Home Office

Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016

Version 5.0

Contents

About this guidance 3
- Contacts 3
- Clearance and publication 3
- Changes to this guidance 3

Introduction 4
- Regulations 4
- Background 6
- Case law 6
- Section 55 duty 6

Cases not normally suitable for regulation 33 certification 8

Regulation 33 consideration process 10
- Section 55 duty 11
- Removal pending appeal and the Human Rights Act 1998 11
  - Serious irreversible harm and human rights 12
  - Human rights procedural protection 15
  - Process and consideration 15
- Discretion 17
- Timing of certification 17
- Peer review process 18
- Reasons for decision 18
- Decisions served to file 18
- Decisions not to certify 19

Dual certification 20
- Decisions made between 6 April 2015 and 31 January 2017 20
- Decisions made on or after 1 February 2017 20

Interim orders 21

Appeals 22
- Appeals lodged from within the UK against a removal decision made under the EEA Regulations 2016 22
- Appeals lodged from within the UK against a removal decision made under the EEA Regulations 2006 22
- Re-entry to present appeal in person 22
- Successful appeals 25

About this guidance

This guidance explains to case owners in Criminal Casework and Special Cases Unit how to consider certifying the removal of a person under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). It also explains how to consider an application for temporary admission made under regulation 41 of the EEA Regulations 2016.

This guidance applies to any EEA national or non-EEA national with enforceable EU law rights, where a decision has been taken to remove that person under regulation 23(6)(b) of the EEA Regulations 2016 and the person could appeal or has a pending appeal against that decision.

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 Free Movement 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 you can email the Guidance Rules and Forms team.

Clearance and publication

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

- Version **5.0**
- published for Home Office staff on **1 February 2017**

Changes to this guidance

- Changes to reflect that the Immigration (European Economic Area) Regulations 2016 have revoked and replaced the Immigration (European Economic Area) Regulations 2006.

Introduction

This section tells you about the background and legal framework for regulation 33 and regulation 41 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').

Regulations

Regulation 33 of the EEA Regulations 2016 reads:

> **'Human rights considerations and interim orders to suspend removal**
>
> **33.** (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 32(3) applies, in circumstances where—
>
> (a) P has not appealed against the EEA decision to which regulation 32(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
>
> (b) P has so appealed but the appeal has not been finally determined.
>
> (2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
>
> (4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—
>
> (a) where the removal decision is based on a previous judicial decision;
>
> (b) where P has had previous access to judicial review; or
>
> (c) where the removal decision is based on imperative grounds of public security.
>
> (5) In this regulation, "finally determined" has the same meaning as in Part 6.'

Regulation 41 of the EEA Regulations 2016 reads:

> **'Temporary admission in order to submit case in person**
>
> **41.** (1) This regulation applies where—

(a) a person (“P”) is subject to a decision to remove made under regulation 23(6)(b);
(b) P has appealed against the decision referred to in sub-paragraph (a);
(c) a date for P’s appeal has been set by the First-tier Tribunal or Upper Tribunal;
(d) P wants to make submissions before the First-tier Tribunal or Upper Tribunal in person; and
(e) P is outside the United Kingdom.

(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act, as applied by this regulation) to the United Kingdom in order to make submissions in person.

(3) The Secretary of State must grant P permission, except when P’s appearance may cause serious troubles to public policy or public security.

(4) When determining when P is entitled to be given permission, and the duration of P’s temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where—
(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;
(b) a hearing of P’s appeal has taken place; and
(c) the appeal is not finally determined,
P may be removed from the United Kingdom pending the remaining stages of the appeal (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the appeal in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the purposes of paragraphs 8, 10, 10A, 11, 16 to 18A and 21 to 24 of Schedule 2 to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if—
(a)the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and
(b)the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P’s case in person in accordance with this regulation.

(8) P is deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation.

Background

An appeal against a deportation decision made under regulation 23(6)(b) of the EEA Regulations 2016 will suspend removal proceedings, unless the Secretary of State for the Home Department (SSHD) has exercised her discretion to certify removal. The SSHD can certify removal if the person's deportation before the conclusion of any appeal proceedings would not give rise to a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act 1998. If removal has been certified, it will only then be suspended if the person subject to removal has made an application to the courts for an interim order to suspend removal proceedings (eg judicial review) and that application has not yet been determined, or a court has made an interim order to suspend removal.

