NON-COMPLIANCE

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Introduction

The policy on Non-Compliance is designed to encourage compliant behaviour. However in some cases, as a result of non-compliance, applicants fail to establish their claim. This instruction gives guidance on refusing asylum or human rights claims in these circumstances.

Application of this instruction in respect of children and those with children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

The Main Points

Asylum or human rights claims can be refused where as a result of non-compliance a person has failed to establish that they qualify to remain on asylum or human rights grounds.

Non-compliance is relevant to a refusal of asylum or a human rights claim when a person has failed without reasonable excuse to make a prompt and full disclosure of material facts or otherwise to assist the Secretary of State to the full in establishing the facts of the case. This includes:

- failure to report at a designated place to be fingerprinted;
- failure to return or late return of the Statement of Evidence Form (SEF) Self Completion or other asylum questionnaire;
- failure to attend a screening interview about the application;
- refusing, without reasonable explanation, to answer questions relating to the application;
- leaving an interview, without reasonable explanation, prior to its completion; or
- failure to report to an Immigration Officer for examination.

From 7 April 2008 an application may be treated as impliedly withdrawn if an applicant fails to attend their asylum interview, unless the applicant demonstrates within a reasonable time

that that failure was due to circumstances beyond his or her control. For more information on this please refer to the Asylum Instructions: Failure to Report & Absconders and Withdrawal of Applications.

Human Rights claims

Non-compliance in connection with Human Rights claims should be treated in the same way as in asylum claims. In this instruction a reference to an asylum claim applies equally to a claim under the European Convention on Human Rights (ECHR). Where a claim to remain is made on Human Rights grounds (and not for asylum under the Geneva Convention) then any decision to grant leave will be for a limited period under Humanitarian Protection (HP) or Discretionary Leave (DL) provisions. Further guidance on Human Rights claims is contained in the Asylum Instruction (AI) on the ECHR and guidance on Humanitarian Protection and Discretionary Leave is contained in the AIs on Humanitarian Protection and Discretionary Leave.

Refusing Asylum or Humanitarian Protection on Non-Compliance Grounds

Paragraph 339M of the Immigration Rules (HC395 as amended) states that the Secretary of State may consider that a person has not substantiated his application for asylum or established that he is eligible for humanitarian protection or substantiated his human rights claim, and thereby reject his application for asylum, determine that he is not eligible for humanitarian protection or reject his human rights claim, if he fails, without reasonable explanation, to make a prompt and full disclosure of material facts, either orally or in writing or otherwise to assist the Secretary of State in establishing the facts of the case; this includes, for example, a failure to attend a screening interview, failure to report to a designated place to be fingerprinted, failure to complete an asylum questionnaire or failure to comply with a requirement to report to an immigration officer for examination.

A failure to comply will ***usually,*** but not always***,*** mean that the applicant has not established that they qualify for asylum or HP or DL and so result in the refusal of the application. It is important that consideration is given to any explanation provided by the applicant or their legal representative for the non-compliance. If consideration is given to refusal of asylum then the grant of humanitarian protection must also be considered.

The Immigration Appeal Tribunal case of *Ali HADDAD*, (HX/74078/97 (STARRED))/[00/HX/00928] considered how the decision maker should approach cases of non-compliance. It confirmed that any information held about a claim, however brief, ***must*** be considered. This information may be in the form of brief comments noted by an Immigration Officer on arrival, comments recorded in the Asylum Screening Unit, correspondence from a legal representative etc.

The determination also confirmed that in a case of non-compliance the refusal is on the grounds that the person has not established their claim and so must be made under paragraph 339M of the Immigration Rules (non-compliance) ***and*** paragraph 336 (asylum). From 9 October 2006, humanitarian protection has been placed on a statutory basis under the EU Qualification Directive and has been included in the Immigration Rules. If humanitarian protection is to be refused this should be under paragraph 339F and 339M. Paragraph 339M cannot be used alone to justify a refusal of asylum or humanitarian protection. Any refusal under non-compliance will usually be under paragraphs 336, 339F and 339M.

Information supplied at any point after the initial decision is taken and before removal ***must*** also be considered. See also the AI on Further Submissions.

Refusing asylum or humanitarian protection on non-compliance grounds in case of children

When making a decision as to whether it is appropriate to make a non-compliance decision in the case of a child, Case Owners must have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. Refer to Application of this instruction in respect of children and those with children for further information.

It is of particular importance to exercise discretion and greater sensitivity when making non-compliance decisions in the case of children. When investigating whether a non-compliance decision is appropriate, the Case Owner should, if required, contact the child's responsible

adult, and/or representative, and/or social services for information on the reasons for non-compliance.

