Home Office

Evidential flexibility: points-based system

Version 8.0

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About this guidance

This guidance tells you how to apply the evidential flexibility policy for applications made under the points-based system which is set out in paragraph 245AA of the Immigration Rules. It replaces all previous instructions and guidance on evidential flexibility.

It also tells you how to consider judicial reviews and appeals when the grounds of challenge raise the evidential flexibility policy and the cases of Mandalia v Secretary of State for the Home Department [2015] UKSC 59 or SH(Pakistan) v Secretary of State for the Home Department [2016] EW Civ 426.

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 Administrative 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 email the Guidance Rules and Forms team.

Clearance

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

- version **8.0**
- published for Home Office staff on **24 November 2016**

Changes from last version of this guidance

- guidance put into new guidance format and rewritten to reflect changes to the Immigration Rules and case law of SH(Pakistan) and Mandalia
- guidance for litigation operations casework put into the guidance

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When evidential flexibility applies in PBS applications

The requirements of each PBS route, including the evidence which must be submitted, are set out in the Immigration Rules. This means applicants should provide all information and evidence on which they rely to support their application at the outset of the process. However, it is recognised that if an applicant makes a minor error or omission with the supporting evidence they provide, then in some circumstances it may be appropriate to contact them and invite them to provide additional information. Guidance on how to consider applications submitted prior to 24 November 2016 can be found in the guidance archive on Horizon.

The circumstances when a decision maker can request additional information are set out in the evidential flexibility rule in paragraph 245AA in part 6A of the Immigration Rules.

Paragraph 245AA only applies to specified documents. Specified documents are route specific and are documents the applicant has to provide in order to meet the requirements of the Rules. A request for further information can only be made under evidential flexibility when the applicant has made a valid application.

Additional information can only be requested once and only in the specific circumstances set out in paragraph 245AA(b). These are where:

- documents (for example bank statements) are missing from a sequence – for the definition of this see 'Documents missing from a sequence'
- a document has been submitted but is in the wrong format, for example, where a document contains all of the substantive information required by the Immigration Rules but should have been submitted on letterheaded paper
- the document submitted with the application is a copy and an original document is required
- a document does not contain all of the specified information – for example, if an employer's letter has been provided that does not confirm the applicant's gross annual salary or that the employer needs to employ the applicant in their current role for the foreseeable future

If a specified document does not include all the specified information, you do not need to write to an application where the missing specified information can be obtained from one of the following:

- other documents submitted with the application
- the website of the organisation which issued the document
- the website of the appropriate regulatory body, for example, the Financial Conduct Authority

You must only request additional information under paragraph 245AA if you have reason to believe the information exists and that the applicant would meet the requirements of the Immigration Rules if they were given a further opportunity to

provide that information. If the application falls for refusal for a reason which could not be addressed by requesting additional information, for example, under general grounds for refusal then you must not request further evidence under paragraph 245AA. If you are unsure, you must discuss this with your senior case worker or line manager.

If you decide that evidential flexibility does not apply to the case you must accurately and fully record on either CID or Proviso:

- whether evidential flexibility applies
- if it does why no request for further information has been made

You must explain fully in the decision letter why no request for further information has been made. Suggested wording for your decision letter can be found in the deciding the case section of this guidance.

Documents missing from a sequence

Applications made on or after 24 November 2016

In relation to applications submitted on or after 24 November 2016, a document will only be considered to be missing from a sequence if the documents at both the beginning and the end of the sequence have been provided.

Therefore, if an applicant needs to demonstrate that they have held the required level of funds for 3 months, and have provided page one and page 3 of a statement, but have omitted the second page, then the missing page could be requested under evidential flexibility. However, if they had omitted the first page of the bank statements then it could not be requested under paragraph 245AA.

In some circumstances, PBS applicants must show that they have held the required level of funds to demonstrate maintenance for either 28 or 90 days and the closing balance in the account must be dated within 31 days of the date the application is submitted. If they have provided information for the full 28 or 90 day period, but the most recent information they have provided is older than 31 days prior to the date of application additional information could not be requested under paragraph 245AA.

