

DECISIONS WHICH FRUSTRATE THE INTENTIONS OF THE IMMIGRATION RULES

By David Jones

There is an increasing tendency by decision makers in entry clearance and leave to remain applications to place reliance on the general grounds for refusal. Minor offending, a history of overstaying combined with illegal working, minor omissions in application forms or in tax returns are just a few examples of acts triggering intervention under paragraph 320.

This course will:

- Review both the mandatory and discretionary aspects of the rules;
- Appraise the relevant guidance relating to the use of the same;
- Direct delegates to critical cases;
- Offer guidance on the preparation of applications and reviews where the mandatory grounds of refusal operate;
- Describe the proper approach to paragraph 320 (11) so as to better enable the preparation of applications

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1. General grounds for refusal

1.1 Introduction

The Immigration Rules at Part 9 specify that an applicant *can*, or sometimes *must*, be refused leave if one of the general grounds for refusal applies. An application may meet all the category specific requirements of the rules, but still fall to be refused under the General Grounds.

As some categories of the Rules have been reworked in recent years, it is necessary to identify to which of them the General Grounds still apply. This is not always easy. Generally, they do not apply to applications made under Appendices AF, FM and V which have their own 'suitability' criteria, subject to some exceptions laid out in rule A320. Some points to note on their application:

- None of the General Grounds in Part 9 apply to applications made Appendix V (for visitors). However, the 'Suitability' criteria in Appendix V (for visitors) are almost identical to the General grounds. They have been reworded, helpfully, so may shed some light on the meaning of the equivalent General ground.
- Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to family applications made under Appendix FM (see paragraph A320). The 'Suitability' criteria in Appendix FM are similar to the General Grounds, but with important differences. Importantly, an applicant under Appendix FM will not be subject to the mandatory re-entry ban provided for in paragraph 320(7B) for those with a poor immigration history, but...
- Also importantly, paragraph 320(11) *does* apply to family applications made under Appendix FM, and is often the basis upon which entry clearance applications, particularly those made under the partner category, are refused, where the applicant has what is considered by the HO to be a very poor immigration history (see below under *Refusal of entry clearance or leave to enter*).
- Paragraphs 321, 321A, concerning the cancellation of visas on arrival in the UK, and paragraph 323, on curtailment, apply to applications made under Appendix FM
- The General Grounds in Part 9 Part 9 do not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE(1)

In a category to which they do apply, the General Grounds of Refusal can be applied to any application, from entry clearance to settlement, and to existing leave which can be cancelled or curtailed. They are applied as follows;

Rule 320:	Refusal of entry clearance or leave to enter the United Kingdom
Rule 321:	Refusal of leave to enter in relation to a person in possession of an entry clearance
Rule 321A:	Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom
Rule 322:	Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave
Rule 323:	Grounds on which leave to enter or remain may be curtailed
Rule 323A:	Curtailment of leave in relation to a Tier 2 Migrant, a Tier 5 Migrant or a Tier 4 Migrant
Rule 323AA:	Prohibited changes to employment for Tier 2 Migrants and Tier 5 Migrants
Rule 323B:	Curtailment of leave in relation to a Tier 1 (Exceptional Talent) Migrant
Rule 323C:	Curtailment of leave in relation to a Tier 1 (Graduate Entrepreneur) Migrant

Rule 324: Crew members

1.2 Refusal of Entry Clearance and Leave to enter

The grounds in r320(1) to 320(7D) are mandatory (i.e., as per the heading to the relevant sub-rules, the application “is to be refused”) and they can be summarised thus:

- applications outside the Rules (320(1));
- subject to human rights and the Refugee Convention, and to exceptional cases an applicant convicted of a criminal offence of more than 12 months, the ban lasting for varying periods depending on the length of sentence (320(2));
- failure to satisfactorily establish identity via a valid national passport or other document (320(3));
- failure to establish admissibility to a destination within the common travel area for which they are travelling through the UK (320(4));
- lack of a visa for a visa national (320(5));
- personal direction of the Secretary of State on conducive to the public good grounds (320(6));
- medical reasons making admission undesirable (subject to strong compassionate reasons) (320(7));
- making false representations or failing to disclose information or facts in the instant application or regarding supporting documents (320(7A));
- overstaying, breaching conditions of leave, being an illegal entrant, or using deception in a past application (320(7B)); unless
 - overstaying was for less than 90 days followed by voluntary departure at the migrant’s own expense
 - deception took place more than 10 years ago
 - (in a non-deception case) there was a voluntary departure more than 2 years ago
 - made a voluntary departure at public expense, directly or indirectly, more than two years ago, within six months of receiving notice of a refusal decision or of exhausting appeal rights
 - made a voluntary departure at public expense, directly or indirectly, more than five years ago (i.e. by implication, more than six months after notice of refusal or exhausting appeal rights)
 - removal or deportation more than 10 years ago
 - leaving or being removed as a condition of a caution (given under s22 of the Criminal Justice Act 2003) more than 5 years ago
- failing to comply with a request by an ECO to attend for interview (320(7D)).

1.3 Refusal of leave to remain (rule 322)

Where it is for a purpose not covered by the Immigration Rules (322(1)), or where false representations or false documents have been submitted under rules that reflect the conditions of 320(2), (7A) and (7B) (322(1A-1C)), and should *normally* be refused on the grounds of:

- false representations made in respect of an earlier grant of leave (322(2));
- failure to comply with any conditions attached to a stay (322(3));
- failure to maintain and accommodate without recourse to public funds (322(4));
- undesirability on the grounds of a person’s character, conduct or for national security reasons, including offending causing serious harm, or persistent offending by a person who shows a particular disregard for the law (322(5-5A));
- refusal by a sponsor to give an undertaking (322(6));

- failure to honour a declaration or undertaking as to the intended duration and/or purpose of stay (322(7));
- non-returnability abroad (322(8));
- failure to produce documents, and failure to attend an interview (322(9)-(10));
- failure of a child to have written consent from a parent where required (322(11));
- owing the NHS £500 (reduced from £1000 on 6 April 2016) or more (322(12));
- failing to pay litigation costs awarded to the Home Office, where there has been a costs order made against the applicant in previous litigation with the Home Office (322(13)). This new ground was introduced from 6 April 2016.

1.4 Refusal of indefinite leave to enter or remain (rule 322(1C))

ILE/R will be refused to a person where;

- they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or
- they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence; or
- they have been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or
- they have, within the 24 months preceding the date of the application, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record.

Additionally, applications for limited leave to remain or ILR made from 24 November 2016 will be refused where the person has been excluded from Refugee status or HP under Articles 1F and 33(2) of the RC51 (and r339D for HP), or has been sentenced to imprisonment for 12 months or more and would, if they had claimed asylum, be so excluded. They will not be able to apply for leave within the Rules, ever, but if their removal or deportation would breach their human rights, they can be granted 'restricted leave' outside the Rules. This will be granted for 6 months at a time, with the HO always looking to remove the person as soon as possible.



Top Tip

It will always be necessary to consider Part 9 (or the 'suitability' criteria, if applicable) when taking a client's instructions, if necessary by asking direct questions to your client in respect of criminal convictions (in the UK or abroad), their UK immigration history and money owed to the NHS.

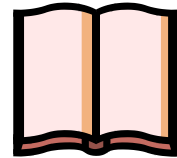
2. Mandatory or discretionary grounds

As has been alluded to the general grounds are divided into those that are mandatory, i.e. that must be applied by the decision maker, and those that are discretionary, where the decision maker can decide to apply them or not. Where there is discretion, the exercise of discretion should be considered in accordance with Home Office policy as outlined in their Operational Guidance.

As will be seen though there is even scope for the use of discretion in mandatory cases.

You can see from the wording of the section heading that contains the particular rule whether the application '*is to be refused*' on the basis of the general ground (i.e. a mandatory ground), or '*should normally be refused*' (a discretionary ground).

