Home Office

Applications from overstayers

Version 9.0

Contents

About this guidance

This guidance is for caseworkers who consider applications made on or after 9 July 2012 by individual's without extant permission to enter or stay in the UK.

The routes this guidance applies to are:

- all work and study, including the points-based system
- visitors
- appendix Long Residence
- appendix UK Ancestry
- most discharged Her Majesty's (HM) forces
- family (except certain categories including bereaved partners, victims of domestic violence and children – if in doubt whether this applies, seek advice from senior caseworkers)

It does not apply to:

- the following armed forces routes:
  - dependants applying for permission to stay as the family member of a serving HM forces member
  - those applying under an armed forces concession, for example, Gurkhas discharged before July 1997 applying under the special discretionary arrangements
- applications for administrative review under Appendix AR of the Immigration Rules
- applications for delegates of a VIP under Appendix VIP Delegate Visa of the Immigration Rules (Statement of changes)

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 Compliant Environment and Enforcement Unit.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

Publication

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

- version **9.0**
- published for Home Office staff on **15 October 2024**

Changes from last version of this guidance

This guidance has been updated to include changes to:

- paragraph 39E(2) to incorporate applications that have been rejected
- account for both the Coronavirus Extension Concession and Exceptional Assurance schemes that were in use during the Covid-19 pandemic - these changes are reflected in the new additions of paragraphs 39E(5) and 39F

Related links
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Considering applications from overstayers

Where an individual has been granted permission to enter or stay in the UK they must comply with the conditions of that permission including, but not limited to, the timeframe any permission is valid for.

Prior to the expiry of any extant permission an individual should either apply for further permission to stay or depart from the UK. Remaining in the UK after permission has expired is commonly known as overstaying.

The Immigration Rules do recognise, however, that in some, limited circumstances, a short period of overstaying may be unavoidable and should be disregarded during consideration of an application. Overstaying which falls outside of these exceptions, as set out in the Immigration Rules, will result in the refusal of an application.

Paragraph 39E of the Immigration Rules determine when a period of overstaying may be disregarded.

'This paragraph applies where:

(1) the application was made within 14 days of the applicant's permission expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) the application was made:
(a) following the refusal or rejection of a previous application for permission which was made in-time; and
(b) within 14 days of:
(i) the refusal or rejection of the previous application for permission; or
(ii) the expiry of any permission extended by section 3C of the Immigration Act 1971; or
(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or
(iv) any such administrative review or appeal being concluded, withdrawn or abandoned or lapsing; or

(3) the period overstaying was between 24 January and 31 August 2020; or

(4) where the applicant has, or had, permission on the Hong Kong BN(O) route, and the period of overstaying was between 1 July 2020 and 31 January 2021;or

(5) the period of overstaying:
(a) is between 1 September 2020 and 28 February 2023; and
(b) is covered by an exceptional assurance.

39F. For the purpose of paragraph 39E(5), “exceptional assurance” means a written notice given to a person by the Home Office stating that they would not be considered an overstayer for the period specified in the notice.’

Prior to 24 November 2016 the Immigration Rules provided a 28-day grace period for individuals who had overstayed to regularise their status in the UK. However, the Immigration Rules were amended to abolish the 28-day grace period and instead provide for a 14-day period for which overstaying is disregarded.

Changes to paragraph 39E

Rejected applications

On 9 November 2022, paragraph 39E(2) was amended to make it clear that a short period of overstaying can be disregarded if a subsequent application is made within 14-days of a previously in-time application being rejected.

This change makes it clear that the rejection of a previous application, not just a decision to refuse, falls within scope of the provisions of 39E.

The change was made following the findings of the Court of Appeal in the case of R v Secretary of State for the Home Department [2021] EWCA 1909 (IAC). The Court found that a refusal and subsequent notification of a previous application would fall within the scope of paragraph 39E. Therefore, a period of overstaying of up to 14 days from the date the notice of invalidity is served should also be disregarded in permission to stay applications.

Covid Extension Concession and Exceptional Assurance

Paragraph 39E(3) was added to the Immigration Rules on 22 October 2020. The effect is to disregard any overstaying between 24 January to 31 August 2020.

Paragraphs 39E(5) and 39F were subsequently added to the Immigration Rules on 4 April 2024 to account for the exceptional assurance. Exceptional assurance offered individuals a short-term protection against any adverse action or consequences after their permission had expired, where they were unable to leave the UK due to the COVID-19 pandemic and travel restrictions.

Paragraph 39E(5) was added to the Immigration Rules so that overstaying during periods where the person held an exceptional assurance, or short-term assurance will be disregarded and will not break continuous residence. However, it will not count as lawful presence towards any qualifying period (for example, settlement).

