Chapter 53 – exceptional circumstances

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53 Introduction

It is the policy of the Home Office to remove illegal migrants from the UK unless it would be a breach of the Refugee Convention or ECHR, or there are exceptional circumstances for not doing so in an individual case. Separate guidance exists on how to consider an asylum claim or an application for leave to remain on the basis of family or private life. This guidance concerns further exceptional circumstances claiming that removal would be inappropriate.

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

- When considering cases involving children regard must be given to the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 with respect to safeguarding and promoting the welfare of children. 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 Home Office guidance
 'Safeguard and promote child welfare' sets out the key principles to take into account in
 all department activities.
- Our statutory duty to children includes the need to demonstrate:

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- o 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
- o asylum applications are dealt with in a timely fashion
- Identification of those that might be at risk from harm.

53.1 When to Consider Exceptional Circumstances

An Illegal migrant, who claims that exceptional circumstances apply in their case such that they should not be removed, must put forward their claim by way of an application. An application for leave to remain on the basis of exceptional circumstances should be made, using the charged application form FLR(O) or FLR (FP) where a person is seeking to remain on the basis of family life or long residence. The requirement to make an application does not apply when the claim is raised:

- as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused
- where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 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
- in an appeal(subject to the consent of the Secretary of State where applicable)or
- As part of a further submission lodged in person after an asylum claim has been refused.
 Any further submissions must be considered in accordance with paragraph 353 of the Immigration Rules and the asylum instruction on 'Further submissions'.

Where exceptional circumstances raised amount to an asylum, family or private life claim and have already been fully considered under the relevant rules and guidance, officers need not give further consideration if all the factors have been fully addressed. Where additional factors exist that have not been considered, for example, length of time spent in the UK for reasons beyond the migrant's control, they must be considered in accordance with the factors outlined in paragraph 353B of the Immigration Rules.

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Exceptional circumstances may also be considered in cases where an asylum claim has been refused, appeal rights have been exhausted and no further submissions exist, as part of the process of asylum caseworkers keeping their cases under review. In these cases paragraph 353B of the rules is to be applied.

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53.1.1 Exceptional Circumstances - Relevant Factors

Relevant factors are set out below, but this list is not exhaustive.

When determining whether or not exceptional circumstances exist, consideration of the relevant factors needs to be taken as a whole rather than individually. Discretion not to remove on the basis of exceptional circumstances must not be exercised on the basis of one factor alone.

(i) Character, conduct and associations including any previous criminal record and the nature of any offence of which the applicant has been convicted

When considering an individual's character and conduct, regard must be given to whether:

- there is evidence of criminality that meets the criminal casework (CC) threshold
- the individual has been convicted of a particularly serious crime (below the CC threshold)
 involving violence, a sexual offence, offences against children or a serious drug offence
- there are serious reasons for considering that the individual falls within the asylum exclusion clauses, or
- it is considered undesirable to permit the individual to remain in the UK in light of exceptional circumstances, or in light of their character, conduct or associations, or the fact that they represent a threat to national security.

Evidence of criminality or conduct meeting the criteria above will normally mean that an individual cannot benefit from exceptional circumstances.

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(ii)Compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable

Caseworkers should assess whether there is evidence the individual has sought to delay or frustrate the decision making process, frustrate removal or otherwise not comply with any requirements imposed upon them.

Caseworkers should take account of:

- evidence of deception practised at any stage in the immigration process, including submitting a false identity to the Home Office.
- any other type of fraud or deception, such as benefit fraud or NHS debt
- failure to attend interviews as requested
- failure to supply information as requested (e.g. for re-documentation)
- whether they have lodged spurious application or further submissions to frustrate removal
- failure to comply with reporting conditions
- failure to demonstrate genuine efforts to leave the UK voluntarily
- whether they have worked illegally
- an individual's lawful employment history and how they have supported themselves and/or their family, and
- a sustained history of compliance with every requirement the Home Office has made of them, including providing full information in their application, attending interviews, compliance with reporting requirements.