Where a general ground of refusal has been applied against a migrant, an adviser should consider whether there actually has been an exercise of discretion, or whether the ground may have been applied without consideration of the exercise of discretion. In the latter circumstance, the decision may be unlawful.



Example

Fatima wants to come to the UK as an Entrepreneur. Some years ago, she spent time in the UK as a student and had a baby here. The NHS hospital charged her £7000.00 for the cost of maternity services, but she left the UK without fully paying the debt. She came to an agreement with the NHS to pay off the debt at £100.00 per month and the debt is nearly cleared. She explains this in her covering letter when making her visa application. The ECO ignores her agreement with the NHS, and without giving any additional reasons refuses her application under rule 320(22). By failing to consider the agreement between Fatima and the NHS, the ECO has failed to exercise their discretion (i.e. has failed to consider all the relevant circumstances before deciding to refuse the application on a discretionary ground). Her remedy is an administrative review, followed by a judicial review if necessary: she can argue in these challenges that the ECO has applied the Rules incorrectly, and as an example of unlawful decision making.

2.1 Mandatory Grounds

2.1.1 Criminality, character and conduct

The mandatory entry ban at r320(2), for those sentenced to a period of imprisonment, was added in January 2013. Criminality had previously been only a discretionary ground of refusal.

2.1.2 Sentencing

Paragraph 320(2) of the Immigration Rules provides mandatory grounds for refusal for individuals who have been sentenced to a period of imprisonment. Accordingly, an application must be refused if:

the person seeking entry to the United Kingdom:

- (a) is currently the subject of a deportation order; or*
- (b) has been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or*
- (c) has been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or*
- (d) has been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.*

The rule does however acknowledge that decisions cannot be made in breach of the Conventions (i.e. the Refugee Convention and the European Convention of Human Rights) and that there may therefore be exceptions

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

The Home Office's guidance states this exception is likely to be rare, and most likely to apply in cases where a person was deported from the UK, but their deportation order was later revoked on the grounds that it violated the ECHR, the Refugee Convention or compassionate grounds. This does not mean that the person will be allowed to claim asylum or make an application for protection from outside the UK.

Similar provisions for applications under Appendix FM are found at paragraph S-E.C.1.4. For visitors, it is paragraph V 3.4 of Appendix V.

A person who has been sentenced to a period of imprisonment of at least four years is then permanently excluded from the UK unless there are exceptional circumstances.

Those who have been convicted to periods of imprisonment of less than four years will be banned from the UK for a period of 10 years (if sentenced to imprisonment for a period between 12 months and 4 years) or 5 years (for sentences of less than 12 months). The "ban" starts from the end of the sentence, where the sentence is the entire sentence imposed, rather than simply the time spent in prison.

However, this does not include:

- *suspended sentences (unless that sentence is subsequently 'activated'), or*
- *convictions which are subsequently quashed on appeal.*

If sentences are increased or reduced on appeal but the person remains convicted of the offence, the 'revised' sentence length will apply.

2.1.3 Criminality and Exceptions to mandatory bans

Applications for entry clearance might be granted despite prison sentences in certain limited circumstances. These exceptions do not appear in the rules themselves but instead are set out in a separate Home Office policy document: [General grounds for refusal: Section 1](#).

The Home Office defines the scope of the exception as follows:

This means a situation where refusal would be unjustifiably harsh. A person who is convicted of a criminal offence and sentenced to imprisonment, regardless of whether this is in the UK or elsewhere, must be aware it can affect their ability to gain entry to other countries. Therefore, it would take compelling factors to grant entry clearance or leave to enter when they would otherwise be refused.

The guidance goes on to state that a non-exhaustive list of circumstances which might be considered exceptional:

- *since conviction, the passage of time or the personal circumstances of the person have significantly changed such that maintaining a refusal would be so perverse as to undermine confidence in the immigration system*
- *there is reliable evidence to suggest the conviction was politically motivated*
- *the person concerned intends to make a significant investment in the UK – for example, buying or heavily investing in a major company, so by refusing entry it would not be in the national interest*

Rather controversially, the third exception essentially allows a wealthy convict to buy their way into the UK. The fact that the list is specifically stated to be non-exhaustive does mean there may be some scope to argue, for example, that an exception might potentially be made where the applicant has received a foreign prison sentence which would be considered harsh and excessive by UK standards.

However, the Home Office guidance makes it clear that only compelling circumstances will justify a grant despite the conviction, and that the starting point should always be a refusal.

2.1.4 Poor character, conduct or associations

There is also provision for the Secretary of State personally to order the exclusion of a person from the UK. Where this occurs, refusal is mandatory under paragraph 320(6). Previous examples of personal orders for exclusion from the UK include [Snoop Dogg](#), [Edward Snowden](#) and [Pamela Geller](#).

In 2005 the Government published a list of unacceptable behaviours that might lead to a person being added to this visa “black list”:

The list of unacceptable behaviours is indicative rather than exhaustive. It covers any non-UK national whether in the UK or abroad who uses any means or medium including:

- *Writing, producing or distributing material;*
- *Public speaking including preaching*
- *Running a website; or*
- *Using a position of responsibility such as teacher, community or youth leader*

To express views which:

- *Format, justify or glorify terrorist violence in furtherance of particular beliefs;*
- *Seek to provoke others to terrorist acts;*
- *Foment other serious criminal activity or seek to provoke others to serious criminal acts or*
- *Foster hatred which might lead to inter-community violence in the UK.*

The list was confirmed as current in a [Parliamentary written question](#) on 22 January 2015 and in a House of Commons Library research briefing on [‘Visa bans’: Powers to refuse or revoke immigration permission for reasons of character, conduct or associations](#).

[Guidance](#) to visa officials sets out the broad test to be applied:

A person does not need to have been convicted of a criminal offence for this provision to apply. To decide if a refusal under this category is appropriate you must consider if there is any reliable evidence to support a decision that the person’s behaviour calls into question their character, conduct and/or associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a person has entered into, attempted to enter, or facilitated, a sham marriage to evade immigration control.

2.2 Paragraph 320(7A) and Deception

Immigration Rule 320(7A) mandates automatic refusal of any entry clearance application where deception is used or there is material non-disclosure, whether knowingly or unknowingly. It operates as an absolute bar to the use of deception in an application for entry clearance. However, in [AA \(Nigeria\) and \[2010\] EWCA Civ 773 \(Thebo v Entry Clearance Officer Islamabad \[2013\] EWHC 146 \(Admin\)\)](#).

2.2.1 The need for dishonesty

The Court of Appeal held that false representations must be *deliberately false* rather than accidentally incorrect in order to engage these general grounds. In [Ozhogina and Tarasova \(deception within para 320\(7B\) - nannies\) Russia/Russian Federation \[2011\] UKUT 197 \(IAC\)](#), the Tribunal concluded that:

it is necessary to show that a false statement was deliberately made for the purpose of securing an advantage in immigration terms

Rule 320(7A) operates in respect of the current application, but a migrant who has used deception in an application for entry clearance is likely to face a 10 year re-entry ban under r320(7B).

For deception to be established it must be demonstrated by those raising the allegation that any representation made was dishonestly false (see: [AA\(Nigeria\) v Secretary of State for the Home Department \[2010\] EWCA Civ 773](#) and [R\(Thebo\) v Entry Clearance Officer Islamabad \[2013\] EWHC 146 \(Admin\)](#)).

Accordingly, where an innocent explanation is afforded for the a material non-disclosure, as it is here, that element of dishonesty cannot be made out unless a decision maker can repudiate the explanation furnished is neither plausible or reliable.

In which regard it is material to recall that the evidential and legal burden is on the decision maker in this context.

