A Guide to the November and December 2016 Immigration Changes: Consolidated and Contextualised

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You should never delay seeking legal advice, disregard legal advice, or commence or discontinue any legal action because of information in this Guide.

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This Guide has also been compiled and prepared having regard to UK Government and Home Office websites and resources, therefore legislation and Home Office policy guidance referred to within this Guide is liable to change or amendment over time.

INTRODUCTION

On 3 November 2016, the UK Government announced changes to the Immigration Rules intended to affect applications made on or after 24 November 2016.

The Main Changes:

The Explanatory Memorandum to the Statement of Changes in Immigration Rules presented to Parliament on 3 November 2016 (HC 667) clarifies that the main purpose of the changes to the Immigration Rules is to:

- Implement the first of two phases of changes to Tier 2, announced by the Government on 24 March 2016 following a review by the independent Migration Advisory Committee.
- Introduce a new English language requirement at level A2 of the Common European Framework of Reference for Languages for applicants for further leave in the UK as a partner or parent, after completing 30 months here on a 5year route to settlement under Appendix FM.
- Mandate the refusal of limited or indefinite leave where the applicant has been excluded under Article 1F from the Refugee Convention or under paragraph 339D from a grant of humanitarian protection or is a danger to the security of the UK or, having been convicted by final judgment of a particularly serious crime, is a danger to the community of the UK.
- Clarify when Dublin transfer, safe third country and first country of asylum rules apply and provide a definition of the third country concepts within the Immigration Rules.

Other Changes:

The following other changes were also announced on 3 November 2016:

A change is being made to the entry clearance Rules to clarify that British nationals without the right of abode require entry clearance in order to enter the UK for a purpose for which entry clearance is required.

The Rules are also being clarified so that applications for visit visas can be made at any post in the world which is designated by the Secretary of State to accept such applications.

Rules relating to specified forms and procedures:

The rules relating to specified forms and procedures for applications or claims in connection with immigration, previously A34-34I, were acknowledged to be complicated and difficult to interpret in places. They had been iteratively updated and required a wholesale review to make them understandable and user friendly. They have now been redrafted and simplified, and renamed “How to make a valid application for leave to remain in the UK”.

An application for leave to remain in the UK will, as a result of these changes, now only be valid (subject to some exceptions set out in the Immigration Rules) when the applicant:

- Completes the mandatory sections of the application form.

- Provides any applicable fee (including the Immigration Health Surcharge).
- Provides a valid passport (or other proof of identity) or, where permitted, a valid national identity card or their most recent passport or national identity card, or a valid travel document.
- Provides passport photographs.
- Provides biometric information.

There is no longer a provision to provide mandatory documents as specified in the Immigration Rules; there were no mandatory documents for the purpose of validation of applications set out under the Immigration Rules and so this requirement is unnecessary.

The previous rules distinguished between "online" and "specified" forms. The reference to "specified" has been changed to reflect that a specified form is one which has been posted on the visa and immigration pages of the GOV.UK website. Specified forms can be online or paper forms.

Paragraph 34G has also been redrafted to better reflect how different methods of submitting an application affect the date of application.

Paragraph 34I has been substituted by 34(1)(c) and included in the rules on how to make a valid application to clarify when a previous version of an application form can be used.

Overseas Domestic Worker in Private Household category:

As regards changes to overseas domestic workers, the Immigration Rules are amended to:

- Remove the upper age limit currently applied to those applying in the Overseas Domestic Worker in Private Household category.
- Clarify the meaning of full-time employment in the context of extension applications made in respect of those admitted in the Overseas Domestic Worker in Private Household category where they were admitted under the Rules in force prior to April 2012.
- Provide for those admitted as an overseas domestic worker to qualify for a grant of leave as a domestic worker who is the victim of slavery or human trafficking where they have been granted discretionary leave immediately following a positive conclusive grounds decision under the National Referral Mechanism.
- Amend the conditions of stay applied to a person granted leave to enter or remain as a Tier 5 (Temporary Worker) where they are a private servant in a diplomatic household.

Changes relating to family and private life:

The following changes and clarifications are being made to the Immigration Rules relating to family and private life:

- Include in the transitional provisions in paragraphs A277B and A227C of Part 8 of the Immigration Rules access to the provisions of the child rules under Appendix FM.

- Confirm that a letter confirming the issuing of a Certificate of Eligibility to adopt is required when an entry clearance application involves an inter-country adoption subject to section 83 of the Adoption and Children Act 2002 or the equivalent legislation in Scotland or Northern Ireland.
- Clarify when those who have made false representations or failed to disclose any material fact in a previous application will normally be refused on grounds of suitability.
- Reduce the level of NHS debt from £1000 to £500 as a discretionary basis for refusal on grounds of suitability.
- Introduce from 1 May 2017 a new English language requirement at level A2 of the Common European Framework of Reference for Languages for applicants for further leave in the UK as a partner or parent, after completing 30 months here on a 5-year route to settlement under Appendix FM.
- Clarify that a child is only eligible to apply for entry clearance or leave to enter or remain in the UK under Appendix FM when their parent is applying for or has leave under Appendix FM, and that, where applicable, the minimum income threshold has to be met in respect of all relevant dependent children.
- Clarify the specified evidence required in respect of the minimum income threshold:

  -to reflect the gross business profit which can be counted towards the requirement, and to demonstrate ongoing self-employment.
  -for a self-employed sponsor overseas who is transferring that self-employment to the UK.
  -to include a police disability pension as a source of income.
  -to calculate the gross level of annual income of a person in non-salaried employment

- Clarify that specified evidence from a government department can be provided from a body performing an equivalent function.
- Remake some minor changes in Appendix FM-SE, originally made by Statement of Changes in Immigration Rules HC 877, to evidential requirements for the minimum income requirement so that they apply to all applications decided from 24 November 2016 and not only to those applications made on or after 6 April 2016.
- Clarify specified evidence requirements for an applicant seeking to meet an A1 or A2 English language requirement using an academic qualification.
- Add the new IELTS Life Skills A2 speaking and listening test to the list in Appendix O of English language tests approved by the Home Office.
- Make other minor changes and clarifications.

Changes to the visitor rules:

Part V3 of Appendix V to the Immigration Rules sets out the suitability requirements for visitors. This includes that applications for a visit visa, leave to enter and leave to remain will be refused if the applicant has previously breached the UK immigration laws. The Rule is being clarified where the applicant is outside the relevant re-entry ban period and has been permitted to return to the UK, they will not automatically be refused leave to remain as a visitor.

Changes to reform the periods within which applications for further leave can be made by overstayers:

While applications for further leave to remain for many rules-based applications are expected to be made in time, i.e. before any existing leave expires, any period of overstaying for 28 days or less is not a ground for refusal as far as those applications are concerned. This 28 day period was originally brought in so that people who had made an innocent mistake were not penalised, but retaining it sends a message which is inconsistent with the need to ensure compliance with the United Kingdom' s immigration laws.

The 28-day period is therefore to be abolished. However, an out of time application will not be refused on the basis that the applicant has overstayed where the Secretary of State considers that there is a good reason beyond the control of the applicant or their representative, given in or with the application, why an in time application could not be made, provided the application is made within 14 days of the expiry of leave.

Additionally, for those who have been present on 3C leave (leave extended by section 3C of the Immigration Act 1971), the 28-day period is to be reduced to 14 days from the expiry of any leave extended by section 3C. Without this arrangement, the abolition of the 28-day period would mean that any further application made by persons in this position would be out of time.

For those whose previous application was in-time but decided before their leave expired, or was made out of time but permitted by virtue of the provision outlined, the 28-day period will be reduced to within 14 days of:

- The refusal of the previous application for leave.
- The expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable).
- Any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.

This is to ensure that individuals to whom these circumstances apply also have 14 days to make a further application.

Changes have also been made to the requirements for applicants for indefinite leave to remain to have completed a period of continuous lawful residence in the UK. These ensure that the Secretary of State will disregard any period of overstaying between periods of leave which, at the time the further application was made, fell to be disregarded under the previous 28 day period or the exceptions identified above. This is for reasons of fairness.

Changes to the rules relating to NHS debt:

Reduce the threshold for NHS debt from £1000 to £500 in Appendix FM and Appendix Armed Forces as a discretionary ground for refusal of an application made under those Rules.

Changes out-with the Immigration Rules - EEA Changes:

New Regulations, The Immigration (European Economic Area) Regulations 2016 No. 1052 come into force, in full, on 1 February 2017, however Schedule 5 to the 2016 Regulations replaces regulation 9 (family members of British citizens) of the 2006 Regulations with a new

regulation 9 that mirrors regulation 9 of the 2016 Regulations. This took effect from 25 November 2016 and allows the approach towards family members of British citizens(*Surinder Singh route*) to have effect as soon as possible.

The Explanatory Memorandum to The Immigration (European Economic Area) Regulations 2016 No. 1052 clarifies as follows among other matters:

"2. Purpose of the instrument

2.1 The Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') revoke and replace the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003, as amended) ('the 2006 Regulations'). The 2016 Regulations consolidate the transposition into domestic law of Council Directive 2004/38/EC of the 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Directive').

2.2 The 2016 Regulations in large part consolidate and clarify the provisions under the 2006 Regulations, modernising the language used and simplifying terms where possible in line with current drafting practice. They also make changes to give effect to certain judgments of the Court of Justice of the European Union ('CJEU') and address issues concerning the practical application of the Directive within the UK.

2.3 This includes setting out in detail the factors that should be taken into account when considering an application from a family member of a British citizen for a right to reside in the UK under the Directive, in order to tackle the high levels of abuse and prevent the circumvention of the domestic immigration system.

2.4 The 2016 Regulations also clarify the basis on which restrictive measures may be taken to restrict the free movement rights of people who pose a threat to the UK by setting out a non-exhaustive list of the 'fundamental interests of society'. This is a statement about a range of the circumstances in which the government will seek to restrict a person's free movement rights by removing or excluding them from the UK because of the threat their conduct poses. The 2016 Regulations require courts or tribunals to take into account these interests when considering, for example, an EU nationals appeal against a deportation decision.

….