The application of a regulation 33 certificate does not prevent a person from lodging an appeal from within the UK; rather, it limits the suspensive effect of that appeal. So, whilst a person may lodge an appeal in-country, the lodging of such an appeal does not suspend removal from the UK, provided the removal is certified. Regulation 33 does not impact on the period allowed for voluntary departure, and a person liable to deportation pursuant to the EEA Regulations 2016 still has one month in which to leave the UK voluntarily before removal is enforced. The one month period to leave voluntarily will not apply in certain cases, including where the person is detained pursuant to the sentence or order of any court (regulation 32(6)(c)).

Regulation 33 applies to:

- a person who appeals in time against an EEA deportation decision, where that appeal has not been finally determined
- a person who has not appealed against an EEA deportation decision but would be entitled to do so from within the UK (this does not include out of time appeals)

The EEA Regulations 2016 also allow a person who is subject to a decision to remove under regulation 23(6)(b) and who is outside the UK to apply from outside the UK for permission to re-enter the UK solely in order to make submissions in person at their appeal hearing (regulation 41).

Case law

Regulation 33 is similar in wording to section 94B of the Nationality, Immigration and Asylum Act 2002. The leading judgment on section 94B is Kiarie and Byndloss v SSHD [2015] EWCA Civ 1020, which was handed down by the Court of Appeal on 13 October 2015. This guidance reflects the changes made to the section 94B guidance as a result of the judgment in Kiarie and Byndloss.

Section 55 duty

The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, means that a child's best interests are a primary consideration in deportation cases. Specific guidance on section 55 in the context of regulation 33 is set out under Regulation 33 consideration process.

Related content
Contents

Cases not normally suitable for regulation 33 certification

This section tells you about cases that should not normally be certified under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').

A case cannot be certified under regulation 33 where removal for a limited period pending the outcome of an appeal would be unlawful under section 6 of the Human Rights Act 1998.

A case does not need to be certified under regulation 33 where the appeal made under the EEA Regulations 2016 is based only on grounds that have already been determined in another appeal and therefore regulations 36(7) and (8) apply.

Removal decisions pursuant to regulation 23(6)(b) where the person is serving a determinate-length sentence where release is at the discretion of the Parole Board will not normally be suitable for regulation 33 certification. This includes those who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1991
- given an Extended Sentence for Public Protection (EPP)
- given an Extended Determinate Sentence (EDS)

The list of cases above is not exhaustive. These cases are not normally suitable for regulation 33 certification because applying regulation 33 to these cases may be counterproductive. The Parole Board will have made a decision about release based on the person's removal rather than the possibility that he or she may return to the UK if any appeal is successful. Consequently, there would be no provision to recall to prison in the event of such return even if the Parole Board would otherwise have deemed it to be appropriate, or to impose licence conditions.

Extradition cases are not normally suitable for certification on the grounds that the person will be unable to return for their hearing and may be unable to conduct their case from abroad while in custody. Consideration must be given to all such cases on an individual basis about whether or not it is appropriate to apply regulation 33.

Where the person is a child (under the age of 18), the removal decision under regulation 23(6)(b) will have considered regulation 27(4)(b) which means that either there are imperative grounds of public security or removal is in the child's best interests. Such decisions will not normally be suitable for regulation 33 certification. Nevertheless, children are not excluded from the scope of certification under regulation 33 and you must consider all such cases on an individual basis and having regard to the children's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (see Section 55 children's duty guidance) as to whether it is appropriate to apply regulation 33.

Removal decisions pursuant to regulation 23(6)(b) where the person has a right to permanent residence and the person has not been sentenced to a period of imprisonment of at least four years will not normally be suitable for regulation 33 certification. Consideration of whether or not it is appropriate to certify must be given to all cases on an individual basis.

Where a removal decision has to be served to file because the person's whereabouts are not known, the case is not suitable for certification under regulation 33.

Related content
Contents

Regulation 33 consideration process

This section tells you how to consider whether to certify under regulation 33 of the EEA Regulations 2016.

The government's policy is that the removal process should be as efficient and effective as possible. You must therefore consider whether regulation 33 certification is appropriate in all cases where removal is pursued under regulation 23(6)(b), having due regard to Cases not suitable for regulation 33 certification.