2.2.2 Assessing Deception

In *JC (Part 9 HC395, burden of proof)* [2007] UKAIT 27 Reported, Senior Immigration Judge Storey recorded the following detailed observations:

10. Sixth, in relation to all of the general grounds the burden of proof is on the decision-maker (entry clearance officer, immigration officer, Secretary of State) to establish the facts relied upon. Their common thread is that they depend for their validity on the decision-maker being able to establish a precedent fact. Unless it is not contested, the precedent fact needs to be established for the duty or power to be exercised. As can be seen from their early formulation as “general considerations” (see e.g. HC509, HC510), the general grounds, now found at part 9 of HC395, seek to cover circumstances where the Home Secretary considers that a person should not succeed under the Immigration Rules even though he meets the ordinary substantive requirements. They are general grounds for saying “no”. (That in respect of such grounds the decision-maker is put to proof may be thought salutary, since otherwise their operation could create an executive “override” capable of undermining the efficacy of the substantive rules.)

11. Another reason why the burden rests on the decision-maker is that each of these grounds alleges in one way or another a failing or a wrongdoing on the part of an applicant. As regards failings, they refer to an applicant’s failure to give information, furnish documents, give undertakings or consent or respond to a request to attend an interview (320(3), (5), (8), (8A), (10), (14), (16), (20), 321A(6), 322(9), 322(11), 322(10)), failure to show acceptable intentions (320(4), (9)), restricted returnability (320(13), 321(iii), 322(8)), failure to observe the time limits or conditions attached to any grant of leave to enter or remain (320(11), 322(3)), failure by a sponsor to give an undertaking to be responsible for maintenance and accommodation (322(16)), failure by the person concerned to honour any declaration or undertaking given as to intended duration and/or purpose of stay (322(7), (322(6)), refusal to undergo a medical examination (320(17), (321(iii))), undesirability of admission for medical reasons (321A(3)) and failure to maintain or accommodate himself and any dependants without recourse to public funds (322(4)).

...

2.2.3 The standard of proof

The Tribunal made it clear in *JC* that where deception and/or fraud are alleged the standard of proof will be “at the higher level of balance of probability”:

13. So far as the standard of proof is concerned, we consider that what the Immigration Appeal Tribunal said in *Olufosoye* [1992] Imm AR 141 still holds good: “insofar as the justification consists of deception or other criminal conduct the standard of proof will be at the higher end of the spectrum of balance of probability” (see also *R v IAT ex parte Nadeem Tahir* [1989] Imm AR 98 CA). This approach reflects that of the House of Lords in *R v Secretary of State for the Home Department ex p.Khawaja* [1984] AC 74 and is consistent with subsequent case law (see e.g. *Bishop* [2002] UKIAT 05532).

In R (AN & Anor) v Secretary of State for the Home Department [2005] EWCA Civ 1605 Richards LJ stated at [62]: “Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities”.

Further, whilst the standard of proof is fixed at that of a balance of probabilities, on authority satisfaction of that burden is flexible with the effect that the more serious the implications of a refusal the stronger must be the evidence advanced to substantiate the same. In *Shen (Paper appeals; proving dishonesty)* [2014] UKUT 236 (IAC) :the Upper Tribunal said this:

Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities [Lord Justice Richards in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, at 62].

2.2.4 The Burden Boomerang

Senior Immigration Judge Storey also recorded the stages where the burden of proof shifts from the Appellant to the Respondent and back to the Appellant:

14. Each of the general grounds has an exclusionary, rather than an inclusionary, intent. The applicant is not showing why he qualifies; rather the decision-maker is seeking to show why he is, or should normally be, disqualified.

15. However, once the decision-maker establishes the underlying facts, the burden shifts to the appellant. It shifts to the appellant even when the general ground concerned is discretionary, stating that refusal should normally be refused. That follows from the fact that the legislative structure of the Nationality, Immigration and Asylum Act 2002 requires the appellant to prove that the decision was not in accordance with the law (including the immigration rules) or that a discretion exercised in making a decision should have been exercised differently.

2.2.5 An illustration - The TOEIC Litigation

To better understand how the burden and standard of proof operates in deception cases it is instructive to consider in a little detail the progression of the TOIED litigation.

In *SM and Qadir v SSHD (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) the Upper Tribunal described the context to the ETS litigation thus:

2. The general background of this particular sphere of litigation was explained in R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) (IJR) [2015] UKUT 327 (IAC) at [1] in these terms:

“The litigation context in which this challenge unfolds is conveniently identified in an earlier decision of this Tribunal, R (Mahmood) v Secretary of State for the Home Department [2014] UKUT 439 (IAC), at [1]:

“This is another of the currently plentiful crop of soi-disant “ETS” judicial review cases. These have gained much currency during recent months, stimulated by action taken on behalf of the Secretary of State for the Home Department (“the Secretary of State”), the Respondent herein, in the wake of the BBC “Panorama” programme broadcast on 10 February 2014. “ETS” denotes Educational Testing Services, a global agency contracted to provide certain educational testing and assessment services to the Secretary of State. In order to secure leave to remain in the United Kingdom, by virtue of the relevant provisions of the Immigration Rules it was incumbent on the Applicant to provide evidence that he had obtained a specified type of English language qualification. The action taken on behalf of the Secretary of State, which the Applicant challenges by these proceedings, was based on an assessment that the English language certificate on which he relied had been procured by deception.”

“The decision in Mahmood was promulgated in September 2014. At the outset, it is convenient to be aware that the vocabulary in this sphere includes in particular the following:-

“TOEIC”: this denotes “Test of English for International Communication”.

“ETS”: this denotes the entity Educational Testing Service Limited, one of the Home Office suppliers of “secure English language testing”.

3. The “broader landscape” was outlined, at [45], as follows:

“Some of the decisions in the broad ETS/TOEIC category have generated a right of appeal to the First-tier Tribunal (“FtT”), in country. This has occurred typically in cases where the student concerned has been challenged at port upon returning to the United Kingdom from, for example, a visit to the country of origin, followed by an in-country appealable decision of the Secretary of State. Others have generated a right of appeal exercisable only out of country (as in the present case). Other cases, believed to be the majority, have generated judicial review challenges, as in Mahmood and the present case. Thus there is a slowly expanding body of case law in this sphere. In all of these cases, the Secretary of State has relied on evidence of a generic kind. This consists of the witness statements of Rebecca Collings and Peter Millington, both dated 23 June 2014. The statements of these two witnesses have neither evolved nor altered since then. In some cases, as in the present one, these statements are supplemented by a further witness statement of another Home Office official.”

The “evolving landscape”, noted in [47], has continued to develop.

...

6. The present appeals are the first of several heralding a new phase in Upper Tribunal litigation in this field. They are said to raise fresh issues, not

previously the subject of judicial consideration or determination. In particular, litigants are now concentrating their attentions on (in summary) the strength and quality of the Secretary of State's evidence, the exacting burden of proving deception and the range of evidence which can be adduced by litigants in aid of their cause.

...

12. Mr Green, a Home Office employee, gave written evidence relating to the two spreadsheet computer printouts [derived from the "Look up Tool"] purporting to record the outcome of the ETS testing of the voice samples purporting to relate to the two Appellants. He did not have the expertise or qualifications to elaborate on these two brief documents. On the face of the documents ETS devised a dichotomy of "invalid" and "questionable" TOEIC test results. The Home Office, in turn, has developed a system whereby upon receipt of the ETS testing analysis outcomes these are matched to the person who has the name, date of birth and nationality of the certificate holder. This is known as the "Lookup Tool". Mr Green added that some 200,000 student visas are issued in the United Kingdom annually. There are 1,700 Government approved colleges, of which 1,300 have the kitemark of "highly trusted". ETS is one of the largest English testing organisations in the world, assessing some 50 million tests per annum. Pursuant to the mechanisms noted above, the Home Office has made decisions that TOEIC certificates were procured by fraud in some 33,000 cases.

