigration Rules. The refusal of a human rights claim will attract a right of appeal.

Where the application has merit and may be granted, the ECO must refer the application to the Referred Cases Unit (RCU). This is because an ECO cannot grant an application outside the Immigration Rules.

## Determining if a human rights claim has been made

The visitor form does not ask the applicant to indicate whether the claim being made is a human rights claim. Therefore, the ECO will need to identify whether a human rights claim has been made.

It is important that the ECO gives careful consideration to whether a human rights claim has been made. If no human rights claim has been made, the refusal of the application does not attract a right of appeal.

ECOs should consider the following questions:

- does the application say that it is a human rights claim?
- does the application raise issues that may amount to a human rights claim even though it does not expressly refer to human rights or a human rights claim?
- are the matters raised capable of engaging human rights?
- what are the claim's prospects of success?

Guidance on each stage is set out in the considering human rights claims in visitor applications guidance.

## What to do once the claim's prospects of success have been established

If the human rights claim is to be refused, the ECO should issue a refusal by serving notice GV51 (refusal with right of appeal).

If the ECO considers that the claim should be granted, or believes that it may result in a grant, the application should be referred to RCU who will consider the claim. The application will be returned to the ECO for refusal and service of GV51 (ROA).

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# Removal destination

This section sets out the approach Presenting Officers must take if the appellant or Tribunal raises any questions about the removal destination of the appellant should their appeal be unsuccessful.

Where there has been a refusal of a protection or human rights claim, or a decision is taken to revoke protection status such that the person becomes liable to removal, the decision letter should specify the proposed country or countries of removal.

If the proposed removal destination has not been clearly specified and there is any uncertainty about the removal destination, the Presenting Officer must notify the appellant and the Tribunal of the proposed removal destination.

The removal destination should be one of the following:

- the appellant's country of nationality
- if the appellant is a national of more than one country, any of the appellant's countries of nationality
- if the appellant is stateless, the appellant's country of habitual residence country or territory to which there is reason to believe the appellant will be admitted (which must be supported by evidence from the SSHD)

Where there is more than one possible removal destination for the appellant, the Presenting Officer should notify the appellant and the Tribunal of all possible removal destinations.

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# Human rights application where the person has immigration leave

This section provides guidance on human rights claims where the person has immigration leave and is seeking leave of a different duration (an upgrade application).

It tells you about whether a human rights claim has been made where the applicant has extant immigration leave and is seeking leave of a different duration (an upgrade application).

When considering an application for leave to remain you must first identify whether or not a human rights claim has been made. The section, [What is a human rights claim](#) sets out which applications made under the Immigration Rules are human rights claims. It gives guidance on how to identify human rights claims that have been made outside the Immigration Rules. Where an applicant has made a human rights claim which is refused, they have a right of appeal (subject to certification).

However, where an applicant has extant immigration leave then whether they have made a human rights claim will depend on:

- the basis of the grant of their extant immigration leave
- the basis on which they are seeking leave of a different duration

## Immigration leave: human rights or non human rights

It is important that you establish whether leave has been granted on a human rights or a non human rights basis as this may affect whether the current application is a human rights claim.

Where a person has extant leave on a human rights basis and is seeking leave to remain of a different duration on the basis that the grant of limited leave is itself a breach of their human rights, that application is not a human rights claim. The rationale for this is that the second application (for example, for indefinite leave to remain) is in reality, an upgrade application rather than a human rights claim. The applicant is merely seeking a more generous form of leave than that which they have already been granted.

The refusal of an application seeking a more generous form of immigration leave does not constitute the refusal of a human rights claim. That claim has been recognised and leave granted. The avenue for challenging a refusal of an upgrade application is judicial review.

For example, where an applicant has leave to remain as a partner and makes an application for indefinite leave to remain which is refused there is no right of appeal against that refusal.

On the same basis, where an applicant had been granted leave as a partner under the 10 year route and made an application stating that they should have been granted leave under the 5 year route, a refusal to upgrade would not carry a right of appeal.

In both these examples, provided the applicant has extant leave and is challenging the refusal to upgrade rather than seeking an extension of their current leave, the refusal of the application will not be a human rights claim and will not carry a right of appeal.

Where an applicant is seeking an extension of their current human rights based leave because it is due to expire, that is a human rights claim and there would be a right of appeal against the refusal of that application.

## New human rights claims

There will be applicants who have immigration leave on human rights grounds, who make a new and different human rights claim which if refused will have a right of appeal. For example, an applicant who has extant leave as a partner, which they no longer qualify for, seeks a variation of that leave on the basis that they are the parent of a child. That constitutes a new human rights claim. The refusal of such a claim will give rise to a right of appeal.

Where the applicant has extant immigration leave on a non human rights basis and is seeking to vary that leave on a human rights basis that will normally be a human rights claim and they will have a right of appeal from any refusal of that claim.

The section [What is a human rights claim?](#) gives guidance on this. An example of this would be where an applicant has extant immigration leave as a student and makes an application for leave to remain as a partner which is refused. The applicant would have a right of appeal against that refusal as it has not been accepted that they have a right to remain on human rights grounds. At the end of their student leave they will be required to leave the UK and be removable and their argument is that that removal will be unlawful under the [Human Rights Act 1998](#).

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# Further submissions

This section provides guidance on how to prevent further submissions leading to repeat rights of appeal.

Some people may repeat human rights and protection submissions with the aim of trying to secure a second right of appeal. To prevent repeat rights of appeal you need to consider whether further human rights or protection submissions amount to a fresh claim.

Paragraph 353 of the Immigration Rules describes the process of deciding whether further submissions are a fresh claim and, whether a further right of appeal exists if those further submissions are refused. Guidance on the operation of paragraph 353 can be found in the Asylum policy instruction: further submissions guidance.

If a further submission does not amount to a fresh claim under paragraph 353, there is no right of appeal against the rejection of the further submissions.

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# Late claims

This section provides guidance on the power to certify late claims to remove the right of appeal.

Some people may make late human rights or protection claims that could have been made earlier. A person resisting removal may try and make a late claim because if they exercise their right of appeal it could delay removal.

To make this behaviour ineffective in preventing or delaying removal, the new process under the Immigration Act 2014 requires that a section 120 notice is served in every case. This notice requires the person to make any further claim now or as soon as reasonably practicable after it arises.