Family members of British Citizens

7.3 The Directive and CJEU case law is clear that Member States can take action to tackle the abuse of free movement. Regulation 9 of the 2016 Regulations builds on the provisions of regulation 9 of the 2006 Regulations, concerning the CJEU judgment in Case C-370/90 Surinder Singh (ECLI:EU:C:1992:296), which was applied in case C-291/05 Eind (ECLI:EU:C:2007:771). The case of Surinder Singh relates to the rights

of direct family members of EEA nationals who return to their home Member State after exercising Treaty rights in another Member State. Drawing on the approach of the CJEU in Case C-456/12 O and B, regulation 9(2) requires an assessment of whether residence in another Member State was genuine, and regulation 9(3) sets out factors that should be taken into account. In addition, under the 2006 Regulations, regulation 9 only applied to those British citizens who had worked or were selfemployed in another Member State. But in the 2016 Regulations, in accordance the judgment in Case C-456/12 O & B, regulation 9 also applies to British citizens who have studied or been self-sufficient in another Member State. Regulation 9(4) disapplies regulation 9 of the 2016 Regulations to those individuals whose purpose is to circumvent national immigration rules applying to third country nationals in the UK. Regulation 9(7) clarifies how regulation 9(1) functions in certain situations where it is necessary to treat a British citizen under the 2016 Regulations as though the British citizen were an EEA national.

7.4 Schedule 5 to the 2016 Regulations replaces regulation 9 (family members of British citizens) of the 2006 Regulations with a new regulation 9 that mirrors regulation 9 of the 2016 Regulations. This will have effect from 25 November 2016 and will allow the approach towards family members of British citizens proposed above to have effect as soon as possible. The 2016 Regulations come into force, in full, on 1 February 2017.

7.5 Despite the measures in place to prevent abuse, the Surinder Singh judgment is increasingly being fraudulently used by third country nationals as a means to bypass UK immigration rules. This issue is subject to public and parliamentary interest.

9. Guidance

9.1 The Home Office will publish guidance which gives effect to these changes when the 2016 Regulations come into force. The primary source of such guidance will be on the following website: https://www.gov.uk/government/organisations/uk-visas-andimmigration".

CHANGES TO HOME OFFICE APPLICATION FORMS

Withdrawal of Form FLR(O):

Form FLR(O) was withdrawn on 1 December 2016 and cannot be used anymore. Form FLR(O) has been replaced by Forms FLR(HRO) and FLR(IR).

Introduction of Form FLR(HRO):

Form FLR(HRO) *Application for human rights claims, leave outside the rules and other routes not covered by other forms*, was introduced for the first time on 1 December 2016.

Form FLR(HRO) must be used if an applicant applying for an extension of stay is in one of the following categories:

- Discretionary Leave (DL) where they have previously been granted a period of DL but have not previously been refused asylum or granted less than four years Exceptional Leave (who should use form FLR(DL))
- Medical grounds or ill health
- Human rights claim (not including claims on the grounds of family or private life, claims on the basis of family dependencies between a parent and a child, or protection (asylum) claims)
- Leave outside the rules under the policy concessions in the "Leave outside the rules guidance"
- Claim for leave outside the Immigration Rules because of compassionate and compelling circumstances
- Other claims not covered by another form.

The Form must not be used:

- to make an application for asylum or international protection (this includes an application for humanitarian protection or an Article 3 European Convention on Human Rights (ECHR) application made on protection grounds); or to make further submissions on asylum or human rights grounds after the refusal or withdrawal of an earlier asylum or human rights claim.
- if an applicant is applying for leave to remain based on family or private life in the UK – use the relevant form, either the FLR(M) or FLR(FP) or the digital equivalent where available
- if an application can apply on one of the routes in form FLR(IR) which were previously on the FLR(O). Forms FLR(IR) and FLR(HRO) replace the FLR(O) Form.

Introduction of Form FLR(IR):

Form FLR(IR) was introduced for the first time on 1 December 2016.

Form FLR(LR),*Application For Leave To Remain, In The UK On The Basis Of Long Residence And For A Biometric Immigration Document*, must be used if an applicant is applying for an extension of stay in one of the following categories:

• Long Residence

To qualify for an extension of stay in the categories of the Immigration Rules for which an applicant must use form FLR(LR), they must meet the requirements set out in the following parts of the Rules:

Part 7 - Long Residence.

Form FLR(FP) and extension of Section 94b to non - deportation cases:

Form FLR(FP) *Application for leave to remain in the UK on the basis of your family life as a partner, parent or dependent child or on the basis of your private life in the UK and for a biometric immigration document*, was amended in December 2016 to require that the following be addressed where relevant within the application form:

"*You should complete questions 11.4 to 11.6 if:*

- *you do not have current immigration leave and*
- *your application does not rely on your British partner, parent, or child.*

If your application/claim is refused, it may be certified under section 94 or 94B of the Nationality, Immigration and Asylum Act 2002 so that any appeal must be brought after you have left the UK. A claim cannot be certified under section 94B if requiring you to appeal from outside the UK would cause serious irreversible harm or otherwise breach human rights. You can find information on certification, and the kind of evidence you should provide to us if you consider that your claim should not be certified, on the visas and immigration pages of gov.uk.

11.4 If your claim is refused, are there any reasons that you would not be able to appeal from outside the UK? Give reasons and list any evidence you will provide.
11.5 What would be the impact on you and your family, including any children, if you had to appeal from outside the UK? Provide information and list any evidence that you will provide.
11.6 Is there anything else you want us to consider in deciding whether you should be required to appeal from outside the UK. Provide information and list any evidence you will provide.
15.6 Appeals from outside the UK
Evidence to support the reasons I have given for why I should not be required to appeal any refusal of my claim from outside the UK".

FALSE DOCUMENTS AND VERIFICATION CHECKS BY THE HOME OFFICE

Home Office applications forms usually require that consent be given within the form for the Home Office to request verification checks

Further, the standard declarations within the forms, to be confirmed by the applicant, usually include the following:

- *"I understand that you will check whether the information and supporting documentation that I have supplied to the Home Office from a bank or utility company is correct".*

- *"I understand that documents provided in support of this application will be checked for authenticity; and that false documents will be retained and may result in my application being refused and in my prosecution and subsequent removal from the United Kingdom*".

As from 12 December 2016, the Home Office introduced the *Document Verification Checks Version 1.0* Guidance. This is guidance for Home Office staff on document verification checks and what to do when false documents have been submitted in support of an application for entry clearance, leave to enter or leave to remain.

What is document verification?

Document verification is the process decision makers use to check that a document provided by an applicant in support of their application (qualifications, funds, sponsorship) is genuine. For example, that a bank statement showing funds are held by the applicant, or a certificate showing a qualification was awarded a specific institution is correct. The new guidance is about verification of *supporting documents*. It does not cover verification of travel documents, which are documents that establish identity and nationality. The examination of travel documents is undertaken by trained staff in RALON, trained entry clearance officers or managers or by the National Document Fraud Unit (NDFU) and the results of their examination will be recorded in a Document Examination Record (DER). The new guidance states that this DER must never be disclosed to the applicant or a third party.

Document Verification Report:

Where a document is verified as false, the person who does the verification (the 'verifying officer') will produce a Document Verification Report (DVR). A DVR is a standard format document which sets out the steps the verifying officer has taken to verify the document and records the result of the verification check.

In country, a DVR will be produced either by the verifying officer in the Temporary Migration Enrichment Unit, Permanent Migration Fraud and Verification Team or British Embassy / High Commission in the country from which the document comes.

Out of country, if the decision maker is in a post where there is a dedicated Enrichment team, they will carry out the verification check. If however the decision maker is in a post without a

verification team and they carry out the verification themselves, they must make sure that they produce as full a DVR as possible.

It is not Home Office policy to automatically send a copy of the DVR with a refusal notice when an application has been refused on the grounds that a false document has been submitted.

If the applicant requests a copy of the DVR, the decision make can give them a redacted copy of the report. If the applicant has appealed the decision and a redacted document would serve no value in defending the appeal, a non-redacted DVR must be sent under closed cover using section 108 of the Nationality, Immigration and Asylum Act 2002. Section 108 does not apply in judicial review proceedings. If dealing with a judicial review case, the officer can only disclose the redacted version unless they have permission from the information owner (the team which produced the DVR) to disclose redacted information. Home Office guidance however is that it will rarely be appropriate to disclose such information.

Possible outcomes from document verification:

There are 3 possible outcomes from document verification:

• Genuine document. If the document is genuine then the decision maker can take it into account when they consider the application under the relevant Immigration Rules and/or policy.

• False document. If the document is false then the decision maker must not take account of the information in it.

• Unable to verify document / verification inconclusive. If the document cannot be verified or verification is inconclusive, then the approach the decision maker takes will depend on the type of application.

Using Deception:

When considering an application where a false document has been submitted, the decision maker must also consider whether the applicant has used deception. They must not assume that an applicant who has submitted a false document has also used deception. The applicant has used deception if they *knowingly* submitted a false document. The decision maker must consider whether, on the balance of probabilities, the applicant *knew* they were submitting a false document.

The decision maker must also consider whether the applicant may have a *plausible explanation* for why they did not know the document was false.

If a third party submitted the false document, there will need to be consideration whether that person would benefit, as this may be evidence that the applicant did not know it was false.

If the decision maker is unable to make an assessment based on the available evidence, they may decide that the applicant should be i*nterviewed* before making a decision. At interview the applicant must be asked about the circumstances in which they obtained the documents

as well as any other relevant questions about their application. The answers given must be assessed in the context of the other available evidence.

After assessing whether deception was used, the decision maker must normally go on to assess whether the applicant meets the other requirements of the rules, such as any genuineness requirements. This applies whether or not it is found that false documents were submitted or the applicant used deception.

There must be sufficient evidence to show that a document is false, before refusal of the application on the ground that the applicant has submitted a false document.

The decision maker must make an intelligence referral if a false document (including certificate of sponsorship) has been submitted.

Notifications (Intelligence Reports) may be sent to decision makers when certain documents of a specific type have already been seen and verified as false, advising that all similar documents of that type should be treated in the same way.

Consequences of submission of false documents and use of deception:

Submitting false documents affects the overall credibility of the applicant. This must be taken into account in applications where the decision maker assesses the credibility or genuineness of the applicant.

The decision maker must also consider whether to refuse the application on the ground that the applicant has submitted a false document. This is *either a mandatory or discretionary refusal* under the Immigration Rules, depending on which rules apply to the application.

Applications to which Part 9 of the Immigration Rules applies:

• for *out of country* applications, where a false document has been submitted, the decision maker must refuse the application under Paragraph 320 (7A) of the Immigration Rules.
• for *in-country* applications where a false document has been submitted, the decision maker must refuse the application under Paragraph 322 (1A) of the Immigration Rules.

For both in and out of country applications, if satisfied that the applicant has also used deception this must be fully explained in the decision letter. This is because subsequent applications for entry clearance where Part 9 applies may also fall for refusal under Paragraph 320 (7B) which results in up *to a 10 year re-entry ban*. The decision must also include a warning that subsequent applications may be refused where deception has been used in a previous application.

Applications made under Appendix V: Visits:

• for *out of country* and *in-country* applications, where a false document has been submitted, the application must be refused under Paragraph V3.6 of Appendix V to the Immigration Rules.