13. The evidence adduced on behalf of the Secretary of State was completed by the witness statements and oral testimony of Rebecca Collings and Peter Millington. As all who have any familiarity with this sphere of litigation know, the evidence of these two witnesses, in purely documentary form, has been adduced on behalf of the Secretary of State in a substantial number of "ETS/TOEIC" cases (possibly all), both statutory appeals (mainly) and judicial review challenges (see Gazi). One of the landmark features of the hearing of these appeals was that this was the first occasion upon which these two witnesses have given viva voce evidence. They had not previously been cross examined or judicially questioned on the contents of their witness statements in any other case. Their two witness statements have become known as the Secretary of State's "generic evidence", rolled out in every case belonging to this cohort.

The proper approach to the assessment of deception in cases such as the instant was detailed in *SM and Qadir* where the Upper Tribunal endorsed the position outlined in *Muhandiramge* (section S- LTR.1.7) [2015] UKUT 00675 (IAC) citing with approval the following extract at paragraph 57:

10. One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 00236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:

- (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for

- example, by producing the completed application which is prima facie deceitful in some material fashion.
- (b) The spotlight thereby switches to the applicant. If he discharges the burden – again, an evidential one – of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
 - (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.

A veritable burden of proof boomerang!

The Tribunal in *SM and Qadir* proceeded to emphasise that there was only one standard of proof when assessing deception cases, that of the balance of probabilities, but noted that that standard was flexible in its application such that strength and quality of the evidence required to make out an allegation will be more substantial where the allegation is more serious:

58. *It is well established that proof of dishonesty on the part of the immigrant concerned is required in order to establish either “false representations” or “false documents” under paragraph 321A of the Rules: see AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, at [44] and [51] especially. Following the consumption of large quantities of judicial ink, the legal rule which has emerged with unmistakable clarity is that in civil proceedings there is but one standard of proof, namely proof on the balance of probabilities. One of the clearest expositions of this rule is found in the judgment of Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, at [62]:*

“Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”

In short, as emphasised by Lord Carswell in Re D [2008] UKHL 33, at [28], the fundamental judicial task is to decide whether, having regard to the context, the evidence adduced is of sufficient cogency to warrant the conclusion that the burden of proof has been discharged to the civil standard.

Key finding - A fact sensitive review

Ultimately the Tribunal identified in *SM and Qadir* that resolution of appeals of the instant sort would be entirely fact sensitive, obliging the balancing of a range of competing considerations:

102. *We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties.*

That position was echoed in the statement of Beatson LJ in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615, at [23] in which he stated:

I do not address the question of what evidence will be sufficient to enable a Tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter.

The Disposal

SM and Qadir at 10 & 13]. That evidence it was held marginally surmounted the evidential burden of establishing deception:

68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation (underlining added).

The Tribunal in *SM and Qadir* proceeded then to assess the legal burden doing so by reference to a variety of parameters the particulars of which served to re-emphasise the case sensitive nature of the review required to be performed: the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated [69].

Materially the expert evidence before the Tribunal in *MA* re-confirmed that which could already appear or could be inferred from aspects of the Respondent's generic evidence which was available in the instant case, namely that there were profound deficiencies in the data retention systems utilized by ETS generally:

Peter Millington in his statement observing:

19. In practice this means that after a test is administered in the UK, a test taker's spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre ... ETS has advised that file manipulation, corruption or misapplication has not been an issue once the files are received in the USA (underlining added).

That evidence notably nowhere contended that there could not have been file manipulation, corruption or misapplication of data in the UK prior to transmission to the US.

MA said:

(15) *The experts, jointly, have highlighted the following matters in particular:*
(xi) The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff. Further, the ETS security precautions

concentration on the elicited conduct of candidates and not test centre employees.

...

(xiv) A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates. As a result, the experts say "We do not know the processes by which the candidate's name is linked to each test".

...

(xxii) The "naming conventions" for the digital files of the voice recordings produced do not provide an explicit link between the candidate and the recording: rather, there is only reference to the particular test being taken.

(xxiii) Next, it is observed "The experts have examined the supplied audio files and find that there is no embedded metadata which might assist their enquiries. Time and date stamps appear to be of the most recent copying of the file and not of the point of origination".

...

(17) Mr Stanbury, in his evidence, highlighted the following matters in particular:

...

(d) There is no evidence of any audit logs. An "audit log" is a computerised record which would demonstrate the chain of storage, handling, processing and transmission of the data generated by the speaking and writing tests (our formulation).

(e) Metadata, if they existed, would be located inside the voice recording files: there are none. As a result, these files do not contain particulars of the time, date and location of the recordings therein stored.

(18) Professor Sommer further testified that the evidence fails to disclose whether the important act of uploading the files generated by the speaking and writing tests occurred automatically or involved some human intervention. He agreed that if human intervention was part of this process, this would have created an opportunity for manipulation of the files, particularly if there was a time lag. The latter could occur through, for example, a loss of internet connectivity, whether false or genuine.

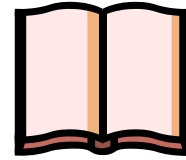
In MA, given what the Tribunal found as to the deficiencies in the case specific evidence, it was concluded that the expert testimony as to apparent deficiencies in ETS's data retention systems could not be regarded as decisive of the appeal.

(47) We must also balance the expert evidence, summarised in [11] – [18] above. This evidence highlights that there are enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS. While we bear this evidence in mind, ultimately it was largely remote from the centre of the Appellant's case.

2.3 Non-disclosure and allegations of deception

2.3.1 Errors on application forms

A common basis for refusal at present arises in the context of errors in the completion of application forms, either current applications or preceding ones:



Example 1

Jon is an entrepreneur from Bahrain with leave under Tier 1. On his application for extension of leave in 2013 he discloses income of £35,000 derived from the profits of his business. He declares only £20,000 of profit to HMRC, however. When Jon applies for settlement in 2017 the Home Office identify the discrepancy and allege deception when obtaining further leave, and it was further asserted that documents, such as invoices, produced in support of his application for further leave must have been forged so as to show an inflated income. They refuse ILR under the general grounds. Jon alleged, however, that it was an accountants error with regard to his HMRC return.

Example 2

Tamsin is a Venezuelan national. In 2014 she was refused leave to enter having arrived at Heathrow without a visa and wishing to enter for a visit. Visa restrictions had only recently been introduced for Venezuelan's and her travel agent had not advised her of the need to secure the same. Tamsin was held at the airport for 6 hours and then removed back to Venezuela. In October 2016 Tamzin sought a visit visa to enter and see family, She prepared the application herself. She did not complete the aspect of the form requiring disclosure of previous removals from the UK, honestly apprehending that she had not been removed before, merely denied entry. She was refused on the grounds of non-disclosure.

Discussion Point

It is instructive to consider what further instructions and evidence would you seek, and what argument you might put in order to meet the allegations made.

You will certainly need details evidence from the applicant as to their reasons for the non-disclosure in order to try to demonstrate an innocent explanation and so no dishonest intent.

Where there is an allegation made that a document is false backed by an enquiry of the issuing institution, it is very difficult to rebut that allegation without making one's own enquiries of the institution.

This should be done independently of the migrant client, whose credibility is in dispute: if they produce a further document themselves then a decision maker can simply say "But you have already produced a document which the issuing institution says is forged". Further enquiries should go via the legal representative to the companies or institutions concerned. Then it will not be open to the Respondent to discount the enquiries only because they are produced by the very person whose honesty is disputed.

2.3.2 Failure to disclose convictions

Detailed consideration of the issues arising in respect of such non-disclosure was undertaken by the Tribunal in *Shen* in the context of a non-disclosure of a conviction, another common basis for refusal under the general grounds.