Caseworkers must assess all evidence of compliance and non-compliance in the round, but repeated non-compliance and/or lengthy periods of absconding will generally mean that an individual cannot benefit from a grant of leave on account of exceptional circumstances, unless there are strong countervailing reasons in their favour.

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(iii) Length of time in the UK accrued for reasons beyond the migrant's control after their human rights or asylum claim has been submitted or refused

The length of residence in the UK is a factor to be considered where residence has been accrued by an unreasonable delay which is not attributable to the migrant. Periods of residence which are built up by actions of non-compliance attributable to the migrant will not count in the migrant's favour. More weight should be attached to the length of time a child has spent in the UK compared to an adult.

Provided that the factors outlined in 'Character' or 'Compliance' do not mean that the claimant cannot benefit from the exceptional circumstances guidance, then caseworkers must also consider whether there has been significant delay by the Home Office, not attributable to the migrant, in deciding a valid application for leave to remain on **asylum or human rights grounds** or whether there are reasons beyond the individual's control why they could not leave the UK voluntarily after their application was refused. For example:

- 'Family' cases where delay by the Home Office, or factors beyond the control of the family which have prevented departure, have contributed to a significant period of residence (for the purposes of this guidance, 'family' cases means a parent or parents as defined in the Immigration Rules and children who are emotionally and financially dependent on the parent, and under the age of 18 at the date of the decision). Following an individual assessment of the prospect of enforcing removal, and where the factors outlined in 'Character' and 'Compliance' do not prevent a case from benefiting from the exceptional circumstances guidance, family cases may be considered exceptionally on grounds of delay where the dependent child has lived in the UK for more than 3 years or more whilst under the age of 18.
- Any other case where the length of delay by the Home Office in deciding the application, or where there were factors preventing departure, may be considered exceptionally on grounds of delay where the person has lived in the UK for more than six years.

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Prospects of removal:

- Consideration must be given to the prospect of removal in considering whether to grant leave on an exceptional basis under paragraph 353B. Decision makers must assess the practical likelihood of removal. Where it is concluded that removal is unlikely, that the factors outlined in 'Character' and 'Compliance' do not weigh against the individual, and there has been significant delay by the Home Office, then a grant of discretionary leave may be appropriate provided there is credible evidence that:
 - the migrant is undocumented;
 - has made genuine efforts to secure appropriate travel documentation to facilitate voluntary departure from the UK but has been unable to do so for reasons beyond their control; or
 - it is accepted that the prospects of securing a document and/or return to the country of origin are unrealistic.

(iv) Any representations received on the persons behalf

These must be considered and given due weight. Individuals may raise other relevant factors not listed above. These should be fully considered on a case-by-case basis.

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53.1.2 Grants of Leave to Remain in Exceptional Circumstances

If having considered the factors set out in the guidance in <u>53.1.1</u> above removal is no longer considered appropriate then discretionary leave to remain should be granted. For further guidance, see 'Discretionary leave' policy.

53.2 Removal Decision following a previous refusal of leave to remain without a right of appeal

The changes to the family immigration rules on 9 July 2012 incorporated the factors relevant to article 8 consideration within the rules, subject to exceptional circumstances. When an overstayer has had an 'out of time' application refused without a right of appeal, which was decided on or after 9 July 2012 with reference to the relevant portions of the asylum, family and/or private life rules, no further human rights consideration is required.