The consequence of not complying with the notice and making a late claim could be that the claim is certified under [section 96](#) of the Nationality, Immigration and Asylum Act 2002. This removes any subsequent right of appeal where the claim is refused. Separate guidance is provided on certification under Late Claims: certification under section 96 of the Nationality Immigration and Asylum Act 2002

[Section 120](#) of the Nationality, Immigration and Asylum Act 2002 states that the Secretary of State (SSHD) or an immigration officer may serve a notice on a person who has:

- made a protection claim or a human rights claim
- made an application to enter or remain in the UK
- a decision to deport or remove has been made or may be taken

The [EEA regulations](#) provide that a [section 120](#) notice can be served in EEA claims.

Once a person has been served with a section 120 notice, if that person requires leave to be in the UK (or only has leave by virtue of section 3C or 3D of the Immigration Act 1971), the person must provide a statement setting out any additional reasons or grounds they have for remaining in the UK, or any grounds on which they should not be removed from the UK.

This is an ongoing duty which continues until the individual has either left the UK or has been granted leave.

A further statement must be made if a new reason or ground for remaining in the UK arises. Any reasons or grounds must be raised as soon as reasonably practicable. There is no requirement to reiterate grounds or reasons that the SSHD is already aware of, or that have previously been considered.

Where a person makes a statement in response to a section 120 notice they may be told that in order to have the matter considered they must make an application on a specified form or follow a specified process, for example, by attending an asylum screening unit to make an asylum claim.

However, if a person wishes to raise again a ground that has previously been refused, supported by further evidence because their circumstances relating to that ground have changed, that information should be included in a section 120 response.

For example, if a person has previously made an application on the basis of family life which was refused because they were single, now claims to have established family life (such as marriage, children from the relationship), that information should be provided to the SSHD together with details of the claim for family life. In this type of case, you will want to consider any application under paragraph 353 (fresh claims) in the first instance.

A time limit may be specified on the section 120 notice. This time limit indicates the period after which a decision may be made. However, once this limit has expired, a person is still under an ongoing duty to provide the SSHD with any new or additional reason or ground. If the time limit has expired, the SSHD must still consider the matter or grounds raised but if appropriate may be able to certify any claim under [section 96](#).

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# Grounds of appeal

The section provides guidance on grounds of appeal.

An appeal against a refusal of a protection claim must be brought on one or more of the following grounds:

- removal of the appellant from the UK would breach the UK's obligations under the Refugee Convention
- removal of the appellant from the UK would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection
- removal of the appellant from the UK would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention)

An appeal against the refusal of a human rights claim may only be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

An appeal against the revocation of refugee status or humanitarian protection may only be brought on the grounds that removal would breach the UK's obligations under the Refugee Convention, or that removal would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection.

In accordance with [section 85 of the Nationality, Immigration and Asylum Act 2002](#), the Tribunal must not consider a new matter, (which amounts to a ground of appeal listed in section 84). This is unless the Secretary of State has given the Tribunal consent to do so.

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# Relevance of an unlawful decision: the determination in *Charles*

Section 86 of the Nationality, Immigration and Asylum Act 2002 was amended by the Immigration Act 2014. In [Charles \(human rights appeal: scope\) \[2018\] UKUT 89 \(IAC\)](#), the Upper Tribunal considered the effect of the amendments to section 86 on the Tribunal's power to determine an appeal. In a determination written by the President, the Upper Tribunal found that, following the amendments, it was no longer possible for an immigration judge to allow an appeal on the ground that the decision was not in accordance with the law:

The former ability of the Tribunal to conclude that a decision of the Secretary of State was unlawful, with the result that a lawful decision remained to be made by her, depended upon the fact that under the version of section 86 of the 2002 Act as it was, prior to its amendment by the 2014 Act, the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought or was treated as being brought was not in accordance with the law (including immigration rules). That requirement has been removed from the legislation.

In this respect, the decision in *Charles* explicitly supersedes the decision in [Greenwood \(No.2\) \[2015\] UKUT 629 \(IAC\)](#).

The question of whether a decision was in accordance with the law will nevertheless be highly relevant in many human rights appeals. Under section 84(2) of the current statutory framework, an appeal against the refusal of a human rights claim must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998. Where it is found that the claimant's rights under Article 8(1) of the European Convention on Human Rights are engaged, the Tribunal will go on to consider whether any interference occasioned by the decision under challenge would be "in accordance with the law" for the purposes of Article 8(2). That is the point at which the lawfulness of the decision in a wider sense may now be relevant.

For the avoidance of doubt, on this point the decision in *Charles* also supersedes the decision of the Upper Tribunal in [Katsonga \("Slip Rule"; FtT's general powers\) \[2016\] UKUT 228 \(IAC\)](#). Guidance on the issue identified in that case has now been provided by the President in *Charles*.

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# Place from which an appeal may be brought or continued

This section provides guidance on whether an appeal may be brought from within the UK or from overseas, including a summary of certification powers.

Section 92 of the Nationality, Immigration and Asylum Act 2002 sets out if a person can bring an appeal from within or outside of the UK. Where the person was outside the UK when they made the claim, they must appeal from outside the UK. When the person was inside the UK when they made a claim they may appeal from within the UK unless the claim has been certified under section 94 or 94B.

This table summarises the effect of section 92.

Type of claim refused	Place from which appeal may be brought
Protection claim	Within UK
Protection claim (and certified under section 94 or 94B)	Outside UK
Human rights claim made while the claimant is in UK	Within UK
Human rights claim made while the claimant is in UK (and certified under section 94 or 94B)	Outside UK
Human rights claim made while the claimant is outside UK	Outside UK
Revocation of protection while the claimant is in UK	Within UK
Revocation of protection while the claimant is outside UK	Outside UK

The Secretary of State (SSHD) has certification powers which have the effect of requiring a person to appeal from outside the UK. The powers can be exercised if the applicant makes a:

- protection or human rights claim under section 94(1) of the 2002 act and the claim is clearly unfounded
- protection or human rights claim under section 94(7) and they are to be removed to a third country where there is no reason to believe that their human rights will be breached
- protection or human rights claim under Schedule 3 to the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#) and it is proposed to remove them to a safe country for that claim to be considered, see: [Safe third country cases](#)
- human rights claim certified under section 94B of the 2002 act where:
  - if they are removed there is no real risk of serious irreversible harm before any appeal is concluded

When an appeal is against the revocation of protection status, the appeal must be lodged while the person is within the UK if the decision to which the appeal relates was made while the person was in the UK. If the decision to which the appeal relates was made while the person was outside the UK, the appeal must be lodged once the person has left the UK.