In *Shen* the applicant had a driving conviction but had ticked the “no” box to the question about previous convictions which is standard on all immigration application forms attracting a mandatory refusal to an application.

She contended, however, that she did not realise she had been convicted because she had not received any further communication from the police about her case. The first instance judge found that the Secretary of State for the Home Department discharged the burden of proving dishonesty, the finding which was then overturned at the Upper Tribunal:

25. On analysis we believe that the way in which the burden of proof operates is as follows. We accept that if an application form is false in a material way, that this may be relied upon as some prima facie evidence which assists in establishing dishonesty. The inference of deliberate deception can be strengthened by reference to other facts, for example if the conviction is shortly prior in time to the completion of the application form this will furnish circumstantial supporting evidence that the conviction must have been high in the applicant’s mind and any explanation based upon oversight would carry little weight. However, this is not dispositive of dishonesty and it is open to an Appellant to proffer an innocent explanation. If an innocent explanation is advanced (by which we mean one that meets a basic, minimum level of plausibility) then the burden switches back to the SSHD to answer that evidence. At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions: eg JC (Part 9 HC395 – burden of proof) China [2007] UKAIT 00027 para 10; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919 para 25; Mumu (paragraph 320; Article 8; scope) [2012] UKUT 143 (IAC)

26. Where the appellant’s evidence is not met, a Tribunal should be slow indeed to find dishonesty, particularly without hearing evidence and submissions on the point from the Appellant and/or the SSHD. It must be recorded that a finding of dishonesty can have catastrophic consequences for the applicant in social and economic terms. It is not to be found lightly.



Top Tips

NON-DISCLOSURE OF CONVICTIONS

One of the more commonly encountered general refusal reason scenario is where a criminal conviction has not been disclosed. Do bear in mind that in these cases there can be a double reason to refuse:

- ***the fact of the conviction***

- *dishonesty in withholding the fact of the conviction, which is itself a false representation*

Application forms make it very clear indeed that any relevant convictions should be disclosed. Nevertheless, as we have seen above, a credible innocent mistake may be forgiven, as it will not exhibit the relevant dishonesty required by the case law. It will be readily appreciated that the more sophisticated the migrant and their application, and the more glaring the omitted criminality, the more difficult it will be to maintain a case of innocent error: it is important to critically interrogate the instructions you are given regarding the surrounding circumstances and the state of mind of the applicant to ensure that the case is put in the best light.

2.4 The duty to investigate where deception is alleged

The TOEIC litigation illustrates the fact sensitive nature of the review, and emphasises the burden borne by the decision maker to substantiate their allegations with clear and persuasive evidence.

Authority also makes plain that the interests of fairness also oblige the decision makers, including the Tribunal itself, afford applicants a proper opportunity to rebut adverse allegations by providing an opportunity to comment on the adverse assertions made.

In *Shen (Paper appeals; proving dishonesty)* [\[2014\] UKUT 236 \(IAC\)](#), the Upper Tribunal found that if the first instance judge was concerned about dishonesty further comments by the Home Office or further evidence from the appellant should have been requested to provide :

27. In our view if the Judge entertained doubts as to the Appellant's story, he should have sought to investigate further. He could have exercised the powers that he has pursuant to rules 45 and/or 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 to require, for example, the Appellant to adduce supporting documentary evidence, or the SSHD to comment upon the Appellant's evidence and adduce such evidence as the SSHD considered appropriate to refute the Appellant's evidence. In extremis the Judge could remit the matter for oral hearing. A further alternative would have been for the Judge to have allowed the appeal but to have remitted the matter to the SSHD to be re-taken, this time with a proper focus upon the evidence, with the Appellant's explanations and evidence now clearly upon the table, and having regard to the dishonesty test.

28. With respect to the Judge we believe that dismissing the appeal was not the proper way to resolve any doubts outstanding in his mind in a case of dishonesty.

2.5 The interests of fairness

Further, the general position in the common law as to fairness is that its requirements depend on the context. So whether or not that Guidance applies expressly to other immigration routes, there will be a requirement for fair procedures, see [Doody](#) [1993] UKHL 8:

3. *The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. ...*

5. *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*

As stated by Wyn Williams J in [New London College](#) [2011] EWHC 856 (Admin) §60:

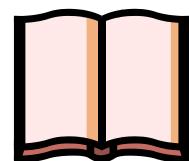
The content of the duty to act fairly in any given case must be judged against the Doody principles; policy or guidance published by UKBA cannot by itself resolve what constitutes the duty, one way or the other.

So the processes laid out in the Rules and Guidance may just be the starting point of the requirements of fairness, not the whole picture.

However there are limitations on fairness.

- Sales LJ stated in [EK \(Ivory Coast\)](#) [2015] EWCA Civ 1517 that given the numbers of applications under the Points Based System the Secretary of State is entitled to aim for certainty via a system enabling processing many applications in a fair and reasonably expeditious manner according to objective criteria. In [EK](#) it was held that the fact that the Secretary of State knew that the CAS letter on which an application for leave to remain was based had been withdrawn by the teaching institution did not require her to give the applicant notice of the problem and an opportunity to rectify the position. In short, there was a difference between the situation where the Home Office created a problem themselves, as against the scenario where they were merely made aware of some misfortune created by a third party.
- In [SH \(Pakistan\)](#) [2016] EWCA Civ 426 Elias LJ stated that the courts should always be alive to unfairness, whether or not created by the Home Office's own actions
- In [SI \(India\)](#) [2016] EWCA Civ 1255 Rafferty LJ stated that a refusal letter was so unclear as to fall below the minimum standard to be expected:

Decision letters should set out with clarity a) the facts determinative of the application, b) why the applicant's evidence has been rejected and c) the reasons for coming to the conclusion reached.



Examples

Dahe is refused an extension of leave as a Tier 4 student because his Sponsor has lost their licence, a development which comes to his attention only when his application is refused.

Dahe's situation is presently covered by the Home Office policy to give 60 days' leave where a person is innocent of any involvement in the reasons for the revocation or their Sponsor's licence. However, even if that policy did not exist, this would be a scenario where the principle in EK Ivory Coast would be in his favour.

James is refused an extension of leave as a Tier 2 migrant because his employer is not paying a salary sufficient to satisfy the Rules. His employer had unilaterally enforced a wage cut on him shortly after he arrived in the UK.

James is the victim of third party action rather than of conduct by the Home Office: applying the EK Ivory Coast principle, this is not unfairness of which the Home Office has to take account.

2.6 The exercise of discretion.

As has been seen in the context of criminal offences which mandate exclusion under paragraph 320(2) the SSHD and ECO's retain a discretion to grant leave outside the rules in certain circumstance.

Beyond that specific exception the UK Visas and Immigration Guidance, General grounds for refusal identify a more general discretion which may be exercised where there are "Exceptional, compelling circumstances?"

As with any application, an ECO needs to consider if there are any human rights grounds (in particular the right to family life under Article 8), or any exceptional, compelling circumstances which would justify the issue of an entry clearance. If there are exceptional, compelling circumstances the application must be referred to the referred cases Unit (RCU) for a decision to be made outside of the rules.

Where no such exceptional, compelling circumstances exist, the grounds set out in 320 (1) - (7) and S-EC.1.2. to 1.7. are mandatory grounds for refusal. The grounds set out in paragraphs 320 (8) - (20) and S-EC.2.2 to 2.5. are discretionary.

ECMs are required to review all refusals under 320 (7A), (7B) and (11) and to ensure that their ECM review is recorded on Proviso and on the documentation verification report (DVR) / documentation examination report (DER) (a copy of these documents can be downloaded under 'Related documents' on the right of this page).