For both in and out of country applications, if the decision maker is satisfied that the applicant has also used deception they must fully explain this in the decision letter. This is because subsequent applications for entry clearance as a visitor may fall for refusal under Paragraph V3.7 of Appendix V, which results in up to *a 10 year re-entry ban*. The must also include a warning that subsequent applications may be refused where deception has been used in a previous application.

Applications made under Appendix Armed Forces:

• for entry clearance and in-country applications, where a false document has been submitted, the application must normally be refused under Paragraph 9(a)(i) of Appendix Armed Forces to the Immigration Rules.

For both in and out of country applications under Appendix Armed Forces, if satisfied that the applicant has also used deception, this must be fully explained in the decision letter as subsequent Appendix Armed Forces applications for leave to remain may also fall for refusal under Paragraph 322 (2). Entry clearance applications on this route may also fall for refusal under Paragraph 320 (7B) which results in up *to a 10 year re-entry ban.* The decision must also include a warning that subsequent applications may be refused where deception has been used in a previous application.

Applications made under Appendix FM:

• in *entry clearance* applications, where a false document has been submitted, the application must normally be refused under Paragraph S-EC.2.2.of Appendix FM to the Immigration Rules
• in *in-country* limited leave to remain applications where a false document has been submitted, the application must normally be refused under Paragraph S-LTR.2.2 of Appendix FM to the Immigration Rules
• in *in-country* indefinite leave to remain applications where a false document has been submitted, the application must normally be refused under Paragraph S-ILR.2.2 of Appendix FM to the Immigration Rules

For both in and out of country applications under Appendix FM, if satisfied that the applicant has also used deception, the decision maker must fully explain this in the decision letter as subsequent applications for leave to remain under Appendix FM may also fall for refusal under Paragraph S-LTR.4.2 or Paragraph S-ILR.4.2. If the applicant leaves the UK and applies for entry clearance under a route to which paragraph 320 (7B) or V3.7 applies, the applicant may be subject to up *to a 10 year re-entry ban.* The decision must also include a warning that subsequent applications may be refused where deception has been used in a previous application.

Applications under private life rules (part 7 paragraph 276ADE(1)):

• it is not possible to make an entry clearance application under the private life rules
• in *in-country* limited leave to remain applications where a false document has been submitted, the application must normally be refused under paragraph 276ADE (1)(i) with reference to paragraph S-LTR.2.2 of Appendix FM to the Immigration Rules

• in *in-country* indefinite leave to remain applications where a false document has been submitted, this must normally be refused under paragraph 276DE (c) with reference to paragraph S-ILR.2.2 of Appendix FM to the Immigration Rules.

For applications under the private life rules, if satisfied that the applicant has also used deception, the decision must fully explain this in the decision letter as subsequent applications for leave to remain on the basis of private life may also fall for refusal under Paragraph S-LTR.4.2 or Paragraph S-ILR.4.2. If the applicant leaves the UK and applies for entry clearance under a route to which paragraph 320(7B) or V3.7 applies, the applicant may be subject to up *to a 10 year re-entry ban.* The decision must also include a warning that subsequent applications may be refused where deception has been used in a previous application.

Deception and effect on future applications:

If an application was refused because the applicant used deception, the effect that this will have on future applications depends on whether they next apply in or outside the UK and on the route under which they apply.

Visitors Appendix V paragraph V3.7 with reference to V3.9 and V3.10:

The effect of deception in a previous application in the UK is a mandatory refusal for up to 10 years. The time period depends on when/how the applicant left UK.

The effect of deception in a previous entry clearance application is a mandatory refusal for 10 years from the date of application

Points Based System, Part 9 paragraph 320(7B):

The effect of deception in a previous application in the UK is a mandatory refusal for up to 10 years. The time period depends on when/how the applicant left UK.

The effect of deception in a previous entry application is a mandatory refusal for 10 years from the date of the application.

Appendix FM:

As to the effect of deception in a previous application in the UK or a previous entry application, there are no provisions in the rules to take account of previous deception.

Private life:

In relation to the effect of deception in a previous application in the UK or previous entry clearance application, there are no provisions in the rules to apply for entry clearance on basis of private life.

Appendix Armed Forces, Part 9 paragraph 320(7B):

The effect of deception in a previous application in UK, is a mandatory refusal for up to 10 years. The time period depends on when/how the applicant left the UK.

The effect of deception in a previous entry clearance application, is a mandatory refusal for 10 years from the date of the application.

Requests to review the decision on false documents/deception:

Officers must not accept any requests to review a decision unless they are submitted in the correct way.

Where an applicant has a right of appeal, they must use the appeals process if they wish to challenge the decision.

Where an applicant has a right of administrative review and wants the decision reviewed, they must make a review request by applying for administrative review.

Some applicants with neither a right of appeal nor administrative review may request a reconsideration of the decision.

For discretionary refusals, if deciding to exercise discretion and grant the application when the applicant has submitted a false document or used deception, the decision must explain in the case notes why they are exercising discretion.

INTRODUCTION OF THE A2 ENGLISH LANGUAGE REQUIREMENT FOR THE FAMILY ROUTE

On 18 January 2016, the Government announced the intention to introduce a new English language requirement, at level A2 of the Common European Framework of Reference for Languages, for partners and parents applying to extend their existing leave under the family Immigration Rules. The announcement indicated that the requirement would not be introduced before October 2016. This new A2 requirement for partners and parents applying for further leave to remain under the family Immigration Rules *will be introduced from 1 May 2017.* It will apply to those required to apply for further leave to remain on a 5-year route to settlement as a partner or parent on or after that date. The new A2 requirement is intended to support progression towards the B1 English language requirement at the settlement stage, helping to ensure that migrants seeking to settle in the UK as a partner or parent are improving their language skills throughout the 5-year probationary period.

In November 2016, the Home Office published the *A2 English language requirement for the family route, Statement of intent regarding changes to the Immigration Rules, November 2016.*

Background to the English language requirements:

Those seeking to enter the UK on the basis of employment under the Points Based System have been required to meet an English language requirement since 2008 and students seeking to enter the UK under Tier 4 of the Points Based System have been required to do so since March 2010. English language requirements have since been increased by:

- Introducing in November 2010 a requirement for a non-European Economic Area (non-EEA) national partner of a British citizen or settled person to demonstrate that they can speak and understand a basic level (A1 level) of English before they can come or remain in the UK;

- Extending the A1 speaking and listening requirement to the post-flight partner of a person in the UK with refugee status or humanitarian protection from April 2011;

- Extending the A1 speaking and listening requirement from July 2012 to those applying for leave as a non-EEA national parent of a child who is a British citizen or settled in the UK;

- Extending the A1 requirement to those applying as a non-EEA national partner of a member of HM Forces under Appendix Armed Forces from December 2013; and

- Extending the B1 level English language speaking and listening requirement and the requirement to pass the new Life in the UK test to all applicants for settlement, including partners and parents on the family route, from October 2013. *These requirements will apply from July 2017 to* non-EEA national partners and parents applying for indefinite leave to remain (ILR) under the family route having completed the minimum probationary period of 5 years introduced in July 2012.

Current A1 English language requirement:

The current English language speaking and listening requirement at level A1 of the Common European Framework of Reference for Languages (CEFR) for those applying for entry clearance or leave to remain as the partner of a British citizen or a person settled in the UK was introduced in November 2010.

Since April 2015 there have been two Home Office approved A1 tests available for partner and parent applicants:

- Graded Examinations in Spoken English (GESE) Grade 2 offered by Trinity College London (available in the UK).
- International English Language Test System (IELTS) Skills for Life offered by the IELTS SELT Consortium (available in the UK and overseas).

An applicant is exempt from the A1 English language requirement if at the date of application:

- They are aged 65 or over;
- They have a disability which prevents them from meeting the requirement; or
- There are exceptional circumstances which prevent them from being able to meet the requirement.

Each application for an exemption is considered on a case-by-case basis. To qualify for an exemption on the basis of exceptional circumstances, applicants must demonstrate that they are unable to learn English before coming to the UK or that it is not practicable or reasonable for them to travel to another country to take an approved English test. An applicant who was exempt from the A1 English language requirement at entry clearance or the initial leave to remain stage is required to meet it when they apply for further leave to remain after 30 months in the UK, unless they remain exempt on the same or a different basis.

Who will need to meet the new A2 English language requirement?

All applicants applying for further leave to remain in the UK under Appendix FM to the Immigration Rules as a partner or parent of a British citizen or settled person or as the post-flight partner of a refugee or person with humanitarian protection will have to meet the new A2 English language requirement, unless exempt from it, to continue on the 5-year partner or parent route to settlement under Appendix FM.

The requirement will apply to those whose leave to enter or remain as a partner or parent on a 5-year route to settlement under Appendix FM will expire on or after 1 May 2017.

Applicants not required to meet the new A2 requirement:

- *Partners of members of HM Forces:*
  The new A2 English language requirement *will not* apply to the partner of a member of HM Forces who has been granted 5 years' leave to enter or remain under Appendix Armed Forces to the Immigration Rules and who is not required to apply for further leave after 2.5 years (30 months).

Partners of members of HM Forces who are applying for further leave to remain under Appendix FM to the Immigration Rules *will* be required to meet the new A2 requirement unless they are exempt from it.

- *10-year partner and parent routes:*
  Like the A1 English language requirement, the new A2 requirement *will not* apply to those applying for further leave to remain under the 10-year partner or parent route to settlement under Appendix FM to the Immigration Rules, or outside the Rules on ECHR Article 8 grounds.

- *Partners granted leave under Part 8 of the Immigration Rules:*
  The new A2 requirement *will not* apply to a partner who has been granted leave under Part 8 of the Immigration Rules and who has not yet completed the route to settlement in that category because they have not yet met the B1 English language and Life in the UK test requirements for indefinite leave to remain.

How the new A2 English language requirement will be met:

From 1 May 2017, applicants who have completed 2.5 years (30 months) in the UK with leave as a partner or parent under Appendix FM to the Immigration Rules, and who are applying for *further* leave to remain in that category, will be required to obtain an approved English language speaking and listening qualification at level A2 or higher, unless they:

- Are a national of a majority English-speaking country (Annex B);
- Hold a degree taught or researched in English (Annex C); or
- Are exempt from the requirement.

As with the current A1 English language requirement for partners and parents, an applicant will be exempt from the new A2 requirement if at the date of application:

- They are aged 65 or over;
- They have a disability which prevents them from meeting the requirement; or
- There are exceptional circumstances which prevent them from being able to meet the requirement.