When a person brings or continues an appeal relating to a protection claim from outside the UK following certification under section 94 or section 94B, the appeal is to be treated as if the person were not outside the UK. This provision is necessary to safeguard the grounds of appeal. This includes where the person's removal would breach the Refugee Convention or the UK's obligations in relation to persons eligible for a grant of humanitarian protection.

Where a person brings an appeal within the UK but leaves the UK before the final determination of the appeal, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified.

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# Matters before the Tribunal

This section explains what the Tribunal can consider at an appeal.

Section 85 states that the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

There are restrictions on the consideration of new matters. A new matter is a ground of appeal not previously considered by the Secretary of State (SSHD). A person may wish to raise a new matter as part of an appeal under section 82(1). The Tribunal however, must not consider a new matter unless the SSHD has given consent for the Tribunal to do so.

## The difference between a new matter and new evidence

A new matter is a human rights or protection claim that the SSHD has not previously considered in the decision under appeal or a response to a section 120 notice.

This does not mean that there cannot be a new matter when there has been a previous protection or human rights claim. There will be a new matter when the factual matrix has not previously been considered by the SSHD. A new matter is something factually distinct from the claim previously made by the appellant, as opposed to further or better evidence of an existing matter. The question of whether something is a new matter is therefore always a fact sensitive one.

Examples likely to constitute a new matter are where:

- there is a human rights claim based on a relationship and the couple have now had a child and this has not previously been considered by the SSHD, because the existence of the child adds an additional distinct new family relationship (with a requirement to consider the best interests of the child) which could separately raise or establish a ground of appeal under Article 8 ECHR
- the appellant made a human rights claim based on a relationship and at the appeal the appellant says that their human rights claim is based on a new relationship, as although the SSHD will previously have considered Article 8 ECHR the factual basis for that claim will have changed and therefore it will be a new matter
- a protection claim has been made, and the appellant is now claiming removal would be (or would also be) a breach of Article 8 ECHR based on their family life in the UK
- a human rights claim based on family life has been made, and the appellant is now claiming (or also claiming) that they are a refugee
- a human rights claim has been made based on private life under Article 8, and the appellant is now claiming (or also claiming) that removal would be a breach of Article 8 ECHR on the basis of family life because the appellant has now married a British citizen

Examples that are unlikely to be a new matter are where:

- a human rights claim is based on a relationship which the SSHD has considered and the couple have now married, which is additional evidence relating to the original claim are not a new matter
- a protection claim is based on risk from the authorities and at the appeal hearing the appellant produces arrest warrants, which amount to new evidence about the protection claim, not a new matter

## Handling new matters before the appeal hearing

If a new matter is raised before an appeal hearing, for example in the grounds of appeal, the SSHD should try to consider the matter before the appeal hearing so that consent can be given and the Tribunal can consider all matters relating to that appellant in a single appeal.

Even if the new matter is not identified until shortly before or at the hearing, if it can be considered and a decision reached quickly, that should be done. If the new matter cannot be considered before the appeal hearing, for example because the PO needs to check whether a document is genuine and there is insufficient time to do so, the PO should inform the Tribunal that a new matter has been raised and that the SSHD does not consent to it being considered by the Tribunal.

In order to make best use of Tribunal resources, an adjournment should be sought for the SSHD to consider the new matter. Where possible, a single appeal should consider all matters that have been raised by the appellant.

If the Tribunal does not agree to an adjournment, the PO must consider whether to:

- refuse consent because the SSHD is unable to consider the new matter in the time available
- record the reasons for seeking an adjournment and the reasons why it was refused in their hearing minute

The Home Office will then consider the minute in deciding whether to challenge any allowed appeal on procedural grounds.

POs should not withdraw the decision under challenge where an adjournment is refused. Decisions can only be withdrawn in line with the withdrawing decisions and conceding appeals.

The PO must consult a senior PO or senior caseworker (SCW) if consent is to be refused. A summary of the process is set out in the consent flowchart.

## At the case management review (CMR) or appeal hearing

At any CMR or appeal, the PO must start the hearing by listing the matters which are to be considered by the Tribunal in that appeal. This will ensure that the parties agree what is to be considered.

The PO must also state whether any new matters have been raised and whether consent is given for them to be considered.

If a new matter has been raised just before the appeal hearing, this is also an opportunity for the PO to inform the appellant and the Tribunal of the SSHD's decision on consent.

## Consent to hear new matters

Withholding consent can delay the conclusion of the person's claim and consequently delay the grant of leave or efforts to remove the person from the UK. Consent should be given unless it would prejudice the SSHD not to be able to consider the new matter.

All the facts and circumstances of the case and the appellant should be considered when reaching a decision on consent.

Unless there are exceptional circumstances, consent should be refused if:

- it is necessary to verify facts or documents that are submitted in support of the new matter and these checks are material to the new matter
- the new matter is a protection claim and it has not already been confirmed that the UK is the responsible state for determining the claim
- it is necessary to conduct additional checks such as a person's criminal conviction history or the status of a criminal prosecution

Where consent would normally be refused, exceptional factors may mean that consent should be granted. Exceptional circumstances may include where the:

- appellant or a dependent has a serious illness and the appeal needs to be determined on an urgent basis
- matter had been raised with the SSHD and, through no fault of the appellant, there has been more than six months' delay in the SSHD considering the matter

## Process for refusing consent

Where consent is refused, the SSHD will provide written reasons for refusing consent. The PO will require a SCW's approval of the letter before it is sent.

If the new matter was raised and considered by the SSHD before the Tribunal hearing, the revised decision must be sent to the appellant and the Tribunal within 2 working days of the decision being made.

If the new matter is considered within 2 working days of the hearing, the revised decision will be sent to the appellant and the Tribunal no later than 4pm on the day before the hearing.

If the new matter is raised at the Tribunal hearing, written reasons will be provided for refusing consent within 2 working days of the hearing.

Decisions relating to consent will be served by Royal Mail recorded delivery unless considered the day before the hearing when the decision will be faxed to the person (person's representative) where possible, and to the Tribunal.

POs must update the new field on CID providing reasons for giving or withholding consent.

## Action if the Tribunal considers a new matter without the SSHD's consent

If the Tribunal considers a new matter without the SSHD giving consent for it to do so, it is acting outside its jurisdiction.

If the SSHD withholds consent on the new matter and the Tribunal proceeds to consider the new matter, the PO should not make any representations or submissions relating to the new matter during the hearing.

The PO should inform the Tribunal that in the view of the SSHD it has acted outside its jurisdiction and seek permission to appeal against the judgment if the appeal is allowed.

## Handling the new matter if consent is refused

If the SSHD withholds consent the appeal should proceed on the basis of the original matter(s) only. No action should be taken on the new matter where consent has been refused until the appeal is determined.