Further, whilst the rules are framed so as to infer refusal and exclusion are mandatory where deception is identified they do not in fact operate so to do the Court of Appeal in *SA (Pakistan) v SSHD* [2009] EWCA Civ 1510 Sir David Keene for instance commenting in the course of a permission decision as follows:

6. I will deal with these arguments in respect of SA and PB before I turn to the rather different case of NB. It is right that this particular provision of the Immigration Rules is expressed in mandatory terms. So, of course, are many other parts of the Immigration Rules, such as those requiring a valid entry clearance if the person is to be allowed to enter under various provisions: see, for example, paragraph 245B.

7. Such provisions are not ultra vires the Home Secretary's power under section 3(2) of the 1971 Act because the rules are, as that subsection states,

statements of the rules as to the practice to be followed in administering the 1971 Act. The Secretary of State retains, as Mr Malik recognises, a discretion to grant leave to enter or leave to remain outside the rules. That is clear from two divisional court cases, R v SSHD ex parte Rajinder Kaur & Ors [1987] Imm AR 278 and R v SSHD ex parte Ounejma [1989] Imm AR 75, both of which dealt with the provision requiring refusal of leave to enter if there was no entry clearance. In the former Glidewell LJ and Schiemann J, as he then was, held that such a mandatory rule was intra vires, the Secretary of State retaining a discretion. The same approach was adopted in the latter case. I can see no prospect of persuading the Court of Appeal that paragraph 322(1A) is ultra vires. Of course there is some force in what Mr Malik says about the approach which one should adopt towards the interpretation of the Immigration Rules. They are to be interpreted sensibly and not as strictly as one would when construing a statute. See for example R v IAT ex parte Alexander [1982] 1 WLR 1076 at 1080.

As to the circumstances in which that discretion may fall to be exercised it is material to consider the Home Offices prevailing guidance on the use of the General grounds for refusal [paragraphs 320-322 of the Rules] (Section 1 – version 26.0 Published for Home Office staff on 19 April 2016). Those rules mirror Section 3 of Appendix V and so the said instructions are relevant to the interpretation and application of the same.

3. Discretionary Grounds for Refusal

3.1 Discretionary refusal reasons in relation to entry and entry clearance

The discretionary refusal reasons (i.e. where the heading within r320 states “should normally be refused”) can be summarised thus:

- failing to provide information on arrival relevant to the grant of leave to enter (320(8));
- outside the United Kingdom, failure to supply information, documents or copy documents, or a medical report (320(8A));
- failing, where claiming to hold indefinite leave, that they truly held such leave, have not been away for more than two years, and received no help from public funds when last leaving the country (320(9));
- producing a passport or travel document from somewhere which is not recognised by the UK as a state or government, or which does not comply with international passport standards (320(10));
- having “previously contrived in a significant way to frustrate the intentions of the Rules” by overstaying, breaching a condition of leave, being an illegal entrant, using deception in an immigration application or in obtaining a supporting document, successfully or not, where there are other aggravating circumstances (see further below) (320(11));
- failing to establish that they are admissible to their next proposed destination unless entering for settlement (320(13));
- refusal by a sponsor to provide an undertaking (320(14));
- failing, for a child not dependent on their parents’ own applications to show written consent to their travel from their parents or legal guardians (320(16));
- refusing to undergo a medical examination unless settled here (320(17));
- having been convicted, or having admitted, an offence for which a non-custodial sentence or other out of court disposal is recorded on their criminal record (320(18A));
- where their offending is thought to have caused serious harm or to evinced particular disregard for the law (320(18B));
- exclusion for reasons conducive to the public good due to conduct, character, associations, or other reasons (320(19));
- failing to comply with a requirement relating to the provision of physical data (320(20));
- failing to pay NHS charge(s) exceeding £500 (reduced from £1,000 from 6 April 2016) where a relevant NHS body has notified the Secretary of State of this in accordance with the relevant regulations (320(22));
- failing to pay litigation costs awarded to the Home Office, where there has been a costs order made against the applicant in previous litigation with the Home Office (320(22)). This new ground was introduced from 6 April 2016. HO guidance is in the Modernised Guidance, [Litigation Debt](#)

3.2 Paragraph 320(11)

The phrase, ‘previously contrived in a significant way to frustrate the intentions of the Rules’ (rule 320(11)), is given further definition in the Entry Clearance Guidance (at [RFL07](#)).

The guidance lists, in addition to the offences referred to in r320(11)(i)-(iv), the obtaining of services or support to which the person is not entitled, including non-exhaustively;

- obtaining asylum benefits

- state benefits
- housing and housing benefits
- tax credits
- employment
- goods or services
- NHS care using an assumed identity or multiple identities or to which not entitled.

As the obtaining of services is not referred to in 320(11), it cannot in itself be a ground for refusal, but will often also amount to a breach of conditions.

The breach of immigration laws must include 'aggravating features', which are listed non-exhaustively as the following:

- absconding;
- not complying with temporary admission / temporary reporting conditions / bail conditions;
- not complying with reporting restrictions;
- failing to comply with removal directions (RDs) after port refusal of leave to enter (RLE);
- failing to comply with RDs after illegal entry;
- previous working in breach on visitor conditions within short time of arrive in the UK (i.e. pre-meditated intention to work);
- previous recourse to NHS treatment when not entitled;
- previous receipt of benefits (income, housing, child, incapacity or otherwise) or NASS benefits when not entitled;
- using an assumed identity or multiple identities;
- previous use of a different identity or multiple identities for deceptive reasons;
- vexatious attempts to prevent removal from the UK, e.g. feigning illness;
- active attempt to frustrate arrest or detention by UK Border Agency or police;
- a sham marriage / marriage of convenience / polygamous marriage in the UK;
- harbouring an immigration offender;
- facilitation / people smuggling;
- escaping from UK Border Agency detention;
- switching of nationality;
- vexatious or frivolous applications;
- not complying with re-documentation process.

It may be arguable that this provision cannot be applied where both the immigration misdemeanour (e.g. overstaying) and the asserted aggravating feature are one and the same.

3.3 The use of 320(11) in family cases

It is a popular misconception that persons who seek re-entry to the UK on family grounds avoid the consequences of any earlier period of overstaying or irregularity in a period of previous leave by operation of paragraph 320(7C).

Whilst that is generally the case that exception does not operate if a decision maker is able to identify aggravating features by reference to paragraph 320(11).

ECO's now are frequently interviewing persons who have made a voluntary departure in order to enable re-admission as a partner or spouse, in order to ascertain whether there are instances of conduct which may enable reliance on 320(11).

It is imperative then, when advising clients to pursue the latter course that proper instructions are taken as to their past conduct, character and associations – including convictions, instances of illegal working, studying etc.

As to which it is material to note that Mr Justice Parker in *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC) directed that

[In] exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance.

The Tribunal in *PS* proceeded in particular to emphasise that when deciding an application an Entry Clearance officer should look favourably at the fact that an applicant decided to leave the UK and submit a new application to regularise their status, should acknowledge the effect of para 320(7C) in minimising the role of overstaying, and held too that family circumstances needed to taken into account when deciding of an application.

As to which it is important to scrutinise any applications refused in reliance upon this provision with a critical eye looking for evidence that the Appellant voluntarily departed, and cooperation with the enforcement process, *PS* noting that recognition of the fact of an applicant's full admission of his overstaying on his subsequent applications for entry clearance was an important mitigating factor.

As to which common casework errors by decision makers when invoking this rule include:

- No recognition that reliance on the provision was counter intuitive to effective maintenance of immigration control as specified in *PS* as it would discourage voluntary departure.
- No weighting of the family life considerations operative consequent to the flawed assumption that the Appellant's relationship was not genuine.
- No recognition of the inapplicability of 320(7B) by operation 320(7C).
- No consideration of the significance of the passage of time since the perpetration of the acts deemed to be aggravating. In which regard it is relevant to note that the passing of some 12 months is recognised elsewhere in the general grounds of refusal, in respect of conduct attracting a custodial sentence, to be sufficient to preclude reliance on the same:

320. Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

...

