Home Office

Appeals Guidance		
This instruction applies to		**Reference**
All staff who need to know about appeals under the Immigration Act 2014		
Issue Date	**Effective Date**	**Expiry Date**
20th October 2014	20th October 2014	
Issued on the authority of	Sally Weston	
Instruction type	Appeals Policy Guidance	
Purpose of the guidance	This guidance on the Immigration Act 2014 (The Act) explains the operation of the immigration appeals system as found in Parts 5 and 6 of the Nationality, Immigration and Asylum Act 2002 (The 2002 Act) as amended by Part 2 of The Act. The Act introduced fundamental changes to the appeal process.	
Contact	AppealsPolicy@homeoffice.gsi.gov.uk	
The appeals system	Note that the new appeals system in the Immigration Act 2014 is being commenced on a phased basis. During the transitional phasing period, some appeals may continue under the former appeals regime. The guidance on appeals under the former appeals regime may be found at:- https://www.gov.uk/government/publications/appeals-policy	
Managers must ensure staff members are aware of this guidance and the new appeals process under the Immigration Act 2014.		

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1. Introduction

1.1 The main changes to appeals made by the Immigration Act 2014 are that a right of appeal only arises when the Secretary of State for the Home Department (SSHD):-

(i) refuses a human rights claim;
(ii) refuses a protection claim, namely a claim for refugee or humanitarian protection status;
(iii) revokes protection status, namely refugee or humanitarian protection status;

1.2 Refusal of other applications (and other immigration decisions such as a removal decision or curtailment of leave) will not give rise to a 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: see definitions in Appendix AR of the Immigration Rules: https://www.gov.uk/government/collections/immigration-rules

1.3 If a person has made an application to enter or remain in the United Kingdom (UK), has made a protection claim, or a human rights claim, or a decision to remove or deport has been made, the person may be served a "one stop notice" under section 120 of the Nationality, Immigration and Asylum Act 2002 (as amended by the 2014 Act). This notice places an ongoing duty on a person to raise any additional reasons or grounds (other than those in the application) that would permit him/her to remain in the UK. The purpose of this notice is to require a person to raise reasons and grounds at an early stage and to prevent matters being raised at the last minute. If no response is made to the notice but the person makes a late claim, if refused, the claim can be certified under section 96 of the 2002 Act, such that there will not be a right of appeal if the claim could have been raised earlier (and there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice, s96(2)(c)). Section 7 of the Asylum Policy Instruction, 'Further Submissions' sets out certification under section 96 and can be accessed at:-
https://www.gov.uk/government/publications/further-submissions

1.4 In addition to the power to certify late claims, there are other certification powers which affect rights of appeal. A claim can be certified under section 94 where it is considered to be clearly unfounded. Where a person is from a designated State listed in section 94(4) the claim must be certified unless the case worker is satisfied that it is not clearly unfounded see guidance on section 94:-
https://www.gov.uk/government/publications/non-suspensive-appeals-certification-under-section-94-of-the-nia-act-2002-process

If a claim is certified under section 94 it has the effect of making the appeal out of country. In the case of deportation of a foreign criminal, there is a further certification power in section 94B where a human rights claim has

been refused and there is not a risk of serious irreversible harm if the person is removed and made to appeal from outside the country:- https://www.gov.uk/government/publications/certification-guidance-for-non-eea-deportation-cases-section-94b

There are also certification powers that apply when a person can be safely returned to a third country to have their asylum claim considered (Schedule 3 to the 2004 Act), without an appeal in the UK, and there are powers to certify national security cases which mean that an appeal is heard by the Special Immigration Appeals Commission (SIAC).

1.5 Appeals are made in the first instance to the First-tier Tribunal (FtT) which can allow the appeal or dismiss it:- https://www.gov.uk/government/publications/appeals-policy

1.6 The grounds on which an appeal can be brought are set out in section 84 (as amended) and in summary provide that the appeal can only consider the refusal of the claim made (including a new matter where consent is given – see below).