If the appeal is allowed and leave is to be granted, the applicant should be notified that no action will be taken on the new matter, on which consent was withheld, unless a new application or claim is made raising the new matter.

If the appeal is dismissed then the SSHD will consider whether the new matter constitutes a claim which would give rise to a right of appeal. The SSHD will need to consider if it is possible to consider the new matter on the information provided. The SSHD will direct a person to make a charged application if appropriate and if any claim is refused may certify the claim if it is late or clearly unfounded.

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# Transitional appeals

This section explains when the amendments made by the Immigration Act 2014 to Part 5 of the Nationality, Immigration and Asylum Act 2002 do not apply on or after 6 April 2015.

The new framework for appeals established by the Immigration Act 2014 against refusal of protection and human rights claims above came fully into force on 6 April 2015. There were saving provisions made to protect certain persons who had rights of appeal at the time they applied for leave to enter or remain. See: [Immigration Act 2014 \(Commencement No. 4, Transitional and Saving Provisions and Amendment\) Order 2015](#).

Under the pre-Immigration Act 2014 appeals regime, rights of appeal existed against the refusal of an application:

- where entry clearance was refused, although the available grounds of appeal are limited for some cases by section 88A
- where a certificate of entitlement to a right of abode was refused
- where a decision was taken to refuse to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave

Regarding the last bullet point, in order to qualify the application had to be made while the applicant had leave to enter or remain. The applicant's leave then had to have expired by the time they were notified of the decision to refuse further leave.

These appeal rights continue to exist for decisions made on or after 6 April 2015 where:

- an application was made before 20 October 2014 for leave to remain as a Tier 4 migrant or their family member
- an application was made before 2 March 2015 for leave to remain as a Tier 1 migrant, Tier 2 migrant or Tier 5 migrant or their family member
- any other application was made before 6 April 2015 the outcome of which was an appealable decision under the pre-Immigration Act 2014 regime, unless:
  - the decision was a refusal of an asylum or human rights claim
- a person with continuing leave is examined on arrival in the UK before 6 April 2015 and that leave is cancelled on or after 6 April 2015 under paragraph 2A(8) of Schedule 2 to the Immigration Act 1971, to the extent that:
  - the person would have been entitled to a right of appeal against the cancellation decision if it had been taken before 6 April 2015

The appeals regime changed for some deportation cases prior to 6 April 2015.

In accordance with the [Immigration Act 2014 \(Commencement No. 3, Transitional and Saving Provisions\) Order 2014](#), from 20 October 2014, the post-Immigration Act 2014 appeals regime applies to a person who:

- becomes a foreign criminal within the definition in section 117D(2) of the 2002 act on or after 20 October 2014
- is liable to deportation from the UK under section 3(5)(b) of the 1971 act because they belong to the family of the person

By virtue of the [Immigration Act 2014 \(Transitional and Saving Provisions\) Order 2014](#), the post-Immigration Act 2014 appeals regime applied to any decision to make a deportation order, or to refuse to revoke a deportation order. It also applied to decisions made under [section 32\(5\) of the UK Borders Act 2007](#) made on or after 10 November 2014 in respect of a person who is:

- a foreign criminal within the definition in section 117D(2) of the 2002 act
- liable to deportation from the UK under section 3(5)(b) of the 1971 act because they belong to the family of the person

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# European decisions

This section tells you about rights of appeal under the [Immigration \(European Economic Area \(EEA\)\) Regulations 2016](#) against an EEA decision.

EEA decisions made on or after 1 February 2017 are governed by the [EEA Regulations 2016](#). Appeals in relation to an earlier EEA decision are governed by the EEA Regulations that were in force at the date of that decision.

An appeal against an EEA decision can be made in relation to an EEA national, an EEA family member or a person who claims to have a derivative right to reside.

An EEA family member is:

- the spouse or civil partner of an EEA national
- the direct descendants of the EEA national, their spouse or civil partner who are either:
  - under 21
  - dependants of the EEA national or their spouse or civil partner
- dependent direct relatives in the ascending line of the EEA national or their spouse or civil partner

However, where the EEA national is in the UK exercising their EEA rights as a student, the person will not be a family member of the student unless they are a dependent child of the student or of their spouse or civil partner, or where the EEA national as well as being a student is also exercising treaty rights as a:

- jobseeker
- worker
- self-employed person or self-sufficient person

An EEA family member, for appeals purposes, also includes the extended family member of an EEA national if they have been issued with any of the following:

- an EEA family permit
- a registration certificate
- a residence card

This is only the case so long as they continue to satisfy the conditions for being an extended family member and the document has not ceased to be valid or been revoked. If they do not meet these criteria, an extended family member has no right of appeal if their application is refused - confirmed in the case [Sala \(2016\) UKUT 411 \(IAC\)](#)

Where an extended family member has previously been issued with a residence card, EEA family permit or registration certificate and that documentation has been revoked, the person will have a right of appeal against that decision provided they satisfy the conditions in regulations 36(2) to (5). This provides that where a person is not an EEA national and claims to be an extended family member by virtue of being in a durable relationship with an EEA national, that person will only have a right of

appeal where they satisfy the Secretary of State (SSHD) that they are in a relationship. For further information see the guidance on extended family members.

## Scope of an EEA appeal

This section looks at the scope of EEA appeals and what documents are required to bring an appeal under the EEA Regulations against a decision that was made on or after 6 April 2015 (either under the 2006 or the 2016 Regulations).

A person served with an EEA decision, who has a right of appeal, may appeal against that decision to the First-tier Tribunal ([Regulation 36\(1\)](#)). In the appeal, the appellant will have to demonstrate why the EEA decision was wrong. An EEA decision means a decision under the EEA Regulations that concerns:

- a person's entitlement to be admitted to the UK
- a person's entitlement to be issued with or have renewed, or not have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision that an application for the above documentation is invalid)
- a person's removal from the UK
- the cancellation pursuant to regulation 25, on grounds of public policy, public security or public health, or on grounds of misuse of rights, of a person's right to reside in the UK

An EEA decision does not include decisions under regulation:

- 12(4) (decision to refuse to issue an EEA family permit to an extended family member)
- 17(5) (decision to refuse to issue a registration certificate to an extended family member)
- 18(4) (decision to refuse to issue a residence card to an extended family member)
- 33 (human rights considerations and interim orders to suspend removal)
- 41 (temporary admission in order submit case in person)

For rights of appeal in relation to extended family members see extended family members.