The following test providers are approved under the Immigration Rules to provide A2 level English language speaking and listening tests for applicants applying for further leave as a partner or parent under Appendix FM:

- Trinity College London
- IELTS SELT Consortium

A2 tests from Trinity College London and IELTS SELT Consortium are only available in the UK at approved test centres. The current list of approved test centres is at Annex E of the new Statement of Intent.

As with the current A1 English language requirement, there is scope for applicants to take an approved English language test above the required level, including one which covers reading and writing skills (on which the scores will be ignored) provided the test is on the approved Home Office list. A list of the Home Office approved tests is included in Appendix O to the Immigration Rules.

Applicants will need to provide the Secure English Language Test unique electronic reference number provided by the awarding body when they submit their further leave to remain application.

What does the A2 test involve?

At A2 level, a person can go beyond a simple factual conversation to express simple opinions. They can understand the main point in short, clear, simple messages and announcements. They can interact in short conversations on familiar topics provided the other person helps if necessary.

Trinity College London's A2 speaking and listening test involves a one-to-one conversation with an examiner which lasts seven minutes.

IELTS SELT Consortium's A2 speaking and listening test is taken with another test taker and one examiner. Candidates are assessed on their own performance during this session.

Both approved A2 speaking and listening tests cost the applicant £150.

Applicants are not required to study for their A2 qualification at any particular institution or to follow any particular curriculum. Applicants may choose to undertake an accredited course with commensurate standards of teaching, management and facilities.

In addition to accredited English language courses, learning English can be undertaken at home using online courses or other learning tools.

There is also a wide range of free resources available on the internet for applicants wishing to improve and practise their English language skills, including through online tutorials and worksheets. In some areas of the UK, there are informal conversation classes and mentoring schemes with local volunteers aimed at helping more individuals improve their English language skills.

Failure to meet the A2 English language requirement for further leave to remain:

An applicant failing to meet the A2 English language requirement for further leave to remain as a partner or parent under the 5-year route to settlement after 2.5 years (30 months) in the UK will have to meet the relevant requirements of Appendix FM or demonstrate exceptional circumstances in order to be granted leave to remain in the UK on family or private life grounds under a 10-year route to settlement. They will still have to meet the B1 English language requirement and pass the Life in the UK test in order to qualify for indefinite leave to remain after 10 years.

ABOLISHMENT OF THE 28DAY GRACE PERIOD FOR OVERSTAYERS

From 24 November 2016, there has been a removal of the 28day grace period for overstayers (which is permitted for applications for renewal of leave from those who have overstayed their leave to be in the UK), replaced with a provision to disregard overstaying in a limited set of circumstances.

Amended Home Office Guidance , *Applications from overstayers (non family routes) – version 7.0* was published on 24 November 2016. The guidance is for Home Office caseworkers who consider applications for further leave to remain made on or after 9 July 2012 by an applicant without valid leave in certain routes.

The routes it covers are:

- all work and study, including the points-based system
- visitors
- long residency
- UK ancestry
- most discharged Her Majesty's (HM) forces

It does not apply to:

- applications for leave to remain under the above routes made before 9 July 2012: case workers must decide these in line with the rules in place on 8 July 2012
- the following armed forces routes:
  -dependants applying for leave to enter or remain as the family member of a serving HM forces member
  -those applying under an armed forces concession, for example, Gurkhas discharged before July 1997 applying under the special discretionary arrangements
- applications for administrative review under Appendix AR of the Immigration Rules

The change from 24 November 2016:

Any applicant who is applying for leave to remain must not have remained in the UK after the expiry of their original grant of leave, on the date of their application. Remaining in the UK after leave has expired is commonly known as overstaying.

The Immigration Rules were amended with effect from 24 November 2016 to abolish the 28 day grace period, under which applications for leave to remain were not refused on the basis of overstaying if made within 28 day of the expiry of leave. The Immigration Rules now provide for current overstaying to be disregarded in a limited number of scenarios but otherwise it is a now a ground for refusal.

When overstaying will be disregarded:

First, overstaying will be disregarded if the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the

application, why it could not be made in time, provided that the application is made within 14 days of the expiry of leave.

Second, overstaying will be disregarded where the applicant previously made an in-time application, or an application which fell within the first exception above, which was refused and the current application was made within 14 days of:

• the refusal of the previous application for leave
• the expiry of any leave extended by section 3C of the Immigration Act 1971
• the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable),
• any administrative review or appeal being concluded, withdrawn or abandoned or lapsing

The provision to permit exceptions for overstayers is found in paragraph 39D of the Immigration Rules.

Relevant considerations:

If, within the 14 day consideration period, the applicant submitted details of circumstances beyond their control that prevented them from seeking leave, these should be considered.

Consideration must be given to:
• the plausibility of the reasons
• whether the reason was genuinely outside the applicant's control or whether the applicant is describing difficulties that could realistically have been surmounted
• the credibility of evidence provided

Each case must be decided on its merits, but examples of reasons that might be considered beyond the control of applicants are:
• the applicant was admitted to hospital for emergency treatment (evidenced by an official letter verifying the dates of admission and discharge and the nature of the treatment)
• a close family bereavement
• an educational institution was not sufficiently prompt in issuing a Confirmation of Acceptance for Studies

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

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

The submission of an application within the 14 day consideration period of overstaying does not mean the migrant's previous leave is either re-instated or extended. Therefore an applicant without valid leave at the point they submit their application continues to be an overstayer from the point their leave expired and throughout the period their application is pending.

As the applicant has no leave during the period their application is pending they have no permission to work in the UK.

THE 10 YEAR LONG RESIDENCE RULES AND OVERSTAYING

Settlement can be granted on the basis of long under paragraphs 276A-276D of the Immigration Rules after a period of 10 years continuous lawful residence.

Before 9 July 2012 it was possible to grant long residence after a period of 14 years continuous residence, but that provision was removed by changes to the Immigration Rules on that date. However, a person granted an extension of stay following an application made before 9 July 2012 can still be considered under the rules in force before that date. This means a person granted leave to remain on the basis of 14 years residence in the UK can still be granted ILR once the requirements are met.

The current Home office policy guidance is, *Long residence, Version 14.0, 24 November 2016.*

Requirements for long residence:

The applicant must meet the following requirements to be granted indefinite leave:

- the applicant must have at least 10 years continuous lawful residence in the UK
- there must be no reason why granting leave is against the public good
- the applicant must meet the knowledge of language and life requirement
- the applicant must not fall for refusal under the general grounds for refusal
- the applicant must not be in breach of immigration laws, except

-for any period of overstaying for 28 days or less which will be disregarded where the period of overstaying ended before 24 November 2016

-where overstaying on or after 24 November 2016, leave was never the less granted in accordance with paragraph 39E of the immigration rules.

Once an applicant has built up a period of 10 years continuous lawful residence, there is no limit on the length of time afterwards when they can apply. This means they could leave the UK, re-enter on any lawful basis, and apply for settlement from within the UK based on a 10 year period of continuous lawful residence they built up in the past. There is also nothing to prevent a person relying on a 10 year period that they may have relied on in a previous application or grant.

Time the applicant has spent in the UK with 3C leave also counts towards lawful residence.

Definition of continuous lawful residence:

Lawful residence is defined in paragraph 276A of the Immigration Rules as a period of continuous residence in which the applicant had one of the following:

- existing leave to enter or remain
- temporary admission within section 11 of the 1971 Immigration Act where leave to enter or remain is subsequently granted
- an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain

Events that break continuous residence:

Continuous residence is considered to be broken if the applicant has:

• been absent from the UK for a period of *more than* 6 months at any one time
• spent a total of 18 months outside the UK throughout the whole 10 year period
• left the UK before 31 October 2016 with no valid leave to remain on their departure from the UK, and failed to apply for entry clearance within 28 days of their previous leave expiring (even if they returned to the UK within 6 months)

Time spent outside the UK:

Continuous residence is not considered broken if the applicant:

• is absent from the UK for 6 months or less at any one time
• had existing leave to enter or remain when they left and when they returned – this can include leave gained at port when returning to the UK as a non-visa national
• departed the UK before 6 October 2016, but after the expiry of their leave to remain, and applied for fresh entry clearance within 28 days of that previous leave expiring, and returned to the UK within 6 months

Periods of overstaying:

When a decision maker is refusing an application on the grounds it was made by an applicant who had overstayed by *more than 28 days before 24 November 2016*, they must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

• serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation
• travel or postal delays which meant the applicant or their representative was not able to submit the application in time
• inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant's control, for example:
-it is the fault of the Home Office because it lost or delayed returning travel documents
-there is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood – the applicant must send evidence of the date of loss and the date replacement documents were sought.

When granting leave in these circumstances, the applicant must be granted leave outside the rules for the same duration and conditions that would have applied had they been granted leave under the rules.

Time spent outside the UK:

A person who is outside the UK will not be in breach of the Immigration Rules.

The decision maker can overlook a period of unlawful residence if the applicant leaves the UK after their valid leave has expired but before 24 November 2016, and:

• applies for entry clearance within 28 days of their original leave expiring
• returns to the UK with valid leave within 6 months of their original departure

Out of time applications:

An applicant applying for an extension of stay or indefinite leave to remain (ILR) on the basis of long residence must not be in breach of the Immigration Rules.

Applications made before 24 November 2016:

Where the application was made before 24 November 2016 a period of overstaying of 28 days or less on the date of application *will* be disregarded.

The 28 day period of overstaying is calculated from the latest of the:

• end of the last period of leave to enter or remain granted
• end of any extension of leave under sections 3C or 3D of the Immigration Act 1971
• the point that a migrant is deemed to have received a written notice of invalidity, in line with paragraph 34C or 34CA of the Immigration Rules, in relation to an in-time application for further leave to remain

When refusing an application on the grounds it was made by an applicant who has overstayed by more than 28 days, the decision maker must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

• serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation
• travel or postal delays which meant the applicant or their representative was not able to submit the application in time
• inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant's control, for example:
-it is the fault of the Home Office because it lost or delayed returning travel documents
-there is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood – the applicant must send evidence of the date of loss and the date replacement documents were sought

When granting leave in these circumstances, the applicant must be granted leave outside the rules for the same duration and conditions that would have applied had they been granted leave under the rules.

Applications made on or after 24 November 2016:

Where an out of time application is submitted on or after 24 November 2016, the decision maker must consider whether to exercise discretion in line with paragraph 39E of the Immigration Rules. Paragraph 39E, provides:

"*Exceptions for overstayers*

39E. This paragraph applies where:

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

(2) the application was made:

(a) following the refusal of a previous application for leave which was made in-time or to which sub-paragraph (1) applied; and

(b) within 14 days of:

(i) the refusal of the previous application for leave; or

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or

(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing".