1.7 Section 85 (as amended) sets out the matters the Tribunal can consider on which see section 7 and 8 below. The main change is that the Tribunal can only consider a "new matter", which has not been considered by the SSHD, if the SSHD has given the Tribunal consent to do so. A new matter should not be raised before the Tribunal unless the SSHD has had a chance to consider the new matter.

2. Right of appeal

2.1 A person ("P") may appeal to the Tribunal where -

(i) the Secretary of State has decided to refuse a protection claim made by P,
(ii) the Secretary of State has decided to refuse a human rights claim made by P or,
(iii) the Secretary of State has decided to revoke P's protection status.

2.2 The definition of "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom

(i) would breach the United Kingdom's obligations under the Refugee Convention, or
(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.

2.3 A "protection claim" therefore includes asylum claims and claims from persons who may fall outside the Refugee Convention but nonetheless 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.

2.4 A person has "protection status" if the person has been granted leave to enter or remain in the UK as a refugee or as a person eligible for a grant of humanitarian protection.

2.5 The definition of "human rights claim" is a claim made by a person that to remove the person from, or require him to leave the UK, or to refuse him entry into the UK, would be unlawful under section 6 of the Human Rights Act 1998.

2.6. In addition to claims citing human rights, the following applications under the Immigration Rules will be considered to implicitly raise human rights and be treated as a human rights claim:

(i) Applications under the family rules in Appendix FM of the Immigration Rules; and
(ii) Applications under the long residence Immigration Rules (paragraph 276ADE of the Immigration Rules).

3. Grounds of appeal

3.1 The grounds of appeal are set out in section 84 (as amended). An appeal against a refusal of a protection claim must be brought on one or more of the following grounds: –

(a) that removal of the appellant from the UK would breach the UK's obligations under the Refugee Convention;
(b) that removal of the appellant from the UK would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection;
(c) that 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).

3.2 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.

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

3.4 In accordance with section 85 (as amended), the Tribunal must not consider a new matter, (which constitutes a ground of appeal listed in section 84) unless the SSHD has given the Tribunal consent to do so (refer to sections 6 to 9 below).

4. Section 120 notice

4.1 Section 120 states that the SSHD or an immigration officer may serve a notice on a person (P) who has:-

(i) made a protection claim or a human rights claim;
(ii) made an application to enter or remain in the UK; or
(iii) a decision to deport or remove has been made or may be taken.

4.2 Once served with a section 120 notice, a person who requires leave to be in the UK (or only has leave by virtue of section 3C or 3D of the Immigration Act 1971), must provide a statement setting out any additional reasons or grounds P has for entering or remaining in the UK; or any grounds on which P should not be removed from the UK. This is an ongoing duty so that a further statement should be made, if a new reason or ground for remaining in the UK arises. Any reasons or grounds should be raised as soon as reasonably practicable. There is no requirement to reiterate the same grounds or reasons that the SSHD is already aware of, or have been considered.

4.3 All persons liable for removal or deportation will normally receive a section 120 notice at some point in the process. Once a notice has been served it will not be re-issued, however a person may be reminded of their ongoing duty.

4.4 A time limit may be specified on the section 120 notice 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 may be able to certify any claim (see below).

4.5 The impact of a section 120 notice is significant. If a person fails to respond to a notice and then makes a claim later without good reason, if the claim is refused, it may be certified under section 96 of the 2002 Act with the consequence that there will not be a right of appeal. Section 7 of the following guidance sets out the certification process under section 96:- https://www.gov.uk/government/publications/further-submissions

4. 6 Where the person makes a statement in response to a section 120 notice the person 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.