Paragraph 39F then sets out what is considered to be an exceptional assurance by specifying the form it must have been given to an individual.

More detail in respect of the concessions and schemes put in place as part of the Home Office’s response to the Covid-19 pandemic can be found in the Coronavirus

extension concession (CEC) and exceptional assurance concession: caseworker guidance

Calculating the date the period of overstaying begins

The 14-day period in which a subsequent application can be made is calculated from the latest of either the:

- last day of the individual's latest grant of permission to stay; or,
- end of any extension of the individual's permission under section 3C or section 3D of the Immigration Act 1971.

Caseworkers must take into account any variation on the duration of permission, such as a cancellation or curtailment decision.

The first day after the migrant's permission has expired will be the start of the 14-day consideration period. This is unless the migrant has submitted an in-time application which has not been decided before their permission expires.

For further information on section 3C of the Immigration Act 1971, including how to calculate when that permission ends, see: 3C and 3D permission.

As detailed above, overstaying is also disregarded and applications can be made during the following periods of overstaying:

- overstaying between 24 January and 31 August 2020, or
- overstaying where the applicant has, or had, permission on the Hong Kong BN(O) route, overstaying between 1 July 2020 and 31 January 2021
- overstaying where the period of overstaying is between 1 September 2020 and 28 February 2023; and is covered by an exceptional assurance.

Examples of how to calculate when a period of overstaying begins can be found in the Applications from overstayers: case examples section.

Migrant's status following submission of an application within 14 days of overstaying

Once an individual's permission has expired, they become an overstayer and no longer benefit from any condition/s that were attached to their previous permission. As set out in the Section 3C leave guidance, Section 3C of the Immigration Act 1971 does not apply to applications made after permission has expired.

The submission or consideration of an application within the 14-day period set out in paragraph 39E does not mean the migrant's previous permission and the conditions that were attached to that permission are either re-instated or extended.

Therefore, an applicant without valid permission at the point they submit their application continues to be an overstayer from the point their permission expired and throughout the period their application is pending.

As the applicant has no permission during the period their application is pending, they have no permission to work, privately rent, or access benefits and social care in the UK.

Any employer found employing a person who does not have permission to work in the UK may be liable to a civil penalty for employing an irregular worker under section 15 of the Immigration, Asylum and Nationality Act 2006 (the 2006 Act). An employer also commits a criminal offence under section 21 of the 2006 Act if they knowingly employ an irregular worker and may face up to 2 years' imprisonment and/or an unlimited fine if the case is dealt with at Crown Court. For more information, see: Check an employee's right to work documents.

Landlords should ask the tenant for proof of their continued right to rent. The tenant can choose to evidence this either by providing the landlord with documents from List A or B as set out in the code of practice or by using the Home Office online checking service, if applicable. In addition, you should refer to who can occupy residential accommodation set out in the landlords guide to right to rent checks.

Considering good reasons beyond the control of the applicant

Paragraph 39E(1) allows short periods of overstaying to be disregarded if an application was submitted within 14-days of the individual's leave expiring **and** there was a good reason beyond the control of the applicant or their representative why the application could not be made in-time.

An explanation of why the application could not be made in-time should be provided as part of or alongside the application. An explanation should also be supported by evidence.

When considering whether 39E(1) applies to an individual's circumstances, caseworkers must give thought to:

- the plausibility of the reasons;
- whether the reason was genuinely outside the applicant's control or whether the applicant is describing difficulties that could realistically have been surmounted; and,
- the credibility of evidence provided.

Caseworkers must decide each case on its merits, but non-exhaustive examples of reasons that might be considered beyond the control of applicants are:

- the applicant was admitted to hospital for emergency treatment (evidenced by an official letter verifying the dates of admission and discharge and the nature of the treatment)
- a close family bereavement (evidenced by a copy of the death certificate)
- an educational institution was not sufficiently prompt in issuing a Confirmation of Acceptance for Studies (CAS)

Discretion

Caseworkers may be able to exercise discretion under exceptional or compassionate circumstances where the application was submitted after the 14-day period set out in paragraph 39E. For example, where an individual was unable to apply to extend their stay in the UK due to a serious illness or a medical condition that went beyond 14-days.

If a caseworker decides to use discretion it must be authorised by a caseworker at Higher Executive Officer (HEO) grade or above.

In these circumstances a caseworker must grant permission under the rules, with the same duration and conditions as a normal grant of permission under the rules attached to it. The decision letter must be clear that permission is being granted because the migrant met all other requirements of the route, and the caseworker has accepted there were exceptional circumstances which prevented the applicant from making an in-time application.