An example of this is when an applicant makes an application, but that application is rejected. They then resubmit the application, having corrected the reason why the application was rejected, but resubmit the same specified documents. However, if the closing date on the bank statements is now no longer within 31 days of the date of the resubmitted application then paragraph 245AA would not apply.

Applications made before 24 November 2016 and the judgment in Mandalia

The judgment in the case of Mandalia v Secretary of State for the Home Department [2015] UKSC 59 clarified what is meant by 'missing from a series' for applications made before 24 November 2016. The court ruled that something can be said to be missing from a series even when the start and end points of that series are not known. See 'Litigation and evidential flexibility' for guidance on how to deal with litigation raising Mandalia.

So, if, to meet a requirement under the Immigration Rules, an applicant must demonstrate that they have held the required amount of funds for 90 days, but have omitted the first month's bank statement, under the version of paragraph 245AA in place before 24 November 2016, a request can be made if it is clear that the missing statement is part of a series. Indicators that the evidence is part of a series might include numbering on the bank statement making it clear that preceding statements exist. For example, the applicant submits bank statements numbered 63 and 64, with a balance carried over, it is obvious that page 62 exists and the applicant can be asked to provide it.

If the applicant has provided bank statements which do not cover the required time period, and it is clear that there are no preceding bank statements in existence, paragraph 245AA would not apply. For example, if the applicant submitted bank statements numbered 1 and 2, and there if no express reference to a previous balance having been brought forward, there can be no missing pages at the start of the sequence and in these circumstances there would be no need to consider requesting further evidence.

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Entry clearance applications

Process to request information

To request additional information under paragraph 245AA you must contact either the applicant or representative by email using the email address or telephone numbers provided on the application form (VAF). If you contact them by email you must use the standard email template. If you contact them by telephone you must follow your telephone call with an email. You must allow a maximum of 10 working days from the date the request for additional information is made for them to provide the requested information.

When requesting information under evidential flexibility you must tell the applicant to provide the requested information within 10 working days. You should allow time for any additional information provided by the applicant to reach the decision maker; this may be after the 10 working day deadline and so it is appropriate to defer the case for 13 days. If any additional information has been received within 10 working days you must take this into account when deciding the case.

If you do not receive any additional information within the 10 day deadline, you must make a decision on the basis of the available information.

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In-country applications

Applications made at the Premium Service Centre (PSC)

If the applicant does not have a legal representative you must make the request for additional information to the applicant by email. When making this request you must use standard email template. Prior to making the request for further information by email you must confirm with the applicant that they are content for the Home Office to contact them via this email address regarding their application. If not, you must ask applicant to provide an email address they are happy to be contacted at. If the applicant is not happy to give an email address for this purpose then you must send them a letter making the request for further information. You must use an ICD.5114 to make the request. You must record on CID that the migrant refused to provide an email address that they were willing to be contact by the Home Office at.

When you request additional information you must state of the following requirements:

- the applicant must respond within a maximum of 10 working days of the date of the request
- the missing information must be with the Home Office within this timeframe
- recommend it is sent by next day special delivery – original documentation must be provided, as faxes, scans or photocopies are not accepted

If the applicant has a legal representative you must inform the applicant that the request for additional information will also be sent to their legal representative by email.

You must send all emails from the team mailbox, not your personal mailbox. This allows others to access any responses in your absence. You must save a copy of the email you sent in the team mailbox so colleagues can see what details you have requested.

You must note the following details on CID:

- the information requested
- any emails sent including your name the date and the content of the email

This is to show that paragraph 245AA has been correctly applied.

If you cannot contact the applicant or their representative by email, because, for example, emails have bounced back as undelivered, you must send them an ICD.5114 detailing the information you require and record the issues you had making contact with them in CID.

You must send the letter to the address they have provided for correspondence. You must record details of any letter sent on CID including the date you created the letter. This is to evidence that the evidential flexibility policy has been correctly applied.

Postal applications or applications made online

When requesting additional information under paragraph 245AA the Home Office's policy preference is to make the request by:

- making preliminary contact by telephone
- following up with a written request by email
- if there is no email address follow up with a request by letter

Contacting the applicant by telephone

Contacting the applicant by telephone is a preliminary step, as a request for further evidence under paragraph 245AA must be made in writing following any telephone conversation.