5. Place from which an appeal may be brought or continued

5.1 Section 92 of the 2002 Act (as amended) 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.

5.2 The table below 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)	Outside UK
Human rights claim made in UK	Within UK
Human rights claim made in UK (and certified)	Outside UK
Human rights claim made outside UK	Outside UK
Revocation of protection while in UK	Within UK
Revocation of protection while outside UK	Outside UK

5.3 The SSHD has the following certification powers which have the effect of requiring a person to appeal from outside the UK:

(i) a protection or human rights claim under section 94(1) of the 2002 Act if the claim is clearly unfounded;
https://www.gov.uk/government/publications/non-suspensive-appeals-certification-under-section-94-of-the-nia-act-2002-process

(ii) a protection or human rights claim under section 94(7) if the person is to be removed to a third country where there is no reason to believe that their human rights will be breached;
https://www.gov.uk/government/publications/non-suspensive-appeals-certification-under-section-94-of-the-nia-act-2002-process

(iii) a protection or human rights claim under Schedule 3 to the 2004 Act if it is proposed to remove him or her to a safe country for that claim to be considered;
https://www.gov.uk/government/publications/safe-third-country-cases-to-consider-asylum-application-process

(iv) a human rights claim by those liable to deportation as a foreign criminal under section 94B of the 2002 Act where there is not a real risk of serious irreversible harm if they are removed while the appeal is pending;
https://www.gov.uk/government/publications/certification-guidance-for-non-eea-deportation-cases-section-94b

5.4 With regard to an appeal against the revocation of protection status, the appeal must be brought from within the UK if the decision to which the appeal relates was made while the person was in the UK; and the appeal must be brought from outside the UK if the decision to which the appeal relates was made while the person was outside the UK.

5.5 When a person brings or continues an appeal relating to a protection claim from outside the UK, 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 such as the person's removal breaches the Refugee Convention or the UK's obligations in relation to persons eligible for a grant of humanitarian protection.

5.6 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 – see section 104 of the 2002 Act. If a person wishes to challenge a decision to certify a claim, this must be done by seeking a Judicial Review of the SSHD's decision to certify the claim.

6. Matters before the Tribunal

6.1 Section 85 (as amended) provides that on an appeal against a decision, 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. However, there are restrictions on the consideration of matters which constitute "new matters", which have not previously been considered by the SSHD.

6.2 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.

7. "New matter" or "new evidence"

7.1 In the first instance, the SSHD (here the Presenting Officer (PO) triaging the appeal or representing the SSHD at the appeal) will need to consider if the matter raised amounts to a "new matter" under section 85(6). A matter is a "new matter" if:-

(i) it constitutes a human rights or protection claim, and
(ii) the SSHD has not previously considered the matter.

7.2 A "new matter" must be clearly distinguishable from and outside the context of the original claim. The following examples are likely to constitute new matters:

(i) A protection claim has been made, including a claim under Article 3 of the ECHR, but the appellant is now claiming removal would be (or would also be) a breach of Article 8 based on his family life.
(ii) A human rights claim based on family life has been made, but the appellant is now claiming (or also claiming) that he is a refugee.
(iii) A human rights claim has been made based on private life under Article 8, but the appellant is now claiming (or also claiming) that removal would be a breach of Article 8 on the basis of family life because the appellant has now married a British Citizen.

7.3 A "new matter" does not include additional facts or evidence of the original claim. The following examples are unlikely to constitute new matters:

(i) A human rights claim has been made based on private life under Article 8 of the Convention but since the decision on this matter further time has elapsed, friendships have developed and property assets have been acquired.
(ii) An application has been made for leave to remain as a parent (where an Article 8 claim is implied – see para 2.5 above) but since the decision on this matter the existence of additional children has been introduced to the claim.
(iii) A protection claim has been made, but since the decision on this matter an additional risk factor has been identified or the country situation has changed.

7.4 A matter can only be described as "considered" by the SSHD where a decision has been made on the merits of the matter raised. The new matter has not been considered if it was raised with the SSHD before an appeal but the SSHD has not yet considered the matter for whatever reason.

8. Handling "new matters" prior to and at the appeal hearing

8.1 The nature of the appeal should be clarified at any case management review hearings prior to the appeal, or at the outset of the appeal hearing as a preliminary matter. This will ensure that the parties are in agreement about the matters to be considered and the SSHD can clarify whether or not consent is given to consider any new matter(s). Where a "new matter" is raised before an appeal hearing, for example in the grounds of appeal, the SSHD should endeavour to consider the matter before the appeal hearing. Depending on the way the matter is raised with the SSHD, the new matter may be identified only shortly before or at the hearing. Where the matter raised can be considered quickly, this should be done.