Failure to Attend a Screening Interview

If the applicant fails to attend a pre-arranged screening interview without good reason the application should be considered on the material available to the decision maker and, if the claim is not established, asylum or human rights protection should be refused. The onus is on the applicant or their legal representative to provide a reasonable explanation for the non-attendance.

A reasonable explanation may include illness of the applicant - supported by acceptable medical evidence – or severe transport disruption. Non-availability of the legal representative is ***not*** considered a reasonable explanation. If there is a reasonable explanation a further interview should be arranged.

Port cases

If an applicant fails to attend a screening interview the port should wait for 5 working days for an explanation for the non-attendance. If the applicant makes no contact, the port will write a brief report about the non-attendance and request that the application be considered on the information on file including evidence of non-compliance. The port will send the file to the regional Asylum Team that has been allocated the case and a case owner will consider the application in accordance with the instructions for dealing with non-compliance cases.

Failure to Submit or Late Submission of the Statement of Evidence Form (SEF) Self Completion

Some asylum applicants are given a SEF and asked to return it within ***ten working days*** (by a specific date)***.*** A further period of 5 working days is allowed for the SEF to be linked to the applicant's file.

All requests to extend the 10 working days time limit for the return of the SEF should be considered on their merits and discretion exercised reasonably where there are ***exceptional*** circumstances. An extension ***will not*** be granted to enable the applicant to instruct a legal representative to complete the form.

In all cases the decision as to whether there has been non-compliance should be taken as soon as possible after the deadline for the receipt and consideration of the form. A decision to refuse on grounds of non-compliance should only be made if the SEF has not been received by the date on which the decision is made. If we are to rely upon non-compliance we must deal with applications in a timely manner.

Appeals and Further Submissions

Guidance on dealing with further submissions in non-compliance cases can be found in the AI on Further Submissions.

Incorrect refusals on non-compliance grounds

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In cases where it becomes clear that a refusal on non-compliance grounds is flawed it will be necessary to take corrective action. Examples of where this would be the case include:

- where a decision to refuse on non-compliance grounds is made on the basis that the applicant failed to return the SEF and it subsequently turns out that the form had been received by the time the decision to refuse was made but had not been linked to the file;
- where a decision to refuse on non-compliance grounds is made on the basis that the applicant failed to attend a screening interview or asylum interview (before 7 April 2008 failure to attend an asylum interview could result in a non-compliance refusal decision) but it subsequently turns out that the invitation was despatched to the wrong address.

Distinguishing Between Port and In-Country Cases

Following the determination of the Tribunal, in *Rasheed Argosh NORI (HX11030-2001)* the handling of the withdrawal of the flawed decision where the person was thought to have been non-compliant where in fact they were not, needs to differ between "In Country" and "Port" cases.

Port Cases

In a Port Case the decision that must be withdrawn in the event of an incorrect refusal on non-compliance grounds is the refusal of leave to enter. Only an immigration officer (IO) can cancel this decision and make a fresh decision. Following changes introduced in Section 119 of the Nationality, Immigration and Asylum Act 2002 the IO has an additional option under paragraph 6(3) of schedule 2 to the 1971 Act. When cancelling the refusal of leave to enter the IO can:

- require the applicant to submit to further examination; or
- grant limited leave to enter; or
- grant indefinite leave to enter.

Should the IO fail to take one of these courses of action within 24 hours of the cancellation of the refusal of leave to enter the applicant is deemed to have been given six months leave to enter subject to a condition prohibiting employment.

If an appeal has not been lodged the letter cancelling the refusal of leave to enter should include an apology ***and notify the asylum applicant that they are required to submit to further examination***. Arrangements should be made for the application to proceed to interview after which a substantive decision will be made.

If a valid appeal had been lodged the same action should be taken but, additionally, the case owner or Presenting Officer should notify the AIT that the decision to which the appeal relates has now been withdrawn and a new decision will be made.

In-Country Cases

If an appeal has not been lodged, the immigration decision that triggered the right of appeal should be withdrawn as flawed by letter (including an apology) and substantive consideration of the asylum application should continue.

If an appeal has been lodged the same action should be taken but, additionally, the case owner or Presenting Officer should notify the AIT that the decision to which the appeal relates has now been withdrawn and a new decision will be made.

Document Control

Change Record

Version	Authors	Date	Change Reference
1.0	DP	19/01/07	New web style implemented
2.0	UU/SL	19/11/07	Procedures Directive
3.0	RH	04/04/08	Change to para 333C Immigration Rules
4.0	SM	18/09/09	Children's Duty information added