In doing so, you must consider all relevant factors in the round, and in particular:

- the best interests of any children who may be, or it is claimed may be, affected by the decision to remove, in compliance with section 55
- whether there is a real risk of serious irreversible harm to the person being removed pending the outcome of any appeal they may bring (for example, but not limited to, the presence of any serious physical or mental health issues that would be significantly affected by interim removal)
- whether there is a real risk of serious irreversible harm to any individual, for example family members, that the person to be removed claims would be affected by their removal pending the outcome of any appeal
- if there is not a real risk of serious irreversible harm to the person to be removed or anyone else that such person claims would be affected by their removal, would that person's removal pending the outcome of any appeal breach their rights under the European Convention on Human Rights (ECHR) for any other reason
- whether there would be a breach of the ECHR rights of any individual, for example family members, that the person to be removed claims would be affected by their removal pending the outcome of any appeal
- where the person to be removed makes representations or provides evidence as to procedural unfairness, whether a non-suspensive appeal would be procedurally unfair in the particular circumstances of the case
- any request the person to be removed makes for discretion to be exercised in their favour
- whether it is appropriate in all the circumstances to certify the case so that the appeal is non-suspensive of removal

The fact that it has been decided in an individual case that removal would not breach the ECHR does not mean that the case owner can be satisfied that removal for a limited period pending the outcome of any appeal would not breach that person's human rights. They are separate considerations. When considering whether removal pending the outcome of any appeal would breach the ECHR, you should assess the question on the basis that the person's appeal will succeed and consider whether serious irreversible harm or a breach of ECHR rights would be caused by that temporary removal from the UK.

For further human rights guidance see Considering human rights claims and Criminality guidance for Article 8 ECHR cases. As explained above, guidance must

be applied in the context of temporary removal pending the outcome of an appeal rather than long-term removal.

In considering whether to certify a case under regulation 33, you must have regard to all known circumstances and consider all relevant information. This means any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context. Any reference to 'available information' below refers to such evidence. For the avoidance of doubt, information that would only be available if the case owner undertakes additional research or makes additional enquiries is not 'available information' and does not necessarily need to be sought. However, if it is sought on the basis of the individual circumstances of the case, it should then form part of the consideration.

Section 55 duty

When considering whether to certify a case pursuant to regulation 33, the best interests of any child under the age of 18 whom the available information suggests may be affected by the removal decision must be a primary consideration. You must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person liable to removal under regulation 23(6)(b) to be able to remain in the UK until the conclusion of any appeal. This is particularly relevant in considering whether removal pending the outcome of any appeal would cause serious irreversible harm to the child. The case owner must also consider whether those interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in effecting removal quickly and efficiently.

You must carefully assess the quality of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents.

For further guidance in relation to the section 55 duty, see:

- Section 55 children's duty guidance
- Introduction to children and family cases
- Criminality guidance for Article 8 ECHR cases

Removal pending appeal and the Human Rights Act 1998

You can only certify under regulation 33 if satisfied that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act 1998. This means that you need to consider whether removing a person before their appeal is finally determined would breach the ECHR.

The following guidance sets out how to consider whether removing a person from the UK before their appeal is brought or finally determined would breach the ECHR.

You should consider which Articles of the ECHR the person raised either explicitly or implicitly, as grounds against removing him or her from the UK. The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceedings, but not an immigration appeal), but you need to be alert to any Convention rights which may be engaged by removal pending the outcome of an appeal.

Serious irreversible harm and human rights

When considering whether removing a person before their appeal is finally determined would breach the ECHR, you must consider whether removal for that limited period of time until the appeal is concluded would result in a real risk of serious irreversible harm. The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in immigration cases to determine whether to issue a ruling under rule 39 of the Rules of Court, preventing a signatory State from removing a foreign national from its territory. In the context of regulation 33, the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act 1998 and the absence of a real risk of serious irreversible harm is only one relevant factor.

The term ‘real risk’ is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the ECHR. As explained in Considering human rights claims, in practice this is the same standard of proof as in asylum cases – a reasonable degree of likelihood. See section 5.2 of Assessing credibility and refugee status for further guidance on the standard of proof.

The terms ‘serious’ and ‘irreversible’ must be given their ordinary meanings. ‘Serious’ indicates that the harm must meet a minimum level of severity, and ‘irreversible’ means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible.

If the person claims that removal, or removal pending the conclusion of any appeal, would breach Article 8 of the ECHR, you must consider the effect of removal not only on the person liable to removal, but also on any other person whom the available evidence suggests will be affected by the person’s removal (for example, immediate family members such as a partner and/or children).