## Invalid applications: no right of appeal

Where an application is rejected as invalid under regulation 21(4), this is not an EEA decision and there is no right of appeal.

An application is invalid if either it:

- has not been submitted online using the relevant pages of [www.gov.uk](http://www.gov.uk) or
- by post or in person using the relevant application form;

- is not accompanied or joined by the relevant evidence or proof required by the Regulations, including original identity documents where required; or
- is incomplete

## Specified evidence not provided: no right of appeal

There is no right of appeal if the applicant has not provided the specified evidence relevant to the particular type of application - see [regulation 36](#) of the EEA Regulations.

Where there is no right of appeal at the point of decision because specified evidence has not been provided, the person will be notified that there is no right of appeal against the decision. However, the applicant can lodge an appeal with the specified evidence and, if they do so, the appeal will be valid.

The evidence required depends upon the type of EEA claim being asserted under the EEA Regulations. The table below sets out the evidence that needs to be provided under regulation 36 where an EEA decision has been made:

Category	Nationality claim or relationship claim	Documentation and Evidence
1	EEA national	Valid national identity card or passport issued by an EEA State.
2	Durable relationship with an EEA national	<p>Passport and either an EEA family permit or sufficient evidence to satisfy the Secretary of State that they are in a relationship with that EEA national</p> <p>The evidence required for a right of appeal is not the higher test of whether the applicant is in a durable partnership with the EEA national, but rather that there is evidence of a relationship at all.</p> <p>For further information, see page 14 of the extended family members of EEA nationals guidance.</p>
3	Family member of an EEA national, the relative of an EEA national who is an extended family member, or a family member who has retained the right of residence (unless they fall under category 1 in this table)	<p>Passport and either:</p> <ul style="list-style-type: none"> <li>• an EEA family permit</li> <li>• a qualifying EEA state residence card</li> <li>• proof that the person is a family member or relative of an EEA national</li> <li>• in the case of a person claiming to</li> </ul>

Category	Nationality claim or relationship claim	Documentation and Evidence
		<p>be a family member who has retained the right of residence, proof that he was a family member of the relevant person</p> <p>A person claiming to be an extended family member on the basis that they are the relative of an EEA national will need to have submitted proof of that relationship.</p>
4	Derivative right of entry or residence	<p>Valid national identity card or passport issued by an EEA State, and either an EEA family permit or proof that where the person claims to have a derivative right of entry or residence as a result of regulation:</p> <ul style="list-style-type: none"> <li>• 16 (2), he is a direct relative or guardian of an EEA national who is under the age of 18</li> <li>• 16(3), he is the child of an EEA national</li> <li>• 16(4), he is a direct relative or guardian of the child of an EEA national</li> <li>• 16(5), he is a direct relative or guardian of a British citizen</li> <li>• 16(6), he is under the age of 18 and is a dependent of a person satisfying the criteria in 16(2),16(4),or 16(5)</li> </ul>

## Validity of an appeal

Where the Tribunal lists an appeal and the decision later states that there is no right of appeal, the Presenting Officer should check whether new evidence has been submitted. If it has, there will be a right of appeal unless the [SSHD is not satisfied there is a relationship.](#)

## SSHD not satisfied there is a relationship: no right of appeal

Where the evidence concerns whether or not the person is in a relationship, it is for the SSHD to be satisfied that the person is in a relationship. It is not open to the Tribunal to find that the person is in a relationship. Presenting Officers should not decide whether or not a person is in a relationship, the decision should be taken by the EEA caseworker.

In these circumstances, Presenting Officers should argue that there is no right of appeal and it is open to the applicant to resubmit their application under the EEA Regulations.

## Certification of grounds of appeal

The Secretary of State or an immigration officer may certify a ground that could be brought in an appeal under the [EEA Regulations](#) where that ground has previously been considered in an appeal brought under the EEA Regulations or under [section 82\(1\) of the 2002 act](#) (as amended) ([regulation 36\(7\)](#)). Where a ground is certified, a person may not bring an appeal or rely on the ground certified in an appeal under the [EEA Regulations](#).

When you consider whether to certify a ground for claiming a right of residence, you must consider if:

- the applicant provided any new or different information not provided at the time of the original decision or to the court
- such information made a material difference to the claim

When you consider if the information makes a material difference to the claim, you must consider whether, had the applicant presented this information earlier, a different decision would have been made.

The following are examples of claims that are not suitable for certification. Where the applicant:

- has since remarried and is claiming a right of residence because of another relationship
- has since gone on to have children with their EEA national sponsor
- is claiming a right of residence on another basis which has not previously been considered

If you consider the claim is certifiable under regulation 36(7), you must refer this to an SEO senior caseworker to authorise. You should use the following paragraph:

You raised [state the ground] in a previous appeal [determined on date]. The SSHD has considered the previous appeal and has decided it is appropriate to certify the repeated ground under regulation 36(7) of the Immigration (EEA) Regulations 2016. The effect of the certification is that you may not rely on this ground in any appeal under the 2016 regulations.

If an applicant had a right of appeal but this was not exercised then you cannot certify a later appeal.

## EEA rights of appeal that can only be exercised from outside the UK

Some appeals can only be brought while the person is outside the UK by virtue of [regulation 37](#) of the EEA Regulations 2016. These are decisions to:

- refuse to admit a person to the UK
- revoke admission to the UK
- make an exclusion order against a person
- refuse to revoke a deportation or exclusion order made against a person
- refuse to issue a person with an EEA family permit.
- revoke, or to refuse to issue or renew any document under the EEA Regulations where that decision is taken at a time when the relevant person is outside the UK
- remove a person from the United Kingdom after they have entered the UK in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted pursuant to [regulation 23\(1\), \(2\), \(3\) or \(4\)](#) (exclusion justified on grounds of public policy, public security, public health or reasonable grounds to suspect that admission would lead to a misuse of a right to reside)

## Exceptions to the requirement to appeal from outside of the UK

Paragraphs (1) to (3) above do not apply where the person is in the United Kingdom and the person:

- held a valid EEA family permit, registration certificate, derivative residence card, document certifying permanent residence, permanent residence card or qualifying EEA state residence card or can otherwise prove that they are resident in the UK
- is deemed not to have been admitted to the UK under regulation 29(3) but at the date on which notice of the decision to refuse to admit them is given they have been in the UK for at least 3 months

All other EEA decisions not listed in [regulation 37](#) can be appealed in country (that is: while the individual is in the UK) or from outside the UK. For example, an appeal against a decision to refuse to issue a residence card taken at the time the applicant was in the UK can be appealed in-country or from outside the UK.

