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# THE GENERAL REFUSAL REASONS

*By David Jones and Mark Symes*

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, and minor omissions in application forms or in tax returns are just a few examples of acts which may lead to an application being refused in reliance on the general refusal reasons.

This course will:

- Identify the moments in the immigration control process at which the general refusal reasons may impact on a client, from entry clearance to leave to remain, and from curtailment of leave to the refusal of settlement
- Introduce delegates to the Rules, associated guidance and case law
- Review both the mandatory and discretionary aspects of the rules and general principles applicable to their application
- Offer practical insight on the preparation of applications, and pursuit of remedies, in scenarios where the general grounds of refusal may be applicable

We begin by laying out the terms of the general refusal reasons, and then proceed to discuss the most commonly recurring kinds of case that arise in practice and the general principles relevant to advising clients, before reviewing the salient issues surrounding the pursuit of various remedies, from administrative and judicial review to appeals.



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## Introduction to the General grounds for refusal

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. They address various kinds of generic objection to a person being granted leave or entry clearance: particularly bad immigration history and criminal offending, but also practical issues such as inability to establish one's identity or ability to depart the UK for another destination following a period of stay here.

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 in relation to the family migration routes for the Armed Forces and for partners, parents, children and adult dependent relatives generally, or to visitors – because the relevant Appendices, ie Appendices AF, FM and V, have their own 'suitability' criteria, subject to some exceptions laid out in rule A320. Some points to note on their application:

- Some are mandatory (ie they lead to automatic refusal); others are discretionary (ie the decision maker has to decide whether leave should be granted notwithstanding the difficulty in question)

- 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 – Appendix V rewords many of the Rules and so helpfully may shed some light on the meaning of the equivalent General ground

- Paragraphs 320 (except subparagraph (3), (10) and (11): ie production of a non-valid or unrecognised passport, and contriving to frustrate the purposes of the Rules) and 322 do not apply to family applications made under Appendix FM or to an application for leave to remain on the grounds of private life under paragraph 276ADE(1) (see paragraph A320)

- Nevertheless, the 'Suitability' criteria in Appendix FM are similar to the General Grounds, but with some 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

- Also importantly, paragraph 320(11), addressing those who have contrived to frustrate immigration control in the past, *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 further below)

- **The burden of proof in establishing the existence of a general refusal reason is on the decision maker -** JC China [2007] UKAIT 27



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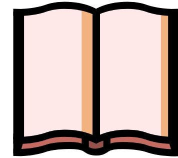

**Example**

**Iqbal applies for entry clearance as a visitor. He is concerned that he previously entered the UK and overstayed his visa.**
**Iqbal should read the Suitability criteria within Appendix V of the Rules, as he is applying in the visitor category; rather than the General refusal reasons under Part 9 of the Rules.**

**Javed has been refused entry clearance under Rule 320(11) for contriving to frustrate immigration control. He wants to know if the decision is discretionary or mandatory.**
**It is a discretionary refusal ground: simply because it appears below the heading "should normally be refused" rather than below the heading "is to be refused".**

**Kirk is worried about his health record and whether he might be refused because of it. He is applying for entry clearance under Appendix FM as a partner. He wonders whether medical reasons apply or not as a general refusal reason given he is applying on family life grounds.**
**The general refusal reason on health does not apply, because A320 does not include 320(7) as one of the Rules which applies to Appendix FM; however this does not take him very far, because the Suitability criteria within Appendix FM include S-EC.1.7, permitting refusal where it is "undesirable to grant entry clearance to the applicant for medical reasons"**

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## STAGES AT WHICH GENERAL REFUSAL MAY OPERATE

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. The Rules are structured to address decisions in relation to

- Entry clearance and leave to enter (ie applications made before travelling or at the border)
- Leave to remain (ie usually extension/variation of leave applications),
- The cancellation or curtailment of existing leave when something comes to light after leave has been granted
- Indefinite leave to remain
- Various specific categories of Points Based System migrant, because certain events during their UK residence are considered to require individualised treatment: for example a Sponsor's loss of licence



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This is their layout:

**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

**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 made 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 nationals who require a visa (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, providing false documents, or failing to disclose information or facts – both in relation to the instant application, and regarding documents advanced to support the application (320(7A));
- Overstaying, breaching conditions of leave, being an illegal entrant, or using deception in a past application (320(7B)); unless a certain period of time has now passed (see below where we address the Mandatory Bans)


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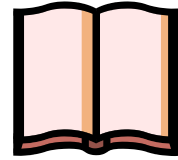
- Failing to comply with a request by an ECO to attend for interview (320(7D)).