POWER TO CANCEL SECTION 3CL LEAVE: THE IMMIGRATION ACT 2016

The Home Office have published amended Guidance, *Leave extended by section 3C (and leave extended by section 3D in transitional cases) Version 7.0, 1 December 2016*. This guidance explains when section 3C of the Immigration Act 1971 operates to extend leave. It also explains when section 3D of the Immigration Act 1971 operates to extend leave in transitional cases.

As regards the amendment, the guidance covers how to exercise the power to cancel section 3C leave brought in by the Immigration Act 2016.

Purpose of Section 3C leave:

The purpose of section 3C leave is to prevent a person who makes an in-time application to extend their leave from becoming an overstayer while they are awaiting a decision on that application and while any appeal or administrative review they are entitled to is pending.

Conditions of immigration leave where 3C applies:

A person who has section 3C leave remains subject to the conditions attached to their extant leave unless the conditions of their leave are varied by the Secretary of State. For example, a person subject to a condition allowing employment may continue to work as before. Any restrictions on the type of employment allowed or the number of hours they can work will still apply.

The conditions attached to a person's leave can be varied while they are on section 3C leave, in the same way that someone who has been granted leave can have their conditions varied. So for example the conditions of a person's leave may be varied to impose a residence requirement or to put them on to reporting conditions.

When section 3C applies:

Pending decision on application

A person will have section 3C leave if:
- they have limited leave to enter or remain in the UK
- they apply to the Secretary of State for variation of that leave
- the application for variation is made before the leave expires
- the leave expires without the application for variation having been decided
- the application for variation is neither decided nor withdrawn

Pending appeal

Section 3C leave continues during any period when:
- an in-country appeal could be brought (ignoring any possibility of appeal out of time with permission)
- the appeal is pending (within the meaning of section 104 of the Nationality, Asylum and Immigration Act 2002), ie it has been lodged and has not been finally determined

Pending Administrative Review

Section 3C leave continues during any period when:
• an administrative review could be sought
• the administrative review is pending ie it has not be determined
• no new application for leave to remain has been made

Section 3C leave will end if the person leaves the UK.

What is an in-time application?

An in-time application is an application made by a person in the UK who at the time of application has leave to enter or remain.

Where an in time application to extend or vary leave is made and the application is not decided before the person's existing leave expires section 3C extends the person's existing leave until the application is decided (or withdrawn).

Section 3C does not extend leave where the application is made after the applicant's current leave has expired.

Effect of an invalid application:

An invalid application does not extend leave under section 3C.

Where an application is received that is invalid and a fee has been paid, even if it is the wrong fee, the specified application forms and procedures guidance provides that the Home Office will write out and provide a single opportunity to correct any omission or error. The person is given 10 business days to respond to the request.
Where the requested information is received and the application is accepted as valid then the application should be treated as valid from the date it was first made, not the date the further information was received. The effect of this is that where the original application was made in time and the application was 'validated' at a later date, the person's section 3C leave starts from the date the application was first made.

Section 3C and EEA applications:

Section 3C does not extend leave where an application is made for a residence card under the EEA Regulations Immigration (European Economic Area) Regulations 2006 . An application for a residence card is not an application to extend or vary leave, it seeks confirmation that rights under the EEA Regulations are being exercised therefore the applicant does not require leave to enter or remain.

Variation applications during section 3C leave:

A variation application can seek to vary the:

• length of time for which the person is permitted to remain in the UK
• the condition attached to the leave
• the purpose for which the person is permitted to remain in the UK

While the person's leave is extended by section 3C they cannot make a new application for variation of leave. This is because Section 3C (4) states:

'A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by this section."

However section 3C (5) does allow the person to amend their existing application at any time before it is decided by the Secretary of State. The application to amend the existing application has to be a valid application. Where there is a difference in the fee between the initial variation application and the amended application any additional fee must be paid.

Section 3C leave extended while an appeal is pending:

If a person does not already have section 3C leave the fact that they are entitled to an in-country right of appeal against a decision does not give them section 3C leave.

A person does not have section 3C leave during an appeal where the appeal can only be brought after the person has left the UK. In these cases section 3C leave will come to an end when their application is decided and certified. If the certificate is withdrawn the underlying decision should also be withdrawn. A new decision should be made which will generate a new right of appeal, which may be subject to recertification. Withdrawal of the decision does not mean that the person once again has section 3C leave. This is because section 3C leave can arise and exist only where it is a seamless continuation of leave, either extant leave or section 3C leave. Where there is a break in that leave, such that section 3C leave has come to an end, section 3C leave cannot be resurrected.

Section 104 of the Nationality, Immigration and Asylum Act 2002 sets out when an appeal is pending.

Where there is an in- country right of appeal under section 82 (1) of the Nationality, Asylum Immigration Act 2002 an appeal is pending during the period it could be brought.

An appeal is finally determined when the appeal has been heard and decided and permission to onward appeal has not been sought within the prescribed time limits, or permission to appeal has been finally refused (namely there is no possibility of renewing the application for permission to appeal to a different court or tribunal).

Cancelling section 3C leave:

Section 62 of the Immigration Act 2016 amends section 3C of the Immigration Act 1971 to provide for a power to cancel section 3C leave. *This power was commenced on 1 December 2016.*

Section 3C leave may be cancelled where a person has either:

• *Failed to comply with a condition attached to their leave*. Section 3C leave may be cancelled where a person has failed to comply with any conditions attached to their leave. The failure to comply can be during the previous period of leave or during the leave as extended under

section 3C. Where the Home Office alleges that there has been a failure to comply with a condition of leave, the burden of proof is on the Home Office to demonstrate that failure and the standard of proof is on the balance of probabilities.

• *Used or uses deception in seeking leave to remain (whether successfully or not).* The power to cancel section 3C leave on grounds of use of deception in an application for leave to remain does not depend on the deception having been successful. It is sufficient that there has been deception. It is also not necessary for the deception to have been used in the most recent application for leave to remain. Section 3C leave can be cancelled when deception has been used in any application for leave to remain, whether that is the current application or any previous application. However, where it was known deception had been used in a previous application and still granted leave, it will not be appropriate to rely on that previous use of deception to cancel section 3C leave. Deception requires a person to act knowing that the information was false.

Relevant questions for Home office caseworkers to consider are:

• was any false document submitted in good faith or in the knowledge that it was false
• was incorrect information in an application an error or deliberate

Where the Home Office alleges that deception has been used, the burden of proof is on the Home Office to demonstrate that deception has been used and the standard of proof is on the balance of probabilities.

Section 3C leave cannot be cancelled for any other reason. The other general powers to curtail leave set out in the curtailment guidance do not apply to section 3C leave.

The power to cancel section 3C leave is discretionary.

Cancellation of section 3C leave under this provision operates to bring the period of leave to an end with immediate effect. It cannot therefore be used to vary leave to, for example, 60 days.

Cancelling 3C leave where there is an outstanding application:

Where a person has an outstanding application, the decision maker must first consider the application and then decide whether to cancel section 3C leave. Where intending to grant leave to remain despite the breach of conditions or deception the decision maker should not cancel section 3C leave.

When refusing an application, and the grounds for refusal include a breach of conditions or deception, the decision maker must decide whether to also cancel section 3C leave.

The consequences of cancelling section 3C leave is that the person will not have section 3C leave while any appeal or administrative review against the refusal of the application is pending. This also means that any conditions associated with the previous immigration leave would no longer apply, for example a right to work or access public funds.

Home Office caseworkers should not cancel section 3C leave solely because they are refusing an application.

Cancelling 3C leave where there is an outstanding administrative review:

Where a person has an outstanding administrative review the decision maker should decide the administrative review. A decision on the administrative review will bring section 3C leave to an end unless new reasons are added to the refusal.

Cancelling 3C leave where there is an outstanding appeal:

Where section 3C leave is extended because the person has an outstanding appeal, cancellation of section 3C leave will not bring the appeal to an end. The consequences of cancelling section 3C leave is that the person will not have section 3C leave while the appeal is pending. This also means that any conditions associated with the previous immigration leave would no longer apply, for example a right to work or access public funds.

Where section 3C leave is being extended by an appeal and it comes to light that a person has used deception or breached their conditions of leave the decision maker should consider whether it is an appropriate to cancel the section 3C leave. As appeals can take some time to determine it may be appropriate to cancel section 3C leave. In considering whether to cancel section 3C leave the decision maker should consider how material the use of deception or breach of conditions has been and whether it led to the application being refused initially. Where the use of deception or breach of conditions comes to light only after the application has been refused, the decision maker will need to consider whether it is sufficiently serious that it would have been a material consideration in the application being refused. Where this is not the case section 3C leave should not normally be cancelled.

Discretion to cancel section 3C leave:

As cancellation of section 3C leave is discretionary, a decision maker must not automatically cancel a person's leave. They must establish the relevant facts and then carefully consider all the person's relevant circumstances before they make a decision on cancelling section 3C leave. This is consistent with the approach taken where consideration is being given to curtailing a person's immigration leave and the principles in the curtailment guidance should be followed. Home Office policy guidance states that for the avoidance of doubt, it will not be appropriate to cancel section 3C leave if a decision maker would not have curtailed immigration leave under the same circumstances.

A decision maker must not cancel section 3C leave simply because they have refused the application for further leave even where there has been a breach of conditions or deception has been used. A key consideration in deciding whether to cancel section 3C leave is the extent to which the deception used or breach of conditions was material to the decision to refuse the application, in that if the decision maker would not have refused the application solely because of the breach of conditions or use of deception then it will not normally be appropriate to cancel section 3C leave.

Where children in the UK are affected by the decision the decision maker must consider the effect of cancellation of section 3C leave on the welfare of the affected child.

Dependants:

Where the main applicant's section 3C leave is cancelled, the decision maker can make a removal decision in respect of their dependants upon section 10 (2) of the Immigration and Asylum Act 1999. The removal decision will invalidate any extant leave (section 10 (6)).

EXTENSION OF THE SECTION 94B CERTIFICATION POWER TO NON-DEPORTATION CASES

What are the relevant amended provisions?

Amendments to section 94B of the Nationality, Immigration and Asylum Act 2002 came into force on 1 December 2016. The amended section reads:

"94B Appeal from within the UK: certification of human rights claims

(1) This section applies where a human rights claim has been made by a person ("P").

(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, refusing P entry to, removing P or requiring P to leave the United Kingdom, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if refused entry to, removed from or required to leave the United Kingdom"

The effect of Section 94B Certification:

The effect of section 94B certification is that any appeal can only be lodged and heard, or continued if the claim is certified after the appeal is lodged, while the claimant is outside the UK. This means the right of appeal against the decision to refuse the human rights claim is non-suspensive, meaning it is not a barrier to removal.