Where an appeal is brought under the EEA Regulations in-country, the appeal does not lapse when the applicant leaves the UK

## Where an appeal under the EEA Regulations does not prevent removal

A person who could bring an appeal or has an appeal pending against an EEA decision cannot be removed from the UK while an appeal can be brought in time or has not been determined. There are 3 exceptions to this:

- 1) Where the removal follows a decision to refuse to admit or exclude the person on grounds of public policy, public security or public health under [regulation](#)

[23\(1\) or 23\(5\)](#) or a decision to refuse to admit because they are subject to a deportation or exclusion order (in accordance with [regulation 23\(2\)](#)).

Where the decision that is taken is a refusal to admit the person or to exclude them on the grounds listed above, the person can be removed without the removal having to be certified. As an appeal against such a refusal or exclusion can only be brought out of country by virtue of [regulation 37\(1\)](#) (unless the exception set out above applies), removal will not be suspended by an appeal.

- 2) Where a person has been admitted to the UK and a decision to remove has been made on grounds of public policy, public security or public health as set out in [regulation 23\(6\)\(b\)](#) but only where the removal has been certified under [regulation 33](#) and either an appeal has been lodged, or the time limit for lodging an appeal in-country has passed. For guidance on certifying removal see Regulations 33 and 41 of the EEA Regulations 2016.
- 3) Where the person is a third country national and that person has never been recognised as being a family member of an EEA national or as having a derivative right of residence, for example where no EEA family permit card has previously been issued and the Secretary of State is not satisfied that there is a relationship with an EEA national, removal can take place under [section 10 of the Immigration and Asylum Act 1999](#) (as amended).

Any appeal made under the [EEA Regulations](#) will be non-suspensive of removal under [section 10 of the 1999 act](#). The [section on sham marriages](#) provides a further example of such a situation.

The Home Office can seek to remove a person who has been refused admission under [regulations 23\(1\), 23\(2\) and 23\(5\)](#) straight away. However, where the person is being removed under [regulation 23\(6\)\(b\)](#) and their removal has been certified, they cannot necessarily be removed straight away. Such a person has one month to leave the UK voluntarily, beginning on the date on which they are notified of the decision to remove them, unless one of the following circumstances set out in [regulation 32\(6\)](#) applies:

- it is a duly substantiated case of urgency
- the person is detained pursuant to the sentence or order of any court,
- the decision has been taken under regulation 23(6) on the basis that the relevant person:
  - has ceased to have a derivative right of residence or
  - would have had a derivative right of residence but for the effect of a decision to remove under regulation 23(6)(b)

## Sham marriages

Where you suspect that a non-EEA national spouse or civil partner is party to a marriage of convenience, and we have not previously issued them a document under the [EEA Regulations](#), we would not consider them to be a family member of an EEA national for the purposes of the [EEA Regulations](#). Although the refusal of a document will take place under the EEA Regulations, they will be removed under

[section 10 of the Immigration and Asylum Act 1999](#) (as amended). This means that although they can bring their appeal in the UK against the refusal to issue them with a document under the [EEA Regulations](#), this is non-suspensive of removal under the [1999 act](#). As there is no right of appeal against removal under the [Nationality, Immigration and Asylum Act 2002](#) (as amended by the [Immigration Act 2014](#)) they **may be removed** before their appeal under the [EEA Regulations](#) is determined.

In contrast, EEA nationals who have been admitted to the UK and are considered to have been a party to a marriage of convenience may be both refused documentation (if they have applied for it) or have it revoked. They may also be removed under the [EEA Regulations](#). In such cases, they cannot be removed until either they can no longer bring an appeal or their appeal is determined, unless their removal is on grounds of public policy, public security or public health and is certified.

## Rights of appeal under the EEA Regulations in relation to EEA decisions made before 6 April 2015

There are differences in appeals under the European Economic Area (EEA) Regulations in relation to EEA decisions made before 6 April 2015. They relate to the ability to raise human rights or protection claims in the context of an appeal against an EEA decision. These differences are set out more in this section.

## Human rights in EEA appeal cases: decisions made on or after 6 April 2015

The [EEA Regulations](#) do not prevent a person with an EEA right of appeal from also bringing a separate appeal under [section 82\(1\) of the 2002 act](#) (as amended). For example against the refusal of an asylum or human rights claim, provided they meet the relevant criteria, which now requires them to have made a human rights claim which has been refused.

In some cases, it will not be necessary for an appellant to pursue parallel appeals under the 2002 act and the [EEA Regulations](#). It is possible for an EEA appellant to raise [2002 act](#) grounds of appeal in an EEA appeal through one of two gateways.

Firstly, where the appellant has made a statement in response to a notice under [section 120 of the 2002 act](#), and it constitutes a ground of appeal under [section 84 of the 2002 act](#)

Secondly, the appellant may raise human rights or protection grounds in their grounds of appeal as a new matter.

Where the SSHD has not considered the human rights or protection claim, raised either in response to the section 120 notice, or as a new ground of appeal, the Tribunal may consider them as a new matter. This is provided the SSHD consents. When deciding whether or not to give consent, the [matters before the Tribunal](#) section of this guidance should be followed.



## Human rights in 2006 Regulations: decisions made before 6 April 2015

Appeals against EEA decisions made before 6 April 2015 can raise the grounds set out in section 84(1) of the 2002 act (as then in force), except paragraphs (a) and (f). (see [Schedule 1 to the EEA Regulations](#) as then in force. If no EEA decision to remove has been made and no section 120 notice has been served, a human rights or protection claim cannot be made in the context of an EEA appeal. The Court of Appeal has confirmed this position in the case of [TY \(2015\) EWCA Civ 1233](#).

### **Related content**

[Contents](#)

# EU Settlement Scheme

This section tells you about rights of appeal against decisions relating to the EU Settlement Scheme (EUSS) including:

- decisions on applications made under the EUSS
- decision on applications for an EUSS Family Permit or Travel Permit

decisions which restrict leave to enter or remain where a person has leave under the EUSS or by virtue of an EUSS Family or Travel Permit.

Rights of appeal in respect of the EUSS and EUSS Family and Travel Permits are set out in the [Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#).

## Rights of appeal where the person has applied for leave under the EUSS or for an EUSS Family or Travel Permit

Anyone who makes a valid application to the EUSS on or after 11pm on the 31 January 2020 will have a right of appeal where they are refused or where they are granted pre-settled status and believe they qualify for settled status.

Anyone who makes a valid application for an EUSS Family Permit or Travel Permit on or after 11pm on the 31 January 2020 will have a right of appeal where their application is refused.