Where the decision pre dates 9 July 2012 and has therefore not considered ECHR factors in line with the post 9 July 2012 family or private life rules, before enforcement action is taken, officers need to be aware that:

- Full consideration must be given to any raised or implied human rights issues in the
 earlier application before any decision to remove is taken. Any consideration of human
 rights issues must be taken following guidance on asylum, family and private life, and
 in accordance with the Immigration Rules.
- Whilst the previous decision may have been to refuse the application without a right of appeal, the individual may be entitled to an in-country right of appeal against any decision to remove them from the UK if that earlier application raised human rights issues.
- Any decision to offer an in country right of appeal should be accompanied with a detailed reasons for removal letter setting out the issues considered and an IS151B.
- Officers should look carefully at the earlier application and any other relevant exceptional factors before deciding whether it is appropriate to detain a person for removal.
- In cases where it is not appropriate to serve an IS151B, officers should make sure that
 the IS151A part 2 is served along with the ICD2163 appeal form. See 'Chapter 51:
 Administrative removal' for further guidance on procedure for serving administrative
 removal decisions.

Where a valid application was not submitted, article 8 factors will be considered only where one of the exceptions set out in GEN.1.9 of appendix FM apply.

53.3 Long residence

The 14-year rule (paragraph 276B(i)(b)), which provides a route to settlement on the grounds of long residence, lawful or unlawful, has been deleted. This has been replaced by a new private life route. The new Immigration Rules provide that at least 20 years' continuous residence, lawful or unlawful, will, subject to suitability, normally be necessary to establish a claim to remain in the UK on the basis of the article 8 right to respect for private life.

The 10-year rule (paragraph 276B(i)(a)), which provides a route to settlement on the grounds of continuous lawful residence in the UK of at least 10 years, has not been amended.

There are also new provisions allowing an applicant to be granted on the basis of private life after seven years continuous residence if they are under the age of 18, or if they have spent at least half of their life in the UK if they are aged between 18 and 24, or if the applicant has less than 20 years continuous residence in the UK but has no ties (including social, cultural or family) with their country of origin. See paragraph 276ADE of the Immigration Rules for full details of the requirements.

Applications for indefinite leave to remain under the long residence rules are charged applications. The onus is on the individual to apply on the correct application form and submit the required fee. A separate application and fee is required for each family member subject to immigration control.

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53.4 Children - Children as dependants

The presence in the UK of dependant children under 18 years of age must be taken into account when deciding whether removal of an immigration offender is the appropriate action to take. The family rules set out in appendix FM contain application routes for those wishing to enter or remain in the UK on the basis of family life with a child. See guidance:

IDI chapter 1.0b Family and private life - 10-year route

53.5 Elderly persons

In terms of removal, Ministers have agreed that a person's age is not, by itself, a realistic or reliable indicator of a person's health, mobility or ability to care for themself. Many older people are able to enjoy active and independent lives. Cases must be assessed on their individual merits. It may however be more appropriate to promote voluntary removal in the first instance rather than consider detention

The old paragraph 317 of the Immigration Rules, together with 318 and 319, allowed elderly and other adult relatives who were financially dependent on a relative settled in the UK to apply for indefinite leave to enter/remain in the UK. These paragraphs have now been deleted, and are replaced by paragraphs EC-DR to D-ILRDR of appendix FM which provides a new route for adult dependent relatives. This route is only accessible to applicants outside the UK.

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53.6 Medical problems

If a person's medical condition is advanced as a reason for delaying or discontinuing removal:

- ascertain full details of the condition
- obtain the person's signature on an ASL.3751 (DocGen) for access to his medical records, if necessary
- obtain a medical certificate
- obtain a doctor's or hospital letter outlining the condition
- ascertain from a doctor whether the person is fit to travel, or when they will be fit
- ascertain if the person has anyone in his home country to provide any necessary care
- check with the relevant country officer in COIS the likelihood of treatment being available in the person's country of origin, and
- refer to the relevant casework section.

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Where a family member of an individual suffers from a medical condition and this is advanced as a reason for delaying or discontinuing with removal, ascertain the information above in respect of the family member.

In the event that the individual refuses to provide a medical report or give consent to access to their medical records then removal action should continue. It is for the individual to provide satisfactory evidence in respect of such a claim and a refusal to do so for no good reason can only lead to the conclusion that the claim is spurious.