**Examples**

**Bari applies for entry clearance to come to the UK as a Tier 4 student. The decision maker identifies a flaw with the passport that he provides supporting his application.**
**Bari is very likely to receive a mandatory refusal under R320(3), for failing to adequately establish his identity via a valid national passport. This is a mandatory refusal reason.**

**Ashfar wants to apply for entry clearance to come to the UK as a Tier 2 worker. He has previously been present in the UK as a student some years ago. He overstayed his visa. He comes to you for advice regarding his prospects of being granted a visa.**
**His case needs to be assessed by reference to R320(7B). Overstaying is a kind of misbehaviour which is treated by varying degrees of severity depending on the circumstances of departure: so it will be necessary to determine whether he made a voluntary or involuntary departure.**

**Anyiam applies for entry clearance as a sole representative. The ECO considering his application decides that a false document has been provided because the company registration number on his letters of reference does not match up with the details of the sponsor's organisation found on its website.**
**Anyiam is likely to be refused on the basis he has made false representations in the present application. This will lead to mandatory refusal.**
**Note that had the document in question related to an earlier application, rather than the present one, then the refusal of that prior application would have entailed a ten year ban on further applications under R370(7B): indeed he now potentially faces such a ban, given the fate of the present application.**

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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))



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- 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 (320(11))

- Failing to establish that they are admissible to their next proposed destination (unless entering for the purpose of 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) (introduced from 6 April 2016). HO guidance is in the Modernised Guidance, Litigation Debt

Whenever discretionary refusal reasons are relied upon, the Home Office has to consider whether to exercise discretion favourably. The question will be whether the case presents compelling factors that amount to an exceptional reason.

**Refusal of leave to remain (rule 322)**

Applications for leave to remain (extension/variation applications) have their code of refusal reasons, largely similar to the on-entry reasons. However, one should never presume that a particular provision applies: always read the Rules themselves.

A variation application will be mandatorily refused where

- it is for a purpose not covered by the Immigration Rules (322(1)), or

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- Where false representations or false documents have been submitted under rules that reflect the conditions of some of the provisions we have just mentioned (ie 320(2), (7A) and (7B) – see 322(1A-1C)

Applications 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)) (introduced from 6 April 2016, but applying to debts whenever they arose). This will normally arise in the context of judicial review proceedings, as costs are only very rarely awarded against an individual in the world of statutory appeals.

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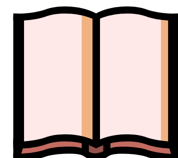

## Example

**Johnson was present in the UK some years ago and brought a judicial review claim against his removal. The judicial review was refused permission. He left the country. You ask whether he has paid any legal costs against him. He says he knows nothing about any such costs.**
**He should have been advised of costs being ordered against him.**
**It is not inevitable that costs of an unsuccessful judicial review claim are awarded against a JR claimant, but they usually are. It will be necessary to find out the truth. The Home Office guidance explains that if an instalment payment plan is agreed with the Litigation Finance Team then the debt must not be taken into account when considering the application. So if Johnson has an outstanding litigation debt, such a plan would be one way of addressing it.**



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**As this is a discretionary ground for refusal, the Home Office nevertheless have to consider where there is a good case for overlooking the matter before they refuse the application. Relevant considerations would include the way in which litigation was conducted and whether or not the claim was found to be Totally Without Merit, and the extent to which Johnson stayed in touch with the solicitors who brought the judicial review claim. Despite the general test for the exercise of discretion in general refusal reason cases being whether a compelling case is put, this particular piece of Guidance does not cite that elevated threshold.**

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

A set of provisions has been introduced to prevent, or at least defer, the grant of settlement to criminals. They apply generally, and via slightly different but generally similar provisions to Appendix FM applications too (see the S-ILR provisions). These bite where an applicant:

- Has been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or
- Has 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
- Has 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
- Has, 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.