By way of example, in the following scenarios where a person is removed before their appeal is determined, it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm, or that there would otherwise be a breach of the ECHR, while a non-suspensive appeal is in progress (you must note that this is an indicative list and not prescriptive or exhaustive):

- a person will be separated from their partner for several months while appealing against the removal decision

- there is no current subsisting family relationship with a child and although a family court case is in progress to obtain access there is no evidence that the case could not be pursued while the person is abroad
- a child or partner is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person liable to removal to act as a carer
- a person has strong private life ties to a community that will be disrupted by deportation (eg a job, a mortgage, a prominent role in a community organisation etc)

The following are examples (as with the preceding paragraph, indicative only and not prescriptive or exhaustive) of when removal pending the outcome of any appeal might give rise to a real risk of serious irreversible harm or otherwise breach the ECHR:

- the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care
- the person being removed is the sole carer of a British citizen child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant interruption to their education
- the person to be deported is subject to a court order for a trial period of contact with their child, the outcome of that trial period will determine the future contact between that person and the child, and that future contact could affect the outcome of the appeal – if removal pending the outcome of the appeal would prevent that person undertaking the trial period of contact, this may amount to serious irreversible harm
- the person has a serious medical condition and medical treatment is not available, or would be inaccessible to the person, in the country of return, such that removal pending appeal gives rise to a risk of a significant deterioration in the person's health (however, note the conclusion of the Court of Appeal in Secretary of State for the Home Department v Dumliauskas and others [2015] EWCA Civ 145 at paragraph 53: 'in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other Member States from those available here')
- there is credible evidence that the person would, due to reasons outside their control, be prevented from exercising their right to an appeal (effectively or at all) against the removal decision – for example, where the person suffers from a serious mental health condition or serious physical disability that would prevent them from effectively pursuing their appeal without the support of their carers in the UK (and where they will not be able to access the requisite assistance from abroad) – for further guidance see the section on human rights protection

In considering whether there is a real risk of serious irreversible harm or whether removal pending the outcome of any appeal would otherwise breach the ECHR, you need to have regard to all known circumstances and to consider all relevant

information. This includes any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context.

You must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents. There is no prescribed evidence to be submitted, but examples of relevant evidence might include:

- where a person claims that they or a family member have a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel
- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation, etc

In the context of an Article 8 claim, you must also consider the public interest in requiring a person to appeal from abroad. The Court of Appeal held in Kiarie and Byndloss v SSHD [2015] EWCA Civ 1020:

> '44. In general terms, and subject to specific factors such as risk of reoffending, it may be thought that less weight attaches to the public interest in removal in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period pending determination of any appeal, than when considering the underlying issue of deportation for the longer term. But the very fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in that context too: Parliament has carried through the policy of the deportation provisions of the UK Borders Act 2007 into section 94B. In deciding the issue of proportionality in an article 8 case, the public interest is not a trump card but it is an important consideration in favour of removal'.

Although the Court of Appeal was considering section 94B, the principle applies equally to regulation 33, because both provisions are considering the proportionality of removal within the context of section 6 of the Human Rights Act 1998. It should be noted that Article 31(4) of the Free Movement Directive (2004/38/EC) specifically provides that 'Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting their defence in person, except when their appearance may cause serious troubles to public policy or public security'. For further guidance on presenting an appeal in person, see Appeals.

Human rights procedural protection

ECHR rights, such as Article 8, have a procedural aspect which means that a breach of that right can arise where there is no effective procedural protection. Procedural protection means access to an effective remedy by way of a mechanism to challenge a refusal decision. Whether a person has an effective remedy is relevant to whether it is lawful to certify a case under regulation 33. If a non-suspensive appeal means that the person cannot access a fair and effective appeal process, removal pending the final determination of the appeal will be a breach of section 6 of the Human Rights Act 1998 and the case cannot be certified under regulation 33.

A non-suspensive appeal may be less advantageous to the person. That does not mean that it would be a breach of their Convention rights. An effective remedy does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. The question to be answered is whether the non-suspensive appeal can be determined effectively and without obvious unfairness.