8.2 If more time is required to consider the matter and, for example, evidence is required or needs to be verified, the PO should indicate to the Tribunal that a new matter has been raised and the SSHD does not consent to that new matter 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, so that the appeal can consider all matters, but if the

Tribunal does not agree to an adjournment the PO will have to consider what is the most appropriate way to proceed in the circumstances and will consider:-

(1) refusing consent on the new matter on the basis that the SSHD is unable to deal with the new matter without, for example, considering evidence or verifying documents;
(2) withdrawing the decision under appeal in accordance with guidance.

8.3 Where a "new matter" is not considered by the SSHD in advance of the hearing, the PO who has conduct of the case will make a decision on whether consent should be granted for the Tribunal to consider the matter. 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 Annex C of this document.

9. Consent to hear "new matters"

9.1 Consent should be given where the substance of the claim remains unchanged but the grounds of the appeal have changed. For example:

(i) where the appeal concerns the refusal of a protection claim, if Article 3 of ECHR is raised at appeal in relation to harm from the same actors as in the asylum claim.
(ii) where the appeal concerns the refusal of a human rights claim on the basis that a medical condition will breach Article 3 rights, if Article 8 is raised at appeal in relation to the same medical condition.

9.2 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 so, consent should usually be given. However, unless there are exceptional circumstances (see para 8.4 below), consent should be refused if:

(i) 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;
(ii) The new matter comprises a protection claim and it has not already been confirmed that the UK is the responsible state for determining the claim;
(iii) If it is necessary to conduct additional checks such as a person's criminal conviction history or the status of impending prosecution.

9.3 Where consent would normally be withheld, consideration must be given to exceptional factors which may indicate consent should be given. Exceptional circumstances may include:

(i) a person has a serious illness and the appeal needs to be determined on an urgent basis.

(ii) the matter had been raised with the SSHD and, though no fault of the appellant, there has been more than six months delay in the SSHD considering the matter.

9.4 Where consent is refused, the SSHD will provide written reasons for refusing consent. The PO will require an SCW's approval of the letter before service. If the new matter has been raised before the Tribunal hearing and if this has been considered by the SSHD in advance of the hearing then the revised decision will be sent in writing to the person 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 then the decision will be served 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. PO's will be required to update the new field on CID providing reasons for giving or withholding consent.

9.5 If the Tribunal considers a new matter without the SSHD giving consent for it to do so, it will act outside its jurisdiction. The SSHD may seek to appeal the decision of the Tribunal to consider the "new matter".

9.6 If the SSHD withholds consent on the new matter and the Tribunal proceed to consider the new matter, the PO should inform the Tribunal that in the view of the PO it is acting outside its jurisdiction. The SSHD will not make any representations or submissions relating to the new matter during the hearing.

9.7 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.

(i) If the appeal is allowed then the applicant will 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.

(ii) If the appeal is dismissed then the SSHD will consider the position and 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.

10. Immigration status during appeals

10.1 A person's immigration status during an appeal continues as it was before the appeal for the duration that the appeal is pending. Where the appeal is brought within the UK, the person has the additional protection that while the appeal is pending they may not be removed, in accordance with section 78 of the 2002 Act.

10.2 Under section 3C of the Immigration Act 1971 (as amended by the Immigration Act 2014) leave is statutorily extended for those situations where a person had leave when they made an application and that leave expired prior to the SSHD making a decision or an appeal (or administrative review) being 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. The link to 3C and 3D guidance is as follows:- https://www.gov.uk/government/publications/3c-and-3d-leave

11. Allowed appeals

11.1 If an appeal is allowed the original decision will have been found by the Tribunal to be unlawful on the basis that it breached a person's human rights and/or the right to protection under the Refugee Convention and/or Humanitarian Protection. The Home Office must respond to the allowed appeal by reconsidering the original decision. In most cases this will mean granting the immigration leave that the applicant would have been entitled to on the factual findings of the Tribunal. Where there is a challenge as to how the Home Office has implemented an allowed appeal the route for this will be through Judicial Review.