Section 94B can only be used where the conditions set out in section 94B itself are met, namely that requiring the claimant to appeal from outside the UK would not be unlawful under section 6 of the Human Rights Act 1998. However, it is a discretionary power so consideration must also be given to whether there are other compelling reasons to exercise discretion and not certify the claim.

The changes from 1 December 2016:

Between 28 July 2014 and 1 December 2016 section 94B applied only in relation to human rights claims made by those liable to *deportation* under section 3(5)(a) and 3(6) of the Immigration Act 1971.

Section 63 of the Immigration Act 2016 amended the Nationality, Immigration and Asylum Act 2002 *to extend the scope of section 94B to all human rights claims* where certification would not cause serious irreversible harm or otherwise breach human rights.

Section 94B continues to be potentially applicable to all deport cases where a human rights claim has been refused.

The Home Office will consider whether section 94B certification is appropriate in all cases where a human rights claim has been made and is refused, unless it is:

(1) (for non-deport cases only), outside the Phased implementation for non-deport cases.

Implementation of the extended power is being phased. The power to certify non-deport cases should be applied on or after 1 December 2016 where the case under consideration meets both of the criteria below:

- the claimant did not have existing leave at the point that they made their human rights claim (for example, overstayers or illegal entrants)
- the claimant does not rely on their relationship with a British national family member

For this purpose, the term 'family member' means a partner, parent, or child, where there is evidence of the relationship.

or

2) a case listed as not suitable for certification:

- Criminal cases with indeterminate sentence
- Unaccompanied children
- Potential Victim of Human Trafficking

Section 94B and those not removable from the UK:

Current Home Office Policy Guidance *Certification under section 94B of the Nationality, Immigration and Asylum Act 2002, Version 7, 1 December 2016*, states at page 26 :

"Removability

Individuals who have no right to be in the UK are expected to leave. Therefore it is appropriate to certify a human rights claim (where all other conditions for doing so are met) even where a claimant is not currently having their removal or deportation from the UK enforced.

Where a claimant could not depart voluntarily and is not currently removable, you should consider whether to exercise discretion not to certify under section 94B. It may be counterproductive to certify if the claimant would be unable to leave the UK to exercise a right of appeal.

Section 94B certification is appropriate where a claimant has made an immigration application or claim and either:

- *has a passport or travel document (including a Home Office Travel Document)*

- *is able to obtain a passport or travel document (including a Home Office Travel Document)*

as the assumption is that the claimant can and should leave the UK voluntarily.

Where a claimant meets all of the following criteria:

- *they do not have a passport or travel document (including a Home Office Travel Document)*
- *show credible evidence that they are unable to leave the UK within a reasonable timeframe, for example there is no realistic prospect of an acceptable travel document or other return information required for biometric returns being available*
- *the barrier to leaving the UK is not their own refusal to co-operate with the removal process*

then certification under section 94B is unlikely to be appropriate".

The Home Office should only consider a case for certification if the claimant has been informed that the power might apply and given the opportunity to provide reasons why their claim should not be certified. Therefore where a claimant is or seems irremovable, reliance upon the above sections of home office policy guidance are relevant when making representations in response.

There are other powers of certification/ denial of a right of appeal:

Some cases may be suitable for dual certification (certification of different elements of the same claim under different certification powers), where a claim is based on Article 2 and/or Article 3 ECHR and other ECHR Articles.

Section 96 of the 2002 Act: late claims :-

Human rights claims which are refused and certified under section 96 of the Nationality, Immigration and Asylum Act 2002 should not be certified under section 94B because certification under section 96 means there is no right of appeal. Section 96 removes the right of appeal against a refusal where the refusal was of a claim that could have been made earlier. Section 96 is intended to prevent claimants raising matters at the last minute to frustrate removal. A case can be certified under section 96 (if the conditions are met to do so) regardless of whether the right of appeal notified or the section 120 notice served was under the 2002 Act before its amendment by the Immigration Act 2014 or after its amendment.

Section 94 of the 2002 Act: clearly unfounded claims:-

Human rights claims which are refused and can be certified under section 94 of the Nationality, Immigration and Asylum Act 2002 as clearly unfounded should be certified under section 94 rather than section 94B. Section 94(1) states that the Secretary of State may certify a protection or human rights claim as clearly unfounded.

In all cases where a protection and/or human rights claim is refused, Home Office caseworkers must consider whether certification is appropriate and cases that are clearly unfounded should be certified unless an exception applies. The effect of certification under section 94 is to restrict the right of appeal against refusal so that the claimant can only appeal once they have left the UK (referred to as a non-suspensive appeal).

Paragraph 353: fresh claims:-

Further submissions which raise human rights grounds, and are considered under paragraph 353 of the Immigration Rules, should not be certified under section 94B if the submissions are refused and it is determined that they do not amount to a fresh claim. This is because the decision to reject the submissions is not refusal of a human rights claim and will not generate a right of appeal. Further submissions are not defined in Paragraph 353 of the Immigration Rules. The purpose of the rule is to provide a mechanism for deciding whether a fresh claim has been made. Where it is decided that a fresh claim has not been made, there is no right of appeal against refusal of further submissions, including refusal of repeat applications. However, where further submissions are refused but it is considered that there is a fresh claim on asylum or human rights grounds, a right of appeal is generated under section 82 of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014.

Protection claims- Articles 2 and 3 of the ECHR:

Human rights claims (initial claims or further submissions accepted as fresh claims under paragraph 353 of the Immigration Rules) made on the basis of Article 2 (right to life) and/or Article 3 (freedom from torture or inhuman or degrading treatment or punishment, including medical claims)should not be certified under section 94B. This is because if the claim has not been certified under section 94, or has met the threshold to be accepted as a fresh claim under paragraph 353, the claim is not clearly unfounded and therefore removal pending the outcome of the appeal may give rise to a risk of serious irreversible harm or breach human rights.

Section 94B and EEA cases:

Section 94B only applies where the claimant has made a human rights claim. This means it does not apply to claims to residence under the EEA regulations. There are separate regulations – Regulations 24AA and 29AA – which allow non-suspensive appeals in certain EEA deportation cases. Separate guidance is available for EEA cases: Regulation 24AA of the Immigration (European Economic Area) Regulations 2006.

However, section 94B may be relevant, and can be applied, in certain EEA deportation cases. This situation will arise where the claim under the EEA Regulations is being considered for certification under regulation 24AA, but the claim also constitutes a human rights claim which will give rise to a right of appeal under section 82 of the 2002 Act if refused. In these circumstances, if regulation 24AA could be applied, but section 94B could not be, or vice versa, then neither part of the case should be certified. This however is recognised by the Home Office as unlikely to be the case in practice as the substantive considerations are very similar in nature.

Section 3C leave and exercise of the Section 94B power:

The current Section 94B guidance states: Where a person who has made a human rights claim has 3C leave, that leave will automatically be brought to an end by certification under section 94B. Section 3C leave following a decision on an application only lasts so long as the person has a right of appeal in the UK. Once a claim has been refused and certified they no longer have a right of appeal in the UK and therefore no longer have 3C leave.

CHANGES TO THE RESTRICTED LEAVE POLICY

On 7 December 2016, the Home office Policy Guidance, *Restricted Leave Version 2.0, 07 December 2016*, was amended. The guidance sets out who should be granted restricted leave, how to consider the duration of leave to be granted and what, if any, conditions should be imposed.

Restricted leave is a form of leave outside the Immigration Rules granted to certain individuals who cannot be removed from the UK because to do so would be a breach of their human rights.

Restricted leave will normally be granted where a foreign national:

- is excluded from protection under Article 1F of the Refugee Convention or from a grant of humanitarian protection under paragraph 339D of the Immigration Rules
- would be excluded had they made a protection claim
- would be excluded from protection and a previous protection claim was refused without reference to Article 1F of the Refugee Convention or paragraph 339D of the Immigration Rules
- is subject to Article 33(2) of the Refugee Convention because they are a danger to the security of the UK
- is subject to Article 33(2) of the Refugee Convention having been convicted by final judgment of a particularly serious crime they pose a danger to the community of the UK

and where their removal would breach their human rights.

Purpose of exclusion:

The UK Government's policy is that foreign nationals who are not welcome in the UK because of their conduct will be deported or administratively removed from the UK, unless there is an European Convention on Human Rights (ECHR) barrier. This includes those whose conduct brings them within Article 1F or Article 33(2) of the Refugee Convention, or paragraph 339D of the Immigration Rules which reflects Article 17 of the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('Qualification Directive').

The purpose of exclusion from asylum or humanitarian protection and associated provisions is to deny the benefits of protection status to those who do not deserve international protection because there are serious reasons for considering that they have committed war crimes, crimes against peace or humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations (including terrorism-related activity). It is also intended to protect the integrity of the asylum process and to ensure that foreign nationals cannot avoid being returned to their country of origin or nationality to be held to account for their actions by claiming protection. The purpose of the Article 33(2) 'refoulement' provision is to deny the

benefit of the principle of non-refoulement to those who are a danger to the community or security of the host country.

The lawfulness of the restricted leave policy was upheld by the Upper Tribunal in its 22 September 2015 judgment in MS, R (on the application of) v SSHD (excluded persons: Restrictive Leave policy) (IJR) [2015] UKUT 539 (IAC).

Relevant law and provisions:

Article 1F of the Refugee Convention excludes persons from protection where there are serious reasons for considering that they have either:

• committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
• committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
• been guilty of acts contrary to the purposes and principles of the United Nations.

Article 33(2) of the Refugee Convention provides that the refoulement (return) of a refugee is not prohibited where there are reasonable grounds for regarding them as a danger to the security of the UK or where they have been convicted by final judgment of a particularly serious crime and constitute a danger to the community.

Section 72 (2) of the Nationality, Immigration and Asylum Act 2002 sets out that a person will be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK, for the purpose of Article 33(2) of the Refugee Convention, if they have been convicted in the UK of an offence and sentenced to a period of imprisonment of at least 2 years. This presumption is rebuttable.

Part 11 of the Immigration Rules includes provisions for refusing asylum or humanitarian protection, excluding a person from the Refugee Convention or humanitarian protection, and revoking or refusing to renew asylum or humanitarian protection. This includes:

• paragraph 339AA, which sets out when a person may be excluded from the Refugee Convention
• paragraph 339AC, which sets out when Article 33(2) of the Refugee Convention applies
• paragraph 339D, which sets out when a person may be excluded from a grant of humanitarian protection

Paragraph 339D of the Immigration Rules reflects Article 17 of the Qualification Directive and allows for a person to be excluded from a grant of humanitarian protection if there are serious reasons for considering that:

i) he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
ii) he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;

iii) he constitutes a danger to the community or security of the United Kingdom; or iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment if it were committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

Paragraph 8(c) of Appendix AF sets out that an application for limited or indefinite leave to remain by a person subject to the restricted leave policy must be refused.