Process and consideration

When a notice of liability to deportation is served, the person is invited to make representations as to why they should not be removed prior to the final determination of their appeal. If no representations are made the case owner does not need to consider whether a non-suspensive appeal will meet the procedural requirements. You do not need to make proactive enquiries, or proactively to investigate the circumstances of a person to establish whether they can have a fair and effective non-suspensive appeal. It is for the person to raise those points.

If representations are made about why a person's appeal should be suspensive of removal, they must be carefully considered. If, notwithstanding such representations, the claim is certified under regulation 33, that consideration must be set out in the decision letter. Where representations about a non-suspensive appeal are made, the principles under which they must be considered are that:

- a non-suspensive appeal is generally fair
- the person is entitled to lodge an appeal, with or without legal representation, before they leave the UK
- regulation 32(6) provides that a person who is liable to removal pursuant to regulation 23(6)(b) shall be allowed one month to leave the UK voluntarily beginning on the date of the decision to remove them before removal is enforced. The one month period to leave voluntarily will not apply in certain cases, including where the person is detained pursuant to the sentence or order of any court. A person could use this time to make arrangements for the continuation of the appeal even though they will leave the UK before it is determined, including but without limitation by giving instruction to a legal representative or seeking assistance from family members in the UK
- oral evidence from the appellant and/or attendance at the appeal by the appellant are not generally required for an appeal to be fair and effective

- regulation 41 provides that a person whose case is certified under regulation 33 may apply for temporary admission to the UK in order to attend the appeal hearing in person (see Appeals for further guidance)
- the SSHD is entitled to rely on the specialist immigration judges within the tribunal system to ensure that the person is given effective access to a remedy against the decision

The person may make representations to the effect that, despite the powers of the Tribunal to secure a fair and effective appeal, their personal circumstances mean that they would not be able to access a fair and effective remedy.

Examples of the steps the Tribunal could take to ensure a fair and effective appeal where the appellant is outside the UK (for example, if the person does not make an application under regulation 41 for temporary admission to the UK in order to attend the appeal hearing in person, or if such an application is refused on the basis that their appearance may cause serious troubles to public policy or public security) are to:

- consider whether the appeal can be fairly determined without the appellant giving oral evidence, including considering any written evidence submitted by the appellant, documentary evidence and oral or written evidence from family members, friends and others
- consider an application from the appellant to give oral evidence via video-link, Skype or telephone and make the necessary arrangements to overcome any practical difficulties if it considers that such evidence is necessary for the fair determination of the appeal
- summon the appellant to attend as a witness – the Tribunal may take this step if it has decided that it is necessary for the appellant to give oral evidence in the appeal in order for it to be fairly determined and it is not possible to receive evidence by video-link or other means of electronic communication, or if the Tribunal decides for some other reason that the appellant must attend the appeal in person in order for it to be fairly determined. A summons does not amount to an enforceable direction to the SSHD to permit the appellant to return to the UK. However if the SSHD does not permit the appellant to return to the UK in these circumstances, the Tribunal may draw inferences in the appellant's favour. Moreover, any decision not to return the appellant to the UK in these circumstances may be vulnerable to challenge by judicial review on the basis that it is unreasonable

The following are examples of representations that will not, without more, amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- a desire to participate in the proceedings, including to give oral evidence or to attend the appeal
- an inability to communicate with ease with family members or legal representatives to prepare the appeal
- the cost, availability or reliability of internet or telephone use in the country to which the person is to be removed

- complexity of legal proceedings and inability to afford legal representation
- the cost, availability or reliability of video-link, for the purpose of participating in and/or giving oral evidence at the appeal, in the country to which the person is to be removed
- the person is disabled to the extent that they cannot instruct legal representatives or liaise with family members or others who will give evidence in the appeal, but the person has family members or others who can assist them in the country to which they are to be removed

The following are examples of representations that may amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- the person is disabled or otherwise personally incapable of giving instructions to legal representatives or communicating with family members or others who will give evidence in the appeal, and there is no one who can assist the person with such instructions or communications in the country to which they are to be removed
- the accepted absence of a route by which the person could return to the UK if the Tribunal considered that their presence at the appeal was necessary for it to be fair

This list is not exhaustive. You should discuss with their senior caseworker any case where you are considering not certifying under regulation 33 as a result of representations about procedural fairness.