(18A) within the 12 months prior to the date on which the application is decided, the person has been convicted of or admitted an offence for which they received a non-custodial sentence or other out of court disposal that is recorded on their criminal record.

- No acknowledgment either that the passage of that time would exclude reliance on para 320(7B).

3.4 Criminality and Discretionary categories

As well as the mandatory bans from entry to the UK, the Secretary of State has the power to refuse an application when an individual:

1. has been convicted of an offence but not sentenced to prison in the last 12 months (paragraph 320(18A));
2. is considered to have caused serious harm (paragraph 18B(a));
3. is a persistent offender (paragraph 18B(b));
4. exclusion deemed to be in the public good for example because of poor character, conduct or associations (paragraph 320(19))

In these cases, there is a *presumption* that an application will be refused because the wording of the rules is that a claim “should normally be refused”, but it does not *have* to be refused.

To put it another way, it is likely that one of these cases will be refused but it may be possible to persuade the decision maker not to. Also, if the application is refused and a legal challenge is brought then a judge will need to consider whether the discretion was lawfully exercised (in an application for judicial review) or exercise the discretion him or herself (in a statutory appeal).

3.4.1 Paragraph 320(18A) - Non custodial sentences

These include:

- *fin*es (but not Fixed penalty notice (FPN), penalty charge notice (PCN), or penalty notice for disorder (PND)
- *cautions, warnings and reprimands*
- *absolute and conditional discharges*
- *non-custodial sentences and orders*
- *disqualifications from driving*

It does not include binding over, as this will not form part of a person’s criminal record.

3.4.2 Paragraph 320(18B)(a) - Serious harm

An individual can be refused when, in the view of the Secretary of State, his or her offending has caused serious harm, such as death or serious injury.

Visa officials are directed to look at the consequences of the person’s actions, rather than the seriousness of the offence itself. Therefore, a person who has been convicted of driving without insurance may have their application refused if, when driving, they killed or seriously injured another person.

3.4.3 Paragraph 320(18)(b) - Persistent offenders

An individual can also be refused when, in the view of the Secretary of State, the person is a persistent offender who shows a particular disregard for the law.

This involves an assessment of the following factors:

- *number of offences*
- *seriousness of the offences, including the degree of public nuisance*
- *escalation in the seriousness of the offence. This seems to be request an assessment of future risk; the guidance directs caseworkers to “identify a pattern of escalating offending and intervene before a more serious offence is committed”.*
- *timescale over which the offences were committed. Here, the guidance reads “If you can attribute a series of offences, committed a long time ago, to a particular incident or issue in a person’s life, this could make refusing that person’s application and/or pursuing their deportation or removal from the UK a disproportionate response. But, repeated criminality over a lengthy period of time would make such action favourable”.*
- *Frequency of the offences*
- *actions taken to address the cause of the offending, including programs or activities aimed at addressing the cause of the offending. These actions must have a significant impact on reducing the offending*

The guidance “General Grounds for refusal: Section 2” directs the Home Office, though, that:

If you decide to refuse an applicant on either of these grounds, you must take into account any human rights grounds and make sure that your refusal is both proportionate and reasonable.

3.5 Paragraph 320(19)

A list of circumstances where refusal would normally be justified is also set out:

You must consider refusing an applicant under paragraph 320(19) when:

- *admitting the person to the UK could unfavourably affect the conduct of foreign policy*
- *the person is subject to a United Nations (UN) or European Union (EU) travel ban that has not yet been listed under the Immigration (Designation of Travel Bans) Order 2000*
- *the person is a threat to national security*
- *there is reliable evidence the person has been involved in or associated with war crimes or crimes against humanity – it is not necessary for them to have been charged or convicted*
- *admitting the person may lead to a breach of UK law or public order*
- *admitting the person may lead to an offence being committed by someone else – for example, the applicant may have extreme views which if expressed could result in civil unrest and a breach of the law*

The guidance goes on to state that it is unlikely a person will be refused for a single conviction resulting on a non-custodial sentence outside the relevant timeframe in other parts of the general grounds for refusal but that the greater the number of

cautions, warnings, discharges and admonishments on a person's record, the more likely it is the person will be refused under this paragraph.

Much of the guidance is redacted, meaning that it is not known what other criteria are applied. The guidance does have specific sections, though, on:

- *low level criminality (e.g. caution, warnings, conditional discharge etc.), when numerous in number*
- *association with known criminals, looking at the extension of the connections and the impact of the activities of these known criminals*
- *involvement with gangs, including how senior an individual is in that gang*
- *pending prosecutions (in this case, the Secretary of State may decide to put the application on hold until the outcome of the prosecution)*
- *extradition requests*
- *public order risks (including if an individual previously made speeches including violence or which brought other persons to commit offences)*
- *membership, support or financing of a proscribed organisation*
- *unacceptable behaviours (as per the list above)*
- *war crimes*
- *deliberate debting, when a person is indebted deliberately and recklessly and there is no evidence of an intention to pay off these debts*
- *where a person has benefited from the proceeds of crime*
- *involvement in corruption*
- *where a person's presence in the UK could unfavourably affect foreign policy*
- *assisting in the evasion of immigration controls, including by providing false documents or being involved in a sham marriage*
- *employing illegal workers*
- *deception and dishonesty dealing with the government, including by defrauding the benefit system or failing to declare convictions.*

One is left with the impression that paragraph 320(19) is used as a "catch all" provision to be deployed whenever an immigration officer would like to refuse an individual but that individual does not fall in any of the other grounds for refusal.

4. Refusal of leave to enter in relation to a person in possession of an entry clearance

A person who holds prior entry clearance can also be refused leave to enter under rule 321 on the basis that:

- whether or not to the holder's knowledge, false representations were employed or material facts not disclosed for the purpose of obtaining the entry clearance, or in order to obtain documents to support the application
- circumstances have changed since issue of the entry clearance which has removed the basis of the person's claim to admission
- and on grounds of criminality, or where it is deemed conducive to the public good

However, following the interpretation provided in [Khaliq \(entry clearance; para 321\) Pakistan \[2011\] UKUT 350 \(IAC\)](#), it is difficult to see in what circumstances this provision might be used as a grant of entry clearance itself has effect as a grant of leave to enter (i.e. they are granted at one and the same time by the ECO), and what has already been granted cannot be refused.

Similar powers apply though under r321A. These allow for the cancellation leave to enter of both a person entering on a visa for the first time, and of a person who has entered the UK but has then travelled outside the UK (i.e. to prevent re-entry on the existing leave).

5. Cancellation and Curtailment of Leave

The power in r321A to cancel leave overlaps with that of curtailment, for example under r323(ii) where circumstances have changed such that the person no longer meets the requirements of the rules under which his leave to enter was granted.

Curtailment however is a discretionary power, and from the migrant's perspective, although both curtailment and cancellation give rise to an in-country right of appeal, it is much to be preferred.

A person whose leave is curtailed will have continuing leave (under s3D of the 1971 Act) pending the conclusion of their appeal and, additionally, the Tribunal will be able exercise their own discretion if they disagree with the decision.

In [Fiaz \(cancellation of leave to remain-fairness\) \[2012\] UKUT 00057\(IAC\)](#), the Upper Tribunal found that in some circumstances the duty of fairness requires that leave be curtailed rather than cancelled.