Paragraph S-LTR.1.8 of Appendix FM sets out that an application for limited leave to remain by a person subject to the restricted leave policy must be refused.

Paragraph S-ILR.1.9 of Appendix FM sets out that an application for indefinite leave to remain by a person subject to the restricted leave policy must be refused.

Other policy guidance to consider in conjunction with the Restricted Leave Policy:

- Exclusion under Article 1F of the Refugee Convention
- Revocation of Refugee Status
- Considering the protection (asylum) claim and assessing credibility
- Deporting foreign nationals
- Revocation of indefinite leave
- General grounds for refusal
- Criminality guidance for Article 8 ECHR cases
- Further submissions
- Rights of Appeal

Grant of restricted leave:

The period of restricted leave to be granted and the conditions which apply to a grant of leave must be considered on a case-by-case basis taking into account the policy aims and the guidance. There is no limit on the number of occasions restricted leave can be granted; provided the individual continues to come within the scope of the restricted leave policy, including that there continues to be an ECHR barrier to removal, a further period of restricted leave can be granted.

The decision letter and notices accompanying the decision must clearly explain why a grant of restricted leave is appropriate and why certain conditions have been imposed. This must include a full explanation of the conditions imposed, how to apply for a variation of the duration of leave or the conditions imposed and, a statement that a failure to comply with conditions without reasonable excuse is an offence which may result in prosecution.

Where a dependent partner or child was included as a dependant of the main applicant before the initial decision to grant restricted leave was made but has not made a protection or human rights claim in their own right, they should be granted leave outside the rules. The length of leave granted should be in line with the main applicant. However it is generally not appropriate to impose similar restrictions to the main applicant.

Where a person is granted restricted leave and members of their family (such as a partner or children) apply for leave to enter or remain in their own right, consideration must be given to that application. If the partner or child qualifies for leave in their own right, they will not be given leave in line with the person granted restricted leave even if they are living together as a family.

It is not possible for a person with restricted leave to sponsor a family member to join them in the UK. A family member of a person granted restricted leave intending to come to the UK must qualify for entry clearance in their own right.

Period of grant of restricted leave:

The period of restricted leave to be granted is at the discretion of the Secretary of State. In most cases, restricted leave should be granted for a maximum of 6 months, however all cases must be assessed individually on their merits. A shorter period than 6 months should be granted where removal appears to be reasonably likely within the next 6 months or where, in exceptional cases, the risk posed by the individual warrants the case being kept under review more frequently. A longer period than 6 months can also be granted if justified by the particular circumstances of the case.

When considering the period of leave to be granted the decision maker must take account of any relevant factor including the following:

• the individual's circumstances;
• the reason why the person qualifies for a grant of restricted leave including the seriousness of any offence or crime they are suspected of committing, or have been convicted of;
• previous compliance with immigration laws or conditions

The decision maker must have regard to the best interests of the child as a primary consideration when considering the duration of restricted leave to be imposed.

Conditions to impose to a grant of restricted leave:

Section 3(1)(c) of the Immigration Act 1971 sets out what conditions may be imposed to limited leave to enter or remain in the UK. The conditions which may be imposed, if justified by the particular circumstances of the case, are:

- a condition restricting employment or occupation in the UK;
- a condition restricting studies in the UK;
- a condition requiring the person to maintain and accommodate himself, and any dependants, without recourse to public funds;
- a condition requiring the person to report to an immigration officer or the Secretary of State;
- a condition about residence.

Breaching one or more condition imposed on a grant of restricted leave is very serious and can lead to criminal prosecution.

Review of restricted leave:

Restricted leave cases must be reviewed regularly with a view to removal as soon as possible. If there is no longer an ECHR barrier to removal, the individual will not qualify for a further grant of restricted leave and enforcement action must be prioritised.

In all cases, the Home Office will assess the conditions in the country of return against the most recent country information, such as the Home Office's country policy and information note.

Information and evidence should also be requested from the person where appropriate and relevant to the consideration as to whether to grant further leave. Information and evidence may include for example up-to-date medical evidence or, where the barrier to removal is ECHR Article 8, information to establish whether there has been any change in family circumstances such as the end of a partner relationship or children who are no longer dependent on their parent or parents).

If an application for further leave is received, and further restricted leave is to be granted, the decision maker must review the conditions attached to the leave, including any evidence of compliance or non-compliance, and consider whether they remain appropriate.

Where the circumstances have changed to the extent that the person's removal would not breach the ECHR, further leave must be refused and the case progressed to removal.

Those who fall within scope of the restricted leave policy but were previously granted discretionary leave before the restricted leave policy was introduced on 2 September 2011 should remain on that existing leave until it falls for renewal. When the application for further leave is received, if removal is not possible, the case must be considered in line with this policy and granted restricted leave with appropriate conditions.

The decision letter and notices accompanying the decision must clearly explain the reason for imposing new conditions including why it is in the public interest to grant a period of restricted leave taking account of the risk the person presents and their compliance with conditions or requirements during previous periods of limited leave or unlawful stay.

Policy of exclusion of those granted restricted leave from qualifying for settlement(ILR):

Home Office policy is that it is only in exceptional circumstances that an individual granted restricted leave will be granted ILR. Where a decision has been taken to grant ILR on the basis of exceptional circumstances, which is likely to be *rare,* this would be granted outside of the Rules.

According to policy guidance, the policy rationale for excluding those granted restricted leave from qualifying for indefinite leave to remain (ILR) is as follows:

*Public interest:-*There is also considerable public interest in deterring others who have behaved in ways described in Article 1F or Article 33(2) of the Refugee Convention, or paragraph 339D of the Immigration Rules from coming to the UK by leading them to understand that they are not welcome here, that if they do come here, they will be a priority for deportation or removal,

that if there is a human rights barrier they will only be given short periods of leave with conditions until their removal can be enforced, and that they are very unlikely to qualify for settlement.

Public protection :- It is legitimate to impose conditions designed to ensure that the Home Office is able to monitor where a person lives and works and/or prevent access to positions of influence or trust where a person has behaved in ways described in Article 1F or Article 33(2) of the Refugee Convention, or paragraph 339D of the Immigration Rules but it is not possible to attach conditions to ILR.

Upholding the rule of law internationally:- Granting limited leave only in order to comply with human rights law until deportation or removal can be enforced supports the principle that those who have committed actions described in Article 1F or Article 33(2) of the Refugee Convention cannot establish a new life in the UK and supports the UK's broader international obligations. It reinforces the Government message that its intention is to remove the person from the UK as soon as is possible.

Applications for settlement(ILR):

An application for ILR will only be considered if it has been submitted on the correct form and the prescribed fee has been paid.

Indefinite leave to remain under the Immigration Rules

An application made under any part of the Immigration Rules by a person who falls within the restricted leave policy must be refused with reference to the general grounds for refusal in part 9 of the Immigration Rules. An application made under the Immigration Rules which has its own suitability requirements (for example, Appendix FM or Appendix AF) should be refused with reference to those requirements.

However, it remains open to the Secretary of State to grant ILR outside of the Rules on a discretionary basis.

Indefinite leave to remain outside the Immigration Rules:

There is no limit on how many times a person can be granted restricted leave, as long as they continue to fall within the scope of the policy, because it is granted at the Home Secretary's discretion outside the Immigration Rules. This is the case even where it is not known when, or even if, a human rights barrier to deportation or removal will be resolved. In almost every case, it will not be known when or if the person's deportation or removal will be possible in the future. Therefore, there is no period of time after which a person subject to restricted leave will automatically or generally qualify for ILR. All ILR applications must be considered on a case-by-case basis.

In accordance with MS, R (on the application of) v SSHD (excluded persons: Restrictive Leave policy) (IJR) [2015] UKUT 539 (IAC) (22 September 2015), consideration must be given to 'whether or not the point has been reached where the only reasonable course is to grant ILR'.

Where the original human rights barrier to deportation or removal has been resolved, and there is no new human rights barrier, the government's policy is that it will not be appropriate

to grant ILR, as the case should be prioritised for enforcement action. This is the case even if the person has been in the UK for a very long time.

If there remains a human rights barrier to deportation or removal, then whatever the basis of the application, consideration must be given to whether there are any public interest reasons why the person should also not be granted ILR outside the rules. Where a person falls within this policy because of behaviour described in Article 1F or Article 33(2) of the Refugee Convention or paragraph 339D of the Immigration Rules (whether or not the person has made a protection claim), there will almost always be public interest reasons not to grant ILR. This is because the government's view is that such persons are not welcome in the UK, even if the adverse behaviour was committed a long time ago and the person has not committed any crimes in the UK. In most cases, a decision to grant ILR would undermine the intention of the restricted leave policy.

Where a person applies for ILR outside the Immigration Rules, consideration must be given to all relevant factors, including all representations that have been submitted, to determine whether the application should be granted or refused. *It will only be in exceptional circumstances that those within scope of the restricted leave policy will ever be able to qualify for indefinite leave to remain outside the rules, and such exceptional circumstances are likely to be rare*.

If ILR is to be refused but the person continues to fall within the scope of this policy, then the person must be granted restricted leave within the terms of the policy. If ILR is to be refused and there is no longer an ECHR barrier to removal, then the case must be prioritised for deportation or removal.

Indefinite leave to remain under the discretionary leave policy:

Those subject to the restricted leave policy might apply for ILR on the basis of having completed a particular continuous period of discretionary leave.

The policy for granting ILR on this basis is set out in the discretionary leave guidance. There are transitional arrangements which apply to those who were initially granted discretionary leave before 9 July 2012 and who do not fall within the restricted leave policy. The current policy applies to those initially granted discretionary leave on or after 9 July 2012, and currently, a person will normally become eligible to apply for ILR after completing a continuous period of 120 months (10 years) discretionary leave.

As those within scope of the restricted leave policy no longer qualify for discretionary leave, accordingly they will not normally qualify for ILR on the basis of having completed any particular continuous period of discretionary leave.

CHANGES TO THE SURINDER SINGH ROUTE: FAMILY MEMBERS OF BRITISH CITZENS

On 25 November 2016, the Home Office published new EEA Guidance, *Free movement rights: family members of British citizens Version 1.0, 25 November 2016.*

The guidance sets out how to consider an application for a residence card made by a family member of a British citizen in line with the Immigration (European Economic Area) Regulations 2006 (as amended by the Immigration (European Economic Area) Regulations 2016).