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53.7 AIDS/HIV positive cases and other article 3 and article 8 medical claims

Applicants may claim that they suffer from a serious medical condition and that their return and the consequent withdrawal of medical treatment being received in the UK would amount to inhuman or degrading treatment contrary to article 3. Medical claims will only reach the threshold for article 3 in rare and extreme circumstances. For further guidance see asylum instructions 'Considering human rights claims' and 'Human rights claims on medical grounds'.

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53.8.2 Inoculations and other preventative treatment (prophylaxis)

See also: 'IDI chapter 1 General provisions, section 8 Medical, part 5'.

If a person claims that it would be a breach of their human rights or simply unreasonable to return them to a particular country without access to preventive treatment of this kind, or attempts to delay their removal on these grounds, the general principle is that individuals are responsible for safeguarding their own health and that of their children.

When someone is informed that their appeal rights are exhausted and/or they are otherwise liable to be removed from the UK, you should:

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- remind them at the same time of their responsibility for minimising any health risks to themselves or their dependants in the country of return
- advise them to consult a general medical practitioner about any preventive treatment needed before travelling
- that they may have to pay for it, and
- record that the advise has been given on CID notes screen and note any comments about the persons medical health.

The above medical advice must be given and recorded on CID at each stage that a person is informed of their liability for removal, voluntary departure or enforced departure.

Certain categories of people who are returning to malaria risk countries are entitled to be issued with **mosquito nets free of charge**:

- children under the age of 18 years
- · pregnant women
- adults who are particularly vulnerable (immuno compromised) and who are unable to make their own provisions to access medication or mosquito nets.

A limited number of people, such as immune deficient, pregnant women and children under 18, may be particularly vulnerable to infection and therefore may need inoculation or other prophylaxis in preparation for their return.

The time between notification that their appeal rights are exhausted and final removal should normally allow sufficient time for people to take medical advice from a general medical practitioner and arrange for, and complete, any recommended treatment.

A person subject to removal cannot in principle claim any entitlement to remain in the UK to benefit from medical treatment. However, requests to delay removal for a short period to allow for preventive treatment should be considered on their merits in the light of medical advice and standard operational procedures before removal. This is particularly important when pregnant women, young children or unaccompanied minors are involved:

obtain a doctor's or hospital letter outlining the treatment required

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- ascertain from a doctor why the treatment is necessary prior to removal
- · ascertain the duration of the treatment, and
- ascertain from the person why the treatment could not have been completed earlier.

The presumption should be that removal will not be delayed unless a doctor has confirmed that the treatment is necessary prior to removal and the person can show good reasons why it could not have been completed earlier.

Where there is clear medical advice recommending the use of malarial medication for children (generally the under fives but also older children if medical advice dictates) but the family cannot afford to pay, (for example on asylum support) reasonable cost of such treatment can be met by the Home Office.

For others who present clear medical evidence to being particularly vulnerable and are unable to make their own provisions to access medication or mosquito nets, the Home Office provide mosquito nets free of charge.

Mosquito nets should be obtained from the nearest immigration removal centre.

Assisted Voluntary Return (AVR)

If a person falling within the above vulnerable categories is due to leave the UK under an assisted voluntary removal scheme requests, with the support of a doctor's letter, that inoculation or malaria prophylaxis be provided, the request should normally be granted.

Detainees

People detained prior to removal have access to medical care and advice from healthcare professionals in immigration removal centres. Detainees are not charged for treatment.

Medical advice on preventive measures, including advice leaflets, should be made available to detainees as soon as possible and should, if possible, be given as appropriate in the initial medical examination or screening which all detainees receive within 24 hours of detention, and in any case when removal directions are set.

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Where removal centre medical staff consider that preventive treatment is necessary and can be completed without delay to planned removal, removal directions may be set but for a date after the treatment is completed.