Discretion

If satisfied that there is not a real risk of serious irreversible harm and that removal pending the outcome of any appeal would not otherwise breach the ECHR, you must consider whether there is any other compelling reason not to certify. Regulation 33 is a discretionary power, meaning that it does not have to be applied in all cases where removal pending the outcome of any appeal would not breach the ECHR. In each individual case, you must be satisfied that it is appropriate in all the circumstances to certify. Exercising discretion should be considered where the person is not currently removable. It would be counterproductive to certify if the person could not then leave the UK to exercise a right of appeal, for example there is no realistic prospect of an acceptable travel document or other return information required for biometric returns being available.

You must consider any request to exercise discretion not to certify, even in the event that removal pending the outcome of any appeal would not breach the ECHR. But in the absence of specific representations, and where there are no particular factors that would justify the exercise of discretion, it is not necessary to give reasons in the decision letter for not exercising discretion in favour of a person liable to removal pursuant to regulations 23(6)(b).

Timing of certification

A certificate under regulation 33 can only be applied after a removal decision is made under regulation 23(6)(b). Only once both decisions have been undertaken

(and depending on the outcome of those assessments) should the case owner consider removal directions. Regulation 33 is clear that a certification decision must be made before any consideration is given to the setting of removal directions.

It is possible to certify under regulation 33 at any stage in the process as long as the person has not exhausted their appeal rights. In practice, this means that if a case is not certified at the initial decision stage, and either party challenges the decision of the First-tier Tribunal (or that of the Upper Tribunal), the case owner must consider whether it is appropriate to certify the case before it is heard by the Upper Tribunal (or the Court of Appeal or the Supreme Court).

In this situation, you must consider whether it is appropriate in all the circumstances, including the factors set out in this guidance, to certify, including the public interest in effecting removal as quickly as possible, the stage the appeal has reached, the reasons for not certifying when the decision to remove was made and any other relevant factors. If, for example, the only reason for not certifying was that a travel document was not available, and one has since been obtained, the question of whether to certify should be considered again in line with this guidance.

If it is decided to certify at any stage after the person has lodged an appeal, the case owner must provide prompt written notification to both the person to be removed (or their legal representative) and the relevant Court or Tribunal.

Peer review process

All decision letters which certify a case under regulation 33 should be subject to a peer review process prior to service of the decision. The peer review can be conducted by another case owner, a senior caseworker or a chief caseworker as deemed appropriate by the relevant casework unit (Criminal Casework or Special Cases Unit) and must be recorded in CID notes and on the case file.

Decisions not to certify under regulation 33 should also be subject to a peer review process which can be by way of conversation or consideration minute as long as the review is recorded in CID notes and on the case file.

Reasons for decision

Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out in CID notes and on the case file. This is because a decision to certify (whether it is made at the same time as the decision to remove, or later on in the appeal process) can be challenged by judicial review and the Home Office may be required to provide records of each stage of the decision-making process.

Decisions served to file

Where a decision has to be served to file because the person's whereabouts are not known, you should not certify under regulation 33. Should the person later come to light, the question of whether to certify can be considered in line with this guidance. See 'Serving decisions on file' for guidance on service to file.

Decisions not to certify

A decision not to certify a case under regulation 33 is not a concession that the SSHD is satisfied that removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act 1998.

Related content
Contents

Dual certification

This section tells you about the dual certification of removal decisions.

Decisions made between 6 April 2015 and 31 January 2017

Where a person liable to deportation under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations 2006') made a human rights claim in response to a notice served under section 120 of the Nationality, Immigration and Asylum Act 2002 (as amended) ('the 2002 Act'), and that claim was refused, it gave rise to a right of appeal under section 82(1)(b) of the 2002 Act (as amended).

This means that although the EEA removal may have been certified under regulation 24AA such that lodging an appeal was non-suspensive of removal, there was an in-country right of appeal against the refusal of the human rights claim unless the human rights claim was certified under section 96, section 94 or section 94B of the 2002 Act.

The case owner should have considered whether it was lawful and appropriate to certify the human rights claim under either section 96 or section 94 of the 2002 Act. Where it was not appropriate to certify the claim under either section 96 or section 94, the case owner should have considered whether it was lawful and appropriate to certify the human rights claim under section 94B of the 2002 Act. Guidance on certification under section 94B of the 2002 Act is available on Horizon.

It was only necessary to consider certification under section 94B where a human rights claim has been made and refused. It was not necessary to certify where the deadline for appealing against the refusal of a human rights claim had passed and no such appeal had been brought.