5.1 Paragraph 323 - Curtailment

Rule 323 provides for the discretionary curtailment of leave under the same discretionary grounds available under r322 and, in addition, where a person;

- ceases to meet the requirements of the rules under which his leave to enter or remain was granted
- has had their refugee status or humanitarian protection revoked (or is a dependant of such a person)
- where a person has, within the first 6 months of being granted leave to enter, committed an offence for which they are subsequently sentenced to a period of imprisonment
- has leave as a dependant of a person whose leave is curtailed

For those granted leave under the PBS, there are discretionary and mandatory grounds to curtail or alter the duration of a person's leave;

- who fails to commence or ceases their studies or employment
- where sponsorship is withdrawn or the migrant is dismissed from their course or job
- where the sponsor ceases to hold a sponsor licence

or where;

- there is a prohibited change to employment as defined in r323AA a Tier 1 (Exceptional Talent) endorsement is withdrawn
- a Tier 1 (Graduate Entrepreneur) sponsor loses its status, has their licence withdrawn or downgraded, or withdraws its endorsement

There is an express policy that addresses the circumstances in which curtailment of leave to remain may be appropriate, [Guidance – Curtailment of leave](#). It makes the points that

- as this is a discretionary ground of refusal, a decision to curtail should not be automatic
- curtailment is not appropriate where the true facts, if previously known, would not have led to the application's refusal

- curtailment is not appropriate where the facts in question arise in relation to a current application – the deception refusal ground under r322(1A) is relevant instead
- the Home Office has a choice as to whether to curtail leave or to take the more draconian step of issuing removal directions under the saved section 10 of the IAA 1999: the latter route will not carry an in-country right of appeal
- “the breach must be of sufficient gravity to warrant such action”: so a discovery of working in breach of conditions that only slightly exceeds the permitted hours need not attract curtailment
- there are specific provisions (in the Rules) for curtailment of migrants under the Points Based System.

Note that curtailment gives rise to a right of appeal under s82(2)(e) of the saved provisions of the NIA 2002, being a decision to vary leave leaving a person without leave.

There are specific procedural safeguards within the relevant Home Office policy, [Guidance – Curtailment of leave – version 12.0](#) which sets out, under the heading *Requesting further information before curtailing*, that:

You should make a curtailment decision on the basis of the available information, providing that is sufficient to inform your decision. In the majority of cases, you will be able to make a decision after reviewing the available information, such as a sponsor notification that sponsorship has been withdrawn.

In some circumstances, it may be appropriate for you to ask a migrant to provide additional information before making a curtailment decision. For example, if the Home Office is aware of circumstances which may mean it is appropriate to curtail a leave to a period which is more than 60 days.

6. Remedies in relation the General Refusal Reasons

The general refusal reasons often feature in appeals. Sometimes an appellant seeks to “clear their name” of an allegation of impropriety to maintain a good immigration history for the future, even if they recognise that their appeal cannot succeed on its merits. Various points arise:

- If the decision letter raises issues that touch on the general refusal reasons without expressly citing them, the judge may consider them, subject to fairness ([MO \(Long residence rule-public interest proviso\) Ghana](#) [2007] UKAIT 00014).
- Where factors were known to a decision maker which might have led to their use but they do not take the point, the judge is entitled to presume that they are not relevant.

6.1 Old Style Appeals under the “saved provisions” of the NIAA 2002

Where a discretionary ground has been applied against the applicant, and there is a right of appeal, the Tribunal judge will be able to exercise their discretion differently under s84(1)(f) of the NIAA 2002 and allow the appeal. A Tribunal judge will not though be able to disapply a mandatory ground where the ground is properly made out on the facts of the case.

If the relevance of a general refusal reason becomes apparent only at a hearing, then it may be appropriate for the judge to allow the appeal on the grounds that a discretion is now available to be exercised which, through no fault of the respondent, so far has not been considered ([RM \(Kwok On Tong: HC395 para 320\) India](#) [2006] UKAIT 00039).

An appeal flowing from an application refused only on general refusal reason grounds cannot be allowed without considering whether the substantive requirements of the rule are satisfied ([JF \(Para 320 refusal; substantive rule?\) Bangladesh](#) [2008] UKAIT 00008).

6.2 New Style Appeals under the “relevant provisions” of the NIAA 2002

Of course, unless there is a refusal of a human rights or asylum claim, there will be no right of appeal: the only remedies will be Administrative Review or judicial review.

There is no direct ability in these appeals to review the adverse exercise of discretion. General refusal issues will be relevant in assessing the public interest side of the balance, once a case reaches the stage at which proportionality is assessed. Presumably, a mandatory refusal reason will carry more weight than a discretionary one.

The [Administrative Review](#) guidance explains that:

Administrative review is available both if the alleged error could have made a difference to the original decision or could have an unfair impact on the applicant’s future applications, for example because they may now be refused on general grounds.

So a refused migrant may wish to use Administrative Review to clear their name of allegations of misconduct relevant to the general refusal reasons even though they

may recognise that their application is doomed to fail for other reasons. Although, only some of the general refusal reasons are mentioned as case working errors at Appendix AR AR.2.11(a), any general refusal is apparently amenable to review under the all-encompassing definition at AR2.11(c): “Where the original decision maker otherwise applied the Immigration Rules incorrectly.” It may be that litigation is required to determine the extent to which Administrative Review will reconsider the exercise of discretion in relation to the general refusal reasons.

Where there is no human rights or asylum refusal, and Administrative Review fails, then consideration will need to be given to judicial review.



7. Re-entry bans

7.1 When does the ban period start?

The ban period will start on the date an individual left UK or, if there in the case of a 10 year ban following the use of deception in an application, from the date of the refusal of that application.

7.2 When do re-entry bans not apply?

Re-entry bans do not apply to applications made under:

- *Appendix FM (Immigration Rule A320)*
- *Appendix Armed Forces (Immigration Rule B320)*
- *EEA Regulations, namely applications for a European Family Permit*

Under rule 320(7B), those who breached immigration law while they were minors will also not be subject to re-entry bans.

Finally, there are some exemptions for other groups of individuals. In particular, re-entry bans do not apply to those who:

- *Were not aware that the documents they submitted or the representations made with previous applications were false.*
- *Those who have been issued with a visa despite a re-entry ban being in place.*
- *Those who were in the UK without permission after 17 March 2008 but who left before 1 October 2008*
- *Victims of trafficking.*
- *Where a student was refused leave after 1 September 2007 solely on the basis that the made an out-of-time application.*

One should bear in mind, however, that the individuals above (with the exception of those applying under the EEA Regulations), might still be caught by Immigration Rule 320(11), which gives the Secretary of State the power to refuse an applicant who has “previously contrived in a significant way to frustrate the intentions of the Rules” (i.e., as per Rule 320 (7B), an individual overstayed, breach the condition of their leave, was an illegal entrant or used deception in an application for leave, when “there are other aggravating circumstances”, such as absconding, making frivolous applications, not complying with a re-documentation process etc. This is a discretionary ground for refusal, i.e. the Secretary of State may decide whether or not to refuse an application on this ground.

7.3 Can entry clearance be granted despite a re-entry ban?

Yes. Firstly, and as explained above, those who apply under Appendix FM, Appendix Armed Forces or the EEA Regulations will not be prejudiced by entry bans.

In addition, and for any other application, the [Home Office's guidance](#) confirms that:

As with any application, an ECO needs to consider if there are any human rights grounds (in particular the right to family life under Article 8), or any exceptional, compelling circumstances which would justify the issue of an entry clearance. If there are exceptional, compelling circumstances the application must be referred to the referred cases Unit (RCU) for a decision to be made outside of the rules.

However, in this later case, it is unlikely that an application will be successful. The old but presumably still in place [guidance on Leave Outside the Rules](#) confirms that:

grants of such LOTR should be rare, and only for genuinely compassionate and circumstantial reasons, or where it is deemed absolutely necessary to allow someone to enter/remain in the UK, when there is no other available option.

In practice, if there were exceptional circumstances or an individual had a strong Article 8 claim, it is more likely they would have applied for leave to remain or revocation of a deportation order when still in the UK.

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