- the grounds of appeal are either that the decision breaches any right which the person has under “the agreements”, which means either:
  - the EU withdrawal agreement (Chapter 1, or Article 24 (2) or 25 (2) of Chapter 2 of Title II of Part 2 of the EU withdrawal agreement)
  - the EEA EFTA separation agreement (Chapter 1, or Article 23 (2) or 24 (2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement)
  - the Swiss citizens' right agreement (Part 2 of the Swiss citizen' rights agreement)

In the rest of the guidance the above are referred to as the agreements.

or:

- that the decision is not in accordance with the “residence scheme Immigration Rules” which means either:
  - [Appendix EU](#), see in particular EU 11 to 13 (eligibility for settled status), EU 14 (eligibility for pre settled status) and EU 15 to 17 (requirements regarding suitability).
  - Family Permit [Immigration Rules Appendix EU \(Family Permit\)](#), see in particular the Rules for consideration of applications being FP6-FP13
  - EU Settlement Scheme Travel Permit under [Immigration Rules Appendix EU \(Family Permit\)](#), see in particular the rules for consideration of applications being FP6-FP13

## Rights of appeal where a decision is made to vary, cancel or revoke leave granted under the EUSS

### Curtailment and cancellation of pre-settled status

Where a person has been granted pre-settled status under the EUSS and a decision is taken on or after 11pm on the 31 January 2020 to curtail that leave (i.e. to vary that leave so that the person does not have leave to enter or remain in the United Kingdom) or to cancel that leave, there is a right of appeal against that decision.

The grounds of appeal relation to the curtailment or cancellation of pre- settled status are:

- [that the decision breaches any right which the person has under the agreements](#)

or:

- the decision was not in accordance with the Immigration Rules by virtue of which it was made

The relevant Immigration Rules are 323 (curtailment) 321 (B) cancellation as applied by Rule E320.

### Cancellation or revocation of settled status

Where a person is granted settled status under the EUSS and a decision is taken to cancel or revoke that indefinite leave to remain on or after 11pm on the 31 January 2020, so that the person does not have settled status, there is a right of appeal against the decision.

The grounds of appeal in relation to the cancellation of indefinite leave to remain are:

- [that the decision breaches any right which the person has under the agreements](#)

or:

- the decision was not in accordance with the Immigration Rules by virtue of which it was made

The grounds of appeal in relation to revocation of settled status are:

- [that the decision breaches any right which the person has under the agreements](#)

or:

- that the revocation of indefinite leave to remain it is not in accordance with section 76 (1) or (2) of the 2002 Act (as the case may be)

## Rights of appeal where a decision is made in connection with an EUSS Family Permit or Travel Permit

Where a person has been granted an EUSS family permit or travel permit and a decision is taken to cancel or revoke that permit on or after 11pm on the 31 January 2020, there is a right of appeal against the decision.

Where a person has arrived in the United Kingdom with a valid EUSS Family Permit, which converted to leave to enter on their arrival in the UK, and a decision is taken on or after 11pm on the 31 January 2020 to cancel that leave to enter or to curtail that leave to enter (i.e. vary their leave to enter so that they no longer have leave to enter) there is a right of appeal against the decision.

Where a person has been granted an EUSS family permit and a decision is taken on or after 11pm on the 31 January 2020 to refuse them leave to enter the United Kingdom under article 7(1) of the Immigration (Leave to Enter or Remain) Order 2000, there is a right of appeal.

The grounds of appeal are:

- [that the decision breaches any right which the person has under the agreements](#)

or:

- it is not in accordance with the provisions of the immigration rules by virtue of which it was made

## Appeal against a deportation order

Where a person is granted pre-settled status or settled status under the EUSS or has leave to enter having arrived in the United Kingdom with a valid EUSS Family Permit and a decision is taken to make a deportation order under section 5(1) of the Immigration Act 1971 on or after 11pm on the 31 January 2020 (), there is a right of appeal against the decision.

The grounds of appeal are:

- [that the decision breaches any right which the person has under the agreements](#)

or:

- that the decision is not in accordance with section 3 (5) or (6) of the Immigration Act 1971

This appeal right does not apply to a person being deported by virtue of a decision to remove them under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016, in which case the deportation decision is appealable under those regulations.

## Who will hear the appeal?

An appeal made under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 will usually be to the First-tier Tribunal (Immigration and Asylum Chamber). The only exception is where it is certified under Schedule 1 of these regulations as having been taken in the interests of national security, in which case the appeal would be to the Special Immigration Appeals Commission.

## Places from which an appeal may be brought or continued

Any appeal made under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 can be brought from within the United Kingdom or from outside the United Kingdom. The only exception is where it is certified under Schedule 1 of these regulations as having been taken in the interests of national security, in which case it can only be brought from out of country, unless the appellant has made a human rights claim while in the UK and there is no certification under regulation 15(4).

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### Official-sensitive: start of section

The information on this page has been removed as it is restricted for internal Home Office use.

### Official-sensitive: end of section

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## Time limits to appeal

### First-tier Tribunal

Where the person is in the UK when they are sent the decision notice, they have 14 calendar days to appeal, from the date the decision is sent.

Where the person is outside the UK when they are sent the decision notice, they have 28 calendar days to appeal from when they receive the decision.

### Special Immigration Appeals Commission

Where the appeal is for appeals to the Special Immigration Commission (SIAC)

The time limits are:

- where the person is detained, 5 days from when they are served the notice of decision
- where the person is in the UK, 10 days from when they are served the notice of decision
- when the person is outside the 28 days from when they are served the notice of decision

## Administrative review

There is a right of administrative review in respect of certain decisions made under the EUSS. For further details see [Administrative review EU settlement scheme](#). An appeal can be lodged at the same time as administrative review.

Where a person applies for an administrative review and is unsuccessful then they will be able to appeal the original decision, provided they have not already appealed that decision. Where they are within the United Kingdom when they are sent their administrative review decision, they have 14 calendar days to appeal the original decision from the date the administrative review decision is sent. Where they are outside the United Kingdom when they are sent their administrative review decision, they have 28 calendar days to appeal the original decision from when they receive the administrative review decision.

## Where an EU Settlement scheme appeal does not prevent removal

All appeals under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 will suspend removal, unless the relevant appealable decision is:

- certified under regulation 16

or:

- certified as having been made in the interests of national security under Schedule 1 and is appealable from out of country, in accordance with regulation 15

## National security, etc: Regulation 15

Where an appealable decision is certified as having been taken in the interests of national security under Schedule 1 to these regulations, regulation 15 provides that the appeal (to the Special Immigration Appeals Commission) cannot be brought from within the UK unless the individual in question brings a human rights claim from within the UK and that claim is not certified under regulation 15(4).