If an applicant has a representative you must contact them first. You should make no more than 2 attempts using the telephone numbers provided in the application form.

If you are making contact by telephone you must speak directly to the applicant or their representative. Any voicemail message must only ask the applicant to contact the Home Office - you should not give any details of the application or any other personal information

When you request additional information you must state all of the following requirements:

- the applicant or their representative must respond within 10 working days of the date of the email/written request
- the missing information must be with the Home Office within this timeframe
- recommend it is sent by next day special delivery – original documentation must be provided, as faxes, scans or photocopies are not accepted

As part of the telephone conversation, you must do one of the following:

- check the email address is correct if one was provided
- ask for an email address if one was not provided on the application form

In addition, you must confirm with the applicant that they are content for the Home Office to contact them via this email address regarding their application. If not, you must ask the applicant to provide an email address they are happy for the Home Office to use. If the applicant is not happy to do this then you must send them a letter making the request for the further information. When doing this you must follow the process in the 'contacting the applicant by post' section. You must record on CID that the applicant did not want to provide an email address that they were happy for the Home Office to use.

You must also inform the applicant that you will be following up your telephone call with a written request via email. You must follow the process for contacting the applicant by email as outlined below.

You must accurately record on CID the telephone number, and time and date of the call to evidence that paragraph 245AA and this guidance was correctly applied.

If you cannot contact the applicant or their representative by telephone because, for example, the contact information provided was incorrect and calls have gone unanswered (without a voicemail facility) you must attempt to contact them by email using the process below.

Contacting the applicant by email

When making a request for additional information to the migrant by email you must use standard email template.

You must send all emails from the team mailbox, not your personal mailbox. This allows others to access any responses in your absence. You must save a copy of the email you sent in the team mailbox so colleagues can see what details you have requested.

You must note the following details on CID:

- the information requested
- any emails sent including your name the date and the content of the mail

You must do this to evidence that paragraph 245AA and our guidance has been followed correctly.

If you cannot contact the applicant or their representative by either telephone or email, because, for example, the contact information provided was incorrect and calls have gone unanswered (without a voicemail facility) or emails have bounced back as undelivered, you must contact them by post following the process below.

Contacting the applicant by post

When contacting the applicant by post you must send them an ICD.5114 detailing the information you require and record the issues you had making contact with them in CID. You must send this to an address they have provided for correspondence. When there is a representative on CID you must send the letter to them.

You must note the following details on CID:

- the information requested
- the address where the further information request was sent
- when the letter was posted

You must do this to evidence that paragraph 245AA and this guidance has been followed correctly.

After a request has been made

After following the process outlined previously for requesting additional information you must normally put the case in the brought forward (BF) for 13 working days from

the date of the email or written request unless exceptional circumstances, for example, there is a postal strike which means that you have to put the case in BF for longer. The additional time, on top of the 10 days specified in the Immigration Rules, is to allow for evidence to move from workflow to the decision making team. The extra time is not an extension to the time for the applicant to respond.

You must then check the case to see if any additional information has been received. If you receive the requested information before the specified deadline you may consider the case immediately.

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Deciding the case

When making a decision on a case you must show, on either CID or Proviso and in your decision letter that you have fully considered paragraph 245AA. This is particularly important if you have decided against making a request for further information. In your refusal letter you must set out how you have tried to contact the applicant or their representative and the response, if any, they provided.

The below wordings for decision letters are not an exhaustive list of possible scenarios. You must amend these paragraphs so that they accurately reflect the facts of the case that you are dealing with.

Option 1 – evidence provided does not meet the substantive requirements of the Immigration Rules
In making the decision to refuse your application I have considered whether evidential flexibility applies as set out in paragraph 245AA of the Immigration Rules. Additional information will not be requested where that information would not change the decision. Your application has failed to meet the requirements of the Immigration Rules for the reasons explained above. As additional information would not change the decision I have not requested additional information in relation to your application.

Option 2 – evidence is missing
In making the decision to refuse your application I have considered whether evidential flexibility applies as set out in paragraph 245AA of the Immigration Rules. Evidential flexibility does not apply if a specified document has not been provided at all. You have failed to provide (caseworker to state what has not been provided). Therefore, evidential flexibility does not apply and I have not requested additional information in relation to your application.