If the refusal of the human rights claim was not certified under section 96, section 94 or section 94B there will have been an in-country appeal against the refusal of the human rights claim and consequently there was no benefit to certifying the EEA removal under regulation 24AA.

Decisions made on or after 1 February 2017

You must not apply section 94B to any removal decisions made under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). This is because when removal is certified under regulation 33 of the EEA Regulations 2016, it has the effect of requiring an appeal under section 82(1)(b) of the 2002 Act to be brought from outside of the UK (see paragraph 2 of Schedule 2 to the EEA Regulations 2016). It is therefore not necessary to certify the refusal of a human rights claim under section 94B separately.

Related content
Contents

Interim orders

This section tells you about the effect of an interim order on a removal certified under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').

Regulation 33 establishes that removal may not be enforced if:

- the person has made an application for an interim order to suspend removal proceedings (for example, through judicial review)
- that application has not yet been determined, or has been determined in favour of the applicant

Regulation 33 lists certain exemptions where an application for an interim order will not suspend removal proceedings (as established by Article 31(2) of the Free Movement Directive (2004/38/EC)). An application for an interim order will not suspend removal proceedings if either:

- the notice of a decision to make a deportation order is based on a previous judicial decision
- the person has had previous access to judicial review about regulation 33 and interim removal
- the removal decision is based on imperative grounds of public security

If the person is removed from the UK pursuant to regulation 23(6)(b) at any stage after the person has lodged an appeal then the case owner must notify the relevant court or tribunal.

Where a court or tribunal makes an interim order suspending removal, removal will not be possible even if the criteria for one of the exemptions set out in regulation 33 are met. In these circumstances, you should contact Litigation Operations to arrange making an application to the court which granted the interim relief to have the effect of the interim order lifted.

Related content
Contents

Appeals

This section tells you about appeals against removal decisions certified under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'), including regulation 41 of the EEA Regulations 2016.

Appeals lodged from within the UK against a removal decision made under the EEA Regulations 2016

Where a removal decision is taken pursuant to regulation 23(6)(b) of the EEA Regulations 2016, the person can lodge an appeal against that decision while still in the UK, provided the relevant time limits are met. The lodging of an appeal does not suspend removal. A person can also lodge an appeal against a decision taken pursuant to regulation 23(6)(b) from outside the UK provided the relevant time limits are met.

Where a case is certified under regulation 33, and the deportation decision contains a decision to refuse a human rights claim, if the person wishes to bring a section 82 appeal, they will only be able to do so after having left the UK.

If the person intends to bring appeals under both regulation 36 of the EEA Regulations 2016 and section 82 of the 2002 Act, they can bring both appeals from outside the UK provided the relevant time limits are met. If the person intends to bring a regulation 36 appeal from within the UK, and a section 82 appeal from outside the UK, it is their responsibility to alert the First-tier Tribunal (Immigration and Asylum Chamber) of their intention and that the appeals should be linked for a single hearing. However, it should not be necessary to bring two separate appeals. In the context of an appeal made under regulation 36, the tribunal will also be able to consider a human rights claim raised in response to a section 120 notice given the SSHD will have made a human rights decision (see Schedule 2 to the EEA Regulations 2016).

A person will not have an appeal under section 82(1)(b) of the 2002 Act where they have not raised a human rights claim, as in such circumstances they could not have had a human rights claim refused. Where the SSHD has not made a human rights decision, a person can only raise human rights in the context of an appeal brought under regulation 36 of the EEA Regulations 2016 where the SSHD has given consent for them to raise human rights as a new matter (whether or not human rights were raised in response to a section 120 notice).

Appeals lodged from within the UK against a removal decision made under the EEA Regulations 2006

The approach to appeals set out above also applies where a person's removal was certified both under regulation 24AA of the EEA Regulations 2006 and section 94 or section 94B of the Immigration, Nationality and Asylum Act 2002 ('the 2002 Act') (see Dual certification)).

Re-entry to present appeal in person

Article 31(4) of the Free Movement Directive (2004/38/EC) states that:

> ‘Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory’.

Regulation 41 reflects the requirements of Article 31(4), and establishes a process whereby a person who has lodged an appeal against a removal decision and who is outside of the UK may apply from outside the UK for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at their appeal hearing.