Related links
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Related external links
Check an employee's right to work documents
Coronavirus Extension Concession (CEC) and Exceptional Assurance Concession

Armed forces cases

This section tells caseworkers how to calculate the 14-day consideration period for armed forces cases and what caseworkers can consider as exceptional circumstances.

Non-UK members of HM Armed Forces (Foreign and Commonwealth members, including Ghurkas) are exempt from immigration control whilst they are serving.

They are able to apply for settlement under Immigration Rules: Appendix HM Armed Forces up to 18 weeks prior to discharge.

The Ministry of Defence (MoD) are required to notify the Home Office (HO) of the date when a non-UK member of HM Armed Forces is discharged, dismissed or retiring from service. 28 days permission to stay (PtS) will then be granted to allow for submission of a settlement application. Where the HO have not been notified of the date a non-UK member of HM Armed Forces is being discharged, dismissed or retiring from service, the 28 days PtS must be granted as soon as the HO are made aware that they are no longer a serving member of HM Armed Forces.
The 14 day, 39E(1) consideration period can only begin on the day after the 28 days PtS has expired.

Exceptional circumstances

For armed forces cases, exceptional circumstances which may justify exercising discretion include reasons which directly relate to the individual's armed forces service or medical discharge. For example:

- deployment abroad at short notice
- the commanding unit have retained or lost their service personnel's documents
- delay in obtaining medical information related to discharge

Dependents of HM forces members should generally be treated in the same way as any other migrant in the immigration system when it comes to consideration of 39E.

Accordingly, if dependents do not fall within the provisions of 39E decision-makers should consider whether exercising discretion is appropriate (as detailed above).

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Case Examples: Considering applications from overstayers

This section gives caseworkers some non-exhaustive examples of how to consider whether a period of overstaying should be disregarded under paragraph 39E.

Late application not accepted under 39E

The migrant's previous permission to stay expired on 15 April 2023.

The migrant made a late/out of time application for further permission to stay on 20 April 2023. As part of their application the migrant stated they had forgotten to apply before the expiry of their previous permission as they thought it remained extant for another week.

As the application was made within 14-days of permission expiring and the migrant provided a reason, the decision-maker considers whether this constitutes a good reason beyond the control of the applicant under paragraph 39E(1).

The decision-maker concludes that forgetting to apply in-time alone does not constitute a good reason beyond the control of the applicant. The onus is on the applicant to ensure they apply for further permission before the expiry of any status they hold.

In this scenario, paragraph 39E does not apply and the period of overstaying is not disregarded during consideration of the application.

Good reasons beyond the control of the applicant

The migrant previously held permission to stay until 31 March 2023.

However, they were unexpectedly admitted to hospital for emergency surgery on 25 March 2023, and remained in recovery in hospital until after the expiry of their permission.

Following the migrant's discharge from hospital, on 3 April 2023 the migrant made an application for further permission to stay. As part of the application the migrant explained why they are applying late/out of time and provided their medical records as evidence.

The decision-maker considered the explanation and evidence provided alongside the late application under paragraph 39E(1); including plausibility of the case. The decision-maker concludes the application was made within 14 days of the original expiry date of the migrant's permission and out of time for reasons beyond the control of the applicant.

To note, although in this scenario the applicant would benefit from the provisions of 39E, which allows them to make an out-of-time application, they will not benefit from 3C leave. Whilst the IHS is paid at the point the application for further immigration permission is submitted, access to NHS treatment without charge only commences from the date the immigration permission is granted.

Prior to a decision being made, an applicant benefitting from 39E would be directly chargeable for NHS treatment accessed.

In this case the provisions of paragraph 39E(1) apply and the period of overstaying is disregarded as part of consideration of the application.

Subsequent application made within 14-days of the rejection of a previous, in-time application

Before the expiry of the migrant's permission to stay on 10 May 2023, the migrant made an in-time application on 4 May 2023 for further permission.

The migrant did not pay the associated application fee at the time or after requests for the fee from the Home Office. The application was rejected on 8 August 2023.

Following receipt of the rejection notice the migrant then made an out of time application for further permission on 12 August 2023.

The subsequent application was made within 14-days of a previously in-time application being rejected, and as such the applicant benefited from 39E(2). The decision-maker disregarded the period of overstaying between 8 and 12 August 2021 when the out of time application was considered.

Coronavirus Extension Concession / Exceptional Assurance

Refer to the Coronavirus Extension Concession and Exceptional Assurance guidance for case examples on how 39E may be applied.

Related links
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