Option 3 – information requested, but no response received
In making the decision to refuse your application I have considered whether evidential flexibility applies as set out in paragraph 245AA of the Immigration Rules. On (case worker to insert date), we wrote to you/your representatives (delete as appropriate) to request additional information. We received no response to that request. Under paragraph 245AA(b) we only request additional information once. Therefore, we have considered your application on the basis of information originally submitted.

Option 4 – information requested, but provided information does not meet the requirements of the Immigration Rules
In making the decision to refuse your application I have considered whether evidential flexibility applies as set out in paragraph 245AA of the Immigration Rules. On (case worker to insert date), we wrote to you/your representatives (delete as appropriate) to request additional information. On (case worker to insert date) you provided (case worker to list evidence received). This was considered, but for the reasons explained in this letter it not considered that your application satisfies the requirements of the Immigration Rules.

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Template for making requests under paragraph 245AA by email

We are considering your application and need further information. This information is being requested under paragraph 245AA of the Immigration Rules. Please provide the following original documents within 10 working days of this request:

- **Insert required documents here**

If we do not receive anything by this deadline we will make a decision on the information we have. No extensions to this deadline will be given. We recommend that you send the requested documents by guaranteed next day delivery to ensure they arrive in time.

You must send your response to:

Insert address here

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Litigation and evidential flexibility

This page gives guidance on how to deal with challenges to evidential flexibility, including those which refer to Mandalia or SH(Pakistan) v Secretary of State for the Home Department [2016] EW Civ 426.

These challenges can usually be divided in to 3 main categories:

- cases involving genuine missing evidence which it should have been obvious to the caseworker was likely to exist
- cases involving a 'near miss'
- cases raising points relating to general fairness

For details on each of these categories please see below.

Cases involving genuine missing evidence were it should have been obvious to the caseworker was likely to exist
A case will fall into this group if all of the below occur:

- the applicant has applied for leave to remain as a PBS migrant
- the application has been refused
- the sole reason for refusal was that the applicant had not provided specified evidence, either because documents in a sequence have been omitted (including where documents marking the beginning and end of that sequence have not been provided) a document has been provided in the wrong format, or a copy rather than an original had been provided
- the applicant was not given, under evidential flexibility, the opportunity to provide the missing information

Where the case falls into this group, the **decision was made on or before 30 September 2013,** and it was clear to the caseworker that the missing evidence existed then you must concede the judicial review. The decision must be withdrawn and the Home Office will request further information under the usual evidential flexibility process.

This is because the evidential flexibility process instruction or evidential flexibility policy guidance versions 1.0 – 3.0 were in force at this time. As a result of the judgments in Mandalia and SH (Pakistan), there are constraints on the Home Office's ability to argue that the guidance is constrained by paragraph 245AA of the Rules.

Where the case falls into this group and **the decision was made on or after 1 October 2013, then you must continue to defend the evidential flexibility decision.**

You should seek to distinguish the case from SH (Pakistan) on the basis that in versions 4.0 onwards of the evidential flexibility guidance, the guidance mirrors the requirements in paragraph 245AA.

A case will not fall into this group if there are **multiple reasons** why the application fell for refusal. In these circumstances you must continue to defend the challenge to evidential flexibility. The decision maker would not have written out for the specified evidence because, even if the missing information had been requested it would not have changed the refusal decision. Neither Mandalia nor SH (Pakistan) change this position.

If you are dealing with a case where part of the missing evidence involves either a Certificate of Sponsorship (COS) or Confirmation of Acceptance for Studies (CAS) you must continue to defend the challenge to evidential flexibility. This is because a CAS or a COS is not a specified document, and it does not fall within paragraph 245AA(b), so evidential flexibility does not apply.

Near-miss cases
In their grounds of challenge applicants may say that because the evidence they had submitted demonstrates that they had nearly met the requirements of the rule, they should have been invited to provide further evidence under evidential flexibility.

These challenges should be defended. There is no requirement either under the terms of the evidential flexibility rules, any version of the guidance or general fairness obligations to request additional information unless there is an indication that the further evidence exists.