When setting removal directions, officers should consult the health care professionals, via the Home Office team at the centre, on the appropriate minimum time lag between administering medication and removal taking place.

Caseworkers, those responsible for setting removal directions and Home Office teams at removal centres must document case histories as thoroughly as possible. This is because, if a JR is commenced, access to a claimant's medical records cannot be guaranteed. Accurate and up-to date minutes of treatment offered, taken or refused may make it easier to keep removal directions in place, and/or respond to any further representations.

Malaria Prophylaxis

Preventive treatment for malaria is a special case in that medication must be taken shortly before travel. People detained prior to removal may not therefore be able to make the necessary arrangements for themselves.

Any malaria prophylaxis recommended as appropriate by the removal centre medical staff for pregnant women and children under five should normally be provided and **time allowed for it to take effect before removal**.

In the event of adverse side-effects, time should also be allowed to obtain and follow further medical advice.

Removal need not be deferred in any case where a detainee declines (on his or her own behalf or on behalf of a dependent child) to take malaria prophylaxis that has been provided on medical advice.

Further detailed information, including tables on 'Countries and territories with malarious areas' and 'Regimes for various types of treatment' can be found in 'IDI chapter 1, section 8, part 5'.

53.9Tuberculosis (TB)

The WHO guidelines 'Tuberculosis and air travel: guidelines for prevention and control (second edition)' specify that 'Physicians should inform all infectious TB patients that they must not travel by air until they have completed at least two weeks of adequate treatment. Patients with MDR-TB should be advised not to travel until proven by adequate laboratory confirmation (i.e. culture) to be non-infectious.'

Removal of those with TB should therefore not take place until these conditions have been fulfilled, but should not be delayed thereafter on medical grounds.

Caseworkers should bring this information to the attention of persons liable to removal at the earliest opportunity

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Revision History

Date	Officer/Unit	Specifics of change	Authorised by;	Version number
change published	Officer/Offic	opecines of change	Authorised by,	after change
		OEM Revision		53 v1
2-4-08	OEP	Amendment to section 53.9.1 and 53.16	Julia Dolby	53 v2
25/04/08	.0	Removal of DP2 and DP3 consideration in marriage cases	J. Dolby	53v3
02/05/08		Further update to DP2/93 and DP3/96	Julia Dolby	53 v4
10/07/08		Further update to DP2/93 and DP3/96	Judith Craig	53 v5
05/08/2008		Insertion of 53.1.7	Judith Craig	53 v6
14/10/2008	OPPI	Revision of Chapter 53.	Judith Craig	53 v7
24/04/2009	OPPI	Amendments to 53 – 53.1.4 to reflect policy changes to Paragraph 395C	Lin Homer	53 v8
11/08/2009	CRD	Amendment to 53.1.2	Phil Woolas	53 v9
22/10/09	ECAT –	Amendment to 53.1.1, 53.1.2, 53.6; insertion of para on Duty to Safeguard and Promote Welfare of Children.	Keith Lambert	53v10
25/05/2010	Professional	Amendment to 53.1.1:	Gail Adams	53 V11

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	Standards for Enforcement	395C of the Immigration rules		
14/04/2011	PSE	Amendment to 53.1.2.1: considerations prior to detaining (EFM).	Gail Adams	53 V12
20/07/2011		Amendment to 53.1.1 to make it clear that 3 years DL is appropriate and need to consider 395C in Section 47 case	Gail Adams/Emma Churchill	53V13
13/2/2012		Changes to 53.1 to remove references to 395C / Changes to 53.9 AIDs /HIV and 53.9.2 Inoculations and other preventative treatment	Richard Quinn	53V14
27/11/2013	Enforcement and Removals Operational Policy	References to UKBA, the Agency and UK Border Agency amended to Home Office	Kristian Armstrong	53v15
11 March 2015	Enforcement Operational Policy	General housekeeping and outdated content removed 53.1.1 updated on consideration of exceptional circumstances	Kristian Armstrong	53v16