You must ensure that the person is notified of the means by which they can make such an application. You should use the following wording unless it is necessary to do otherwise:

> ‘Pursuant to regulation 41 of the Immigration (European Economic Area) Regulations 2016 you may apply from outside the UK for permission to re-enter the UK in order to make submissions in person at your appeal hearing, if you meet the following conditions:
>
> - you appealed within time against the notice of a decision to make a deportation order;
> - you are subject to a removal decision made under regulation 23(6)(b);
> - a date for your appeal has been set; and
> - you want to make submissions before the First-tier Tribunal or Upper Tribunal in person.
>
> You should not apply for permission to re-enter unless you have been given a date for your appeal hearing by the First-tier or Upper Tribunal (Immigration and Asylum Chamber), and you should provide us with evidence of the date of your appeal hearing.
>
> It is your responsibility to notify the relevant Tribunal of your location and contact details and to update the Tribunal in the event of any changes to your location and contact details.
>
> If you meet these criteria then you may apply for permission to re-enter the UK. You can make this application by contacting Immigration Enforcement at [insert email address].
>
> Permission may not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.
>
> You must apply for permission in advance of attempting to re-enter the UK or you will be refused admission at the UK border. If permission is granted, it will be a temporary admission pursuant to Schedule 2 to the Immigration Act 1971.

If you were deported under the Early Removal Scheme then you will be recalled to prison if you are admitted to the UK before the expiry of your sentence. In any other case you are liable to be held in immigration detention for the duration of your stay.

You must leave the UK immediately after your appeal hearing or your removal will be enforced.

In the case of any subsequent hearing at which you wish to submit your case in person, you must apply again for permission to re-enter.

Any return to the UK is entirely at your own cost. If you have insufficient funds (through any available means) to return to the UK to attend your appeal in person (if permission to attend is granted) then the Home Office may consider whether assistance can be made available to you, though this will only be considered in the event that permission is granted and only if documentary evidence demonstrating inability to fund return (through any means) or destitution is provided.

If it is decided to grant you permission to re-enter the UK in order to make submissions in person at your appeal hearing, you will be provided with details of the process which must be followed in order to facilitate your re-entry.'

Under regulation 41 the SSHD must grant such permission, except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security. The Secretary of State's power to detain an individual upon their return to the UK for the purpose of attending their hearing cannot be seen to limit any 'serious troubles to public policy or public security' that individual may cause. However, where it is decided that re-entry may cause such serious troubles, it may be taken into account when assessing whether it is proportionate to refuse re-entry.

Where permission has been granted under regulation 41 for a person to return to the UK to attend their appeal hearing in person, the case owner must consider any application for financial assistance that is made. Financial assistance may be given if there is evidence that:

- the person is unable to fund their return (including the cost of leaving the UK again after the appeal hearing)
- there are no family members, friends or others who are able to assist
- the absence of funds creates a real and genuine barrier to return which would otherwise take place

Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents.

Where the person is granted permission to re-enter the UK pursuant to regulation 41 (or, in relation to EEA decisions made before 1 February 2017, regulation 29AA of the EEA Regulations 2006), they will be permitted to make submissions in person in

relation to both the EEA removal decision and the refusal of any human rights claim (subject to the guidance set out above in Appeals lodged from within the UK against a removal decision made under the EEA Regulations 2016.

Successful appeals

Where a person's non-suspensive appeal succeeds, the deportation order will normally be revoked and the person may make arrangements to return to the UK.

If requested, consideration must be given to whether the Home Office should pay for the person's journey back to the UK.

In considering whether to pay for the person's journey back to the UK, regard should be had to the following factors:

- the quality of the Home Office's removal decision under regulation 23(6)(b) of the EEA Regulations 2016 (or, as the case may be, under regulation 19(3)(b) of the EEA Regulations 2006)
- whether the appeal was allowed on the basis of evidence or information that the person failed to submit to the Home Office in advance of their removal, despite a section 120 notice or other opportunity, and if so, whether there is any reasonable explanation for this
- whether there is compelling evidence that if the Home Office does not pay for the return journey the person would be unable to return to the UK

There is no prescribed evidence to be submitted, but examples of relevant evidence might include bank statements for the person and any family members. You should also take into account any evidence pertaining to the financial circumstances of the person and any family members which was already available prior to deportation, and consider the person's general credibility.

Where it is considered that the Home Office should pay for the journey back to the UK, financial authority must be obtained and signed off at a sufficiently senior level within the relevant casework unit (Criminal Casework or Special Cases Unit), usually Assistant Director.

Related content

Contents