In some circumstances there will be a crossover between this type of case and a missing document case, for example where the applicant is required to submit 28 days worth of bank statements ending no more than one month before the date of the application. They provide 28 days worth of bank statements, but the period ends more than one month before the date of the application. In these circumstances it may be clear that further evidence exists, as the bank statements are numbered and show a balance carried forwards. Consider whether the case should be treated as falling into the missing evidence category and dealt with in line with the guidance on missing evidence.

General fairness challenges
In the grounds of their challenge the applicant may argue that the judgment in Mandalia, broadened the substantive requirements of fairness when dealing with applications. The Home Office considers that the decision in Mandalia provides that an applicant has a right to have his application decided in accordance with the relevant policy, but goes no further than this. Any attempts to broaden this should be resisted.

Scenarios
Below are case studies of how challenges should be handled.

Scenario 1
The applicant has failed to provide any bank statements with their application. They were refused for failing to show that they have the required level of maintenance. They submitted a judicial review and in their grounds have stated that as a result of

the decision in Mandalia the Home Office should have written out to request the missing bank statements.

The claim must be defended. Whether under the evidential flexibility policy instruction, paragraph 245AA or any version of the guidance, the caseworker must have reason to believe that a document exists before being required to contact the migrant to invite them to submit further evidence.

Scenario 2
The applicant is required to show that they hold a required level of funding for 90 days. To demonstrate this they provided bank statements covering the required length of time, but not holding the required amount of funding. In their grounds of challenge they said as a result of Mandalia the Home Office should have contacted them to invite them to remedy the defect in their application.

The claim must be defended. The requirement to contact the applicant and invite them to submit further evidence does not arise when the content of the evidence submitted does not meet the substantive requirements of the Immigration Rules and there is no indication that any other evidence which would assist them exists. Mandalia was concerned with what was meant by 'missing from a sequence'. The situation is not comparable and as such Mandalia does not assist the migrant.

Scenario 3
The applicant was refused because they did not have the required level of maintenance and only provided bank statements from one account. In their grounds of challenge they have said that they had a second bank account and the decision in Mandalia means that the Home Office should have contacted the migrant to invite them to correct the error in their application.

The claim must be defended. Further information may be requested under evidential flexibility if the case worker has reason to believe that the evidence in question exists. It does not allow the case worker to make speculative requests for further information. In this case, when the original decision was made, the case worker was not aware that the second bank account existed. The leading case on this issue is Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2. Mandalia does not change this position. You must continue to defend the judicial review.

Case study 4
The applicant has to provide evidence that they have held the required funding for 90 days. They have provided bank statements showing that they held the required level of funding for 60 days. The bank statements are numbered 62 and 63 and show a balance carried forward.

The claim must be conceded. Since the statements are numbered 62 and 63 and show a balance carried forwards, under the principle in Mandalia they can be said to be part of a sequence. Therefore, the applicant should have been contacted under the evidential flexibility rules to provide evidence to make up the shortfall.

Case study 5
The applicant applied for leave to remain as a Tier 1 Entrepreneur. They failed to provide an English language certificate with their application, but do refer to having completed a higher education qualification in English. The case worker who made the initial decision refused it on 1 August 2013 on the basis that the applicant failed to show that they met the English language requirement. Version 2 of the evidential flexibility guidance was in force when the decision to refuse was made.

Following on from the decision in SH (Pakistan) the evidential flexibility guidance in place at the time of the decision applies and the applicant should have been contacted and invited to submit further evidence. This is because the court held that the evidential flexibility policy applied to applications where there was missing evidence as opposed to missing evidence of a specified type. This interpretation is wider than the circumstances set out in paragraph 245AA(b) or later versions of the guidance. You must concede the judicial review.

Case study 6
An applicant applied for leave to remain as a Tier 1 Entrepreneur. They failed to provide an English language certificate with their application, but did refer to having completed a higher education qualification in English. The case worker who made the initial decision refused it on 1 August 2015 on the basis that the applicant failed to show that they met the English language requirement. Version 7 of the evidential flexibility guidance was in force when the decision to refuse was made.

You must defend the claim. This is on the basis that paragraph 245AA applies and there is no requirement to contact the applicant in these circumstances. The case can be distinguished from SH (Pakistan) because it concerns a later version of the relevant guidance, which is constrained by the provision in the Immigration Rules.

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