The relevant provisions:

The conditions are set out in regulation 9 of the Immigration (EEA) Regulations 2006 ('the 2006 regulations'), as amended by the Immigration (EEA) Regulations 2016. The conditions reflect the European Court of Justice (ECJ) judgments in the cases of:

- Surinder Singh (C370/90)
- Eind (C-291/05)
- O and B (C-456/12)
- S and G (C-457/12)

The applicant must be a direct family member of the British citizen, not an extended family member. If the conditions are met, a direct family member of a British citizen will be treated as if they are the family member of an EEA national under the 2006 regulations (as amended).

Decision makers must issue a residence card to the direct family member of a British citizen if:

- the British citizen exercised free movement rights as a worker, self-employed person, self-sufficient person or student in an EEA host country immediately before returning to the UK, or had acquired the right of permanent residence in the EEA host country, and
- the British citizen would satisfy the conditions for being a qualified person if they were an EEA national, and
- the family member and British citizen resided together in the other EEA member State and that residence was genuine, and
- the purpose of the residence in the EEA host country was not as a means to circumvent any UK immigration law applying to non-EEA nationals (e.g. the Immigration Rules)

Transitional arrangements:

All decisions made on or after 25 November 2016 must be made in line with the new guidance. This is so even where:

- a family permit was issued before 25 November 2016
- the residence card application was made before 25 November 2016

Requesting additional information:

Where an application has been submitted without an application form, or on a version of the application form which provides insufficient evidence to enable the decision maker to consider:

- whether the residence in the other EEA host country was genuine, or
- whether the purpose of that residence was as a means to circumvent any UK immigration law applying to non-EEA nationals (e.g. the Immigration Rules)

The decision maker should write to the applicant for the additional evidence before deciding the application, unless they are able to decide the application without the additional evidence. In general, applicants should be given ten working days to submit the requested additional evidence. The deadline can be extended if the applicant provides a good reason why more time is needed. This will normally be where the requested evidence cannot be provided within ten working days for reasons that are beyond the applicant's control.

If the time limit to submit the requested evidence passes without response from the applicant, a decision should be taken on the evidence that is available, including any information already recorded on Home Office files or systems. The decision maker may draw any factual inferences about a person's entitlement to a right to reside if, without good reason, a person fails to provide the additional information requested.

Where the applicant has applied using an application form which does request the information listed above, the decision maker should make a decision based on the information provided without writing out for additional information.

Evidence of identity:

The application must include evidence of identity and nationality for both the applicant and the British citizen sponsor. This should be in the form of valid passports.

If there is not sufficient evidence of identity or nationality, the application must be refused.

Whether the British citizen is a qualified person:

In order to be able to sponsor a family member's right to reside in the UK, the British citizen must be able to satisfy the conditions for being a qualified person. The application must include evidence that the British citizen is able to satisfy these conditions.

Evidence of relationship:

The applicant must provide evidence of their relationship as a direct family member of the British citizen sponsor as follows, for:

- a spouse – a marriage certificate
- a civil partner – civil partnership certificate
- a direct descendant (child, step-child or adopted child) – documents which name the British citizen sponsor or their spouse as the parent, for example a full birth certificate, or a legal adoption document

- a relative in the ascending line must produce documents to show the full ascending line, for example:
  -a father or mother must produce their child's birth certificate naming them as the parent
  -a grandfather or grandmother must produce their child's birth certificate naming them as the parent, and their grandchild's birth certificate, which names their parent

Applicants claiming to be extended family members (for example, durable partners or dependent relatives) of British citizens do not have a right of residence under the 2006 regulations (as amended). If the applicant is an extended family member, the application must be refused.

The British citizen's exercise of free movement rights in the EEA host country:

The application must include evidence that the British citizen was a qualified person in the EEA host country.

The applicant must provide proof that the British citizen:

- lived and exercised free movement rights as a worker, self-employed person, self-sufficient person or student ('a qualified person') in the EEA host country immediately before returning to the UK, or
- acquired the right of permanent residence in the EEA host country following five years' residence as a qualified person before returning to the UK

Presenting a registration certificate issued by the EEA host country would not, without further evidence, be sufficient to demonstrate that the British citizen was a qualified person there. The decision maker must consider whether the evidence provided shows that the British citizen exercised free movement rights as a:

- worker – e.g. employment contract, wage slips, letter from employer
- self-employed person – e.g. contracts, invoices, or audited accounts with bank statements, and paying tax and other deductible contributions
- self-sufficient person – e.g. bank statements
- student – e.g. letter from the school, college or university
  -plus proof they held comprehensive sickness insurance for themselves and any family members if they were a self-sufficient person or student

For these purposes, the British citizen will not have been a qualified person in the EEA host country if they were a jobseeker.

If it is claimed in the application that the British citizen had acquired the right of permanent residence, in the EEA host country, the application must include evidence of this.

Presenting an Article 19 card (permanent residence card for family members who are not nationals of the EEA host country) would not usually, *without the underlying evidence* showing the residence and exercise of treaty rights covering the five year period, be sufficient to

demonstrate that the British citizen had acquired a right of permanent residence in the EEA host country.

Determining whether the residence in the EEA host county was genuine:

A family member only has the right to reside in the UK with a British citizen if their residence in the EEA host country was genuine. 'Genuine residence' for these purposes means residence which enabled the British citizen and their family member to create or strengthen family life in the EEA host country.

Factors relevant to whether residence in the EEA host country was genuine include:

- whether the centre of the British citizen's life transferred to the EEA host country
- the length of the applicant and British citizen's joint residence in the EEA host country
- the nature and quality of the applicant and British citizen's accommodation in the EEA host country, and whether it is or was the British citizen's principal residence
- the degree of the applicant and the British citizen's integration in the EEA host country

The decision maker must conduct a rounded assessment of all relevant information in order to decide whether the residence was genuine.

Centre of life:

Relevant factors to show the centre of the British citizen's life transferred to the EEA host country include, but are not limited to, the:

- period of residence in the EEA host country as a qualified person
- location of the British citizen's principal residence
- degree of integration of the British citizen in the EEA host country

Length of joint residence:

The applicant must provide proof that they resided with the British citizen in the EEA host country while the British citizen was a qualified person. This might include a mortgage or tenancy agreement in both their names, or correspondence from official or otherwise credible sources, such as payslips or household bills, or bank statements addressed to each of them at the same address.

Generally, the longer the period of joint residence while the British citizen was a qualified person, the more likely it is that the residence was genuine

Principal residence:

The principal residence is the place and country where the British citizen's life is primarily based.

The decision maker must consider the nature and quality of accommodation in the EEA host country and whether it was the British citizen's principal residence. A mortgaged home or long-term rented accommodation is more likely to indicate genuine residence than living at a hotel or a bed and breakfast, or short stays with friends.

Degree of integration:

When considering the degree of integration in the EEA host country, relevant questions to consider in respect of both the British citizen and the family member may include:

- if the family includes any children, were they born or did they live in the EEA host country and if so, did they attend school there and were they otherwise involved in the local community?
- are there any other family members resident in the EEA host country and were they working or studying there or otherwise involved in the local community?
- how did the family member spend their time in the EEA host country – is there evidence they worked, volunteered, studied or contributed to the community in any other ways?
- have they immersed themselves into the life and culture of the EEA host country, for example:
  -have they bought property there?
  -do they speak the language?
  -are they involved with the local community?
  -do they own a vehicle that is taxed and insured there?
  -have they registered with the local health service, a general practitioner (GP), a dentist etc?

The more of these factors present in a case, the more likely it is the British citizen's residence in the EEA host country was genuine.

Determining the purpose of the residence in the EEA host country:

The Home Office will consider whether the purpose of the residence in the EEA host country was to circumvent any UK immigration law applying to non-EEA nationals (e.g. the requirements in the UK's domestic Immigration Rules under which non-EEA family members can apply to reside in the UK with a British citizen or otherwise settled person).

Ordinarily, non-EEA family members who wish to reside in the UK with British citizen sponsors must meet the requirements of the Immigration Rules. If the motivation behind the joint residence in the EEA host country was for the purpose of bringing the family member to the UK under EU law instead of those rules, the applicant will not be eligible to enjoy a right to reside in the UK as the family member of a British citizen under the 2006 regulations (as amended) and the residence card application will be refused.

Consideration of the 'purpose' test should include, but may not be limited to:

- the family member's immigration history – including previous applications for leave to enter or remain in the UK and whether they previously resided lawfully in the UK with the British citizen
- if the family has never made such an application, the reason the family member did not to apply to join the British citizen in the UK before the British citizen moved to the EEA host country
- the timing and reason for the British citizen moving to the EEA host country

- the timing and reason for the family member moving to the EEA host country
- the timing and reason for the family unit returning to the UK

None of these factors is determinative, and the decision maker must not refuse an application under the 'purpose' test solely on the basis that the family member has previously:

- made an application for leave to enter or remain in the UK
- been refused leave to enter or remain in the UK
- remained in the UK beyond the expiry of a period of leave to enter or remain, or
- been removed or deported from the UK

Burden and standard of proof:
If deciding whether additional information is needed, the burden of proof is on the decision maker to show there is reasonable doubt that the applicant has a right to reside under the 2006 regulations (as amended). If they have reasonable doubt, then the burden of proof is on the applicant to show that the conditions are met.

If deciding whether to issue or to refuse to issue a residence card, the burden of proof is on the decision maker to show to the civil law standard (the balance of probabilities) that the applicant does not have a right to reside under the 2006 regulations (as amended).

Credibility interviews:
Credibility interviews should be considered only if:

- any additional information required cannot be obtained by writing to the applicant, or
- having received the applicant's response to a written request for additional information, the decision maker still does not have enough information to decide the application.

Decision on the application:
If the conditions are met to the civil law standard (the balance of probabilities), then the applicant has a right to reside under the 2006 regulations (as amended) and the decision make must issue a residence card.

If the conditions are not met to the civil law standard (the balance of probabilities), then the applicant does not have a right to reside under the 2006 regulations and the decision must be to refuse to issue a residence card on the basis that they are not the family member of a qualified person.

Right of appeal:

The applicant can appeal against a decision to refuse to issue a residence card if the conditions of regulation 26 are met.

Where there is a right of appeal, it is not suspensive of removal(Ahmed, R (on the application of) v SSHD (EEA / s.10 appeal rights: effect (IJR) [2015] UKUT 436 (IAC) (24 July 2015).

The applicant will be liable to removal under section 10 of the Immigration and Asylum Act 1999, on the basis that they require leave to enter or remain in the UK but do not have it.

If and when removal is enforced, the applicant will be subject to a bar on entering the UK under the Immigration Rules for ten years.

CONCLUSION

There are even further immigration changes expected in 2017 and in particular with the coming into force fully in February 2017 of the 2016 EEA Regulations, both immigration practitioners and lay applicants are expected to be fairly au fait with the changes so as to be able to prepare applications with a fair chance of success.