Where an appeal can only be brought from out of country in accordance with regulation 15, the appeal is non-suspensive of removal.

The Secretary of State may take a certification decision under regulation 15(4) where the removal of a person would not be unlawful under section 6 of the Human Rights Act 1998 despite the appeals process in relation to the national security decision not having been begun or not having been exhausted.

Regulation 15(5) provides further that the grounds on which a certificate may be given under regulation 15(4) include, in particular, that the person would not, before

the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which it is proposed they are to be removed; or that the whole or part of any human rights claim made by the person is clearly unfounded.

The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in an immigration case to determine whether to issue a ruling under rule 39 of the Rules of Court, preventing a signatory State from removing a foreign national from its territory. In the context of EUSS the test is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act. The absence of a real risk of serious irreversible harm is only one relevant factor in that analysis.

The terms 'serious' and 'irreversible' must be given their ordinary meanings. 'Serious' indicates that the harm must meet a minimum level of severity, and 'irreversible' means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible: it needs to be both serious and irreversible. An example of serious irreversible harm would include where there is a real risk that the person affected would be subject to significant deterioration in their physical or mental health.

Clearly unfounded means a claim is which is so clearly without substance that it is bound to fail.

it is possible for a claim to be manifestly unfounded even if it takes more than a cursory look at the evidence to come to a view that there is nothing of substance in it

Where a decision is certified under regulation 15 (4) the person may not be removed for the period of one month from the date they are notified of the decision to remove them except:

- in a duly substantiated case of urgency
- where they are detained pursuant to the sentence or order of any court or
- where they have entered the United Kingdom and are removable as an illegal entrant under Schedule 2 to the Immigration Act 1971

However, those exceptions cease to apply where a person makes an application to the Special Immigration Appeals Commission (SIAC) to set aside the certificate and SIAC directs that the person may not be removed, while the application is pending. In considering whether to set aside the certificate SIAC must apply the principles used in judicial review proceedings.

Where SIAC set the certificate aside so that the appeal can be brought within the UK then the person cannot be removed while the appeal is pending.

## Deportation: regulation 16

A case can be certified under regulation 16(3) where:

- a decision has been made to make a deportation order under section 5(1) of the Immigration Act 1971 (which includes deportation decisions under s3(5) and 3(6), including automatic deportation, of the Immigration Act 1971, and deportation by virtue of the Immigration (European Economic Area) Regulations 2016)
- the test at regulation 16(3) and (4) is met

The test at regulation 16(3) is that the removal of a person would not be unlawful under section 6 of the Human Rights Act 1998 despite the appeals process in relation to the appealable decision not have been begun or exhausted.

Regulation 16(4) provides further that the grounds upon which the Secretary of State may certify include (in particular) that the person would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which it is proposed they are to be removed.

It does not matter whether or not the deportation decision is the relevant appealable decision – any appealable decision under the regulations can be certified if, separately, a deportation decision has been made or the individual in question is subject to an extant deportation order;

Where an appeal is certified under regulation 16(3) the appeal does not suspend removal. However, a person whose appeal is certified must be given one month from when they are notified of the decision before they are removed except:

- in a duly substantiated case of urgency
- where they are detained pursuant to the sentence or order of any court or
- where they have entered the United Kingdom and are removable as an illegal entrant under Schedule 2 to the Immigration Act 1971

Where an applicant applies to the appropriate Court or Tribunal for an interim order to suspend removal the exceptions above cease to apply, and the person may not be removed until a decision has been taken on their application unless:

- the decision to remove them is based on a previous judicial decision.
- they have had previous access to judicial review,
- the decision to remove them is based on imperative grounds of public security

## Right of Return

Where an appealable decision is certified under Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 section 16 and the person is removed or leaves the UK they can apply for permission to return to the UK to attend their appeal hearing. Permission to return must be given where the conditions in Schedule 3 are met, unless their return may cause serious troubles to public policy or public security.



Other than when an appeal is certified under regulation 16 there is no right to enter the UK to attend an appeal.

## When is an appeal abandoned?

An appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 is abandoned where:

- leave to enter or remain is granted under the EUSS, unless the person has been granted pre-settled status and:
  - they give notice that they wish to appeal on the grounds they should have been granted settled status or
  - their settled status has been revoked and they wish to continue the appeal on the ground it should be restored.

Where a person has brought an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 leaving the United Kingdom does not abandon the appeal.

### Related content

[Contents](#)

# National Security

This section provides guidance on how national security matters are managed in the appeals system for appeals under the Nationality, Immigration and Asylum Act 2002.

## Section 97 certificates

Certificates may be issued in national security cases under section 97 of the [Nationality, Immigration and Asylum Act 2002](#). The effect of a section 97 certificate is that an appeal may not be brought to the Tribunal. Any appeal already lodged will lapse. Instead there is a right of appeal to the Special Immigration Appeals Commission (SIAC).

Section 97 certificates are issued if the Secretary of State has decided, or directed, that a:

- person's exclusion or removal is for reasons of national security or in the interests of relations between the UK and another country
- decision is or was based on information not to be made public for reasons of national security, in the interest of relations between the UK and another country, or to protect the public interest in some other way

## Section 97A certificates

Certificates can also be issued under section 97A of the 2002 act:

- if a certificate is issued under section 97A (1) or 97A (2), then:
  - an appeal against a deportation order or removal notice cannot be brought or continued from within the UK
- if a certificate is issued under section 97A(2B) to the effect that removal of the individual will not breach the UK's obligations under the European Convention on Human Rights (ECHR)
- as section 97A(2C) interprets section 97A(2B) as meaning that the person in question would not be subject to serious irreversible harm if removed

### Related content

[Contents](#)

# Immigration status during appeals

This section tells you about the immigration status of an applicant who appeals their decision.

Under [section 3C of the Immigration Act 1971](#), leave is statutorily extended where a person had leave when they made an application or claim and that leave expired prior to the Secretary of State making a decision on the application or claim. Leave is extended until any appeal against refusal is finally determined.

[Section 3D of the 1971 act](#) provides for the extension of leave until any appeal is determined where a person's leave is varied so that no leave remains.

Where the right of appeal is exercised from within the UK, [section 78 of the 2002 act](#) provides that the appellant will not be removed while the appeal is pending.

## Related content

[Contents](#)

## Related external links

Leave extended by Section 3C (and leave extended by section 3D in transitional cases)