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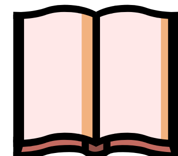

## Example

**Bernardo has been present in the UK as a spouse on the five year route to settlement under Appendix FM. He is about to clock up 60 months of leave. He was convicted of burglary and sentenced to 6 months' imprisonment six years ago.**

**Bernardo does not have a viable settlement application presently: because ILR will be refused until seven years has passed since the sentenced ended (see S-ILR.1.5: ie not seven years from sentencing, but seven years from the end of the sentence). He needs to maintain his lawful status, so should make an extension application under Appendix FM nevertheless: he can expect to be granted another 30 months of leave rather than settlement (D-ILRP.1.2).**



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Individuals whose return abroad would put them at risk of persecution or Article 3 violations will of course not be removable. Thus applications for limited leave to remain or ILR made from 24 November 2016 are refused

- Where the person has been excluded from Refugee status (or Humanitarian Protection) under Articles 1F and 33(2) of the Refugee Convention (or under r339D for HP), or
- Has been sentenced to imprisonment for 12 months or more and would, if they had claimed asylum, be so excluded.

Such individuals 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, which is a form of leave granted outside the Rules, for 6 months at a time, with the HO always looking to remove the person as soon as possible when circumstances change.

### Casework 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.*

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**Refusal of leave to enter for holders of leave in force/entry clearance**

The Rules provide for two kinds of cancellation of leave at the border where a person has already obtained a visa before travelling.

- One set of Rules addresses those holding basic entry clearance (R321);
- The other set of Rules (R321A) addresses those who arrive with leave that is already in force – ie people who were granted entry clearance taking effect on arrival as leave to enter (this in fact applies to most people, because of the way the Immigration Leave to Enter and Remain Order 2000 operates regarding most entry clearances) and people returning to the UK on the basis of a prior grant of leave to enter or remain

Both these sets of Rules target people with prior entry clearance or leave 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



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- 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

The operation of these provisions were considered in Khaliq [2011] UKUT 350 (IAC). There a student arrived in the UK and a baggage search revealed that he was carrying a fake English exam certificate; accordingly he was refused for lack of English language proficiency on the basis of false representations having been made as to his language skills. He had not relied on the document when making his application for entry clearance.

The UT took a close look at the language of the provisions in the Immigration Act 1971 addressing examination at the port of entry by immigration officers, concluding that the only purpose for which a person could be examined was to see whether their present leave had been obtained due to false information or material non-disclosure. This tallied with the language of Rule 321A(2) which referred to false representations/document made "in relation to the application for leave". Dishonesty arising only after the grant of entry clearance was not a proper subject for examination or refusal.

Khaliq limits the application of the cancellation provisions to dishonesty that formed part of the application leading to the entry clearance grant.

The same thinking should apply where the leave in question is held by someone who has been lawfully resident in the UK and has travelled abroad within the currency of their leave with a view to returning here. There is an unreported case you can read on www.bailii.org under the reference number UKAITUR IA190562013 which finds that a forged letter from a student's college purportedly extending his holiday leave (to justify excess absence abroad) had not been provided "in relation to the [original] application for leave".

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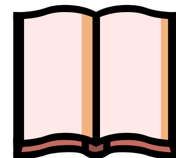

**Example**

**Catherine applies for entry clearance as a Tier 2 general worker. She provides documents showing her qualifications for the work in question. Her application is granted. When she is questioned by an immigration officer on a return to the UK, it materialises that one of the documents is false.**

**Catherine has relied on the false qualifications "in relation to the application for leave", because the entry clearance application and application for leave to enter are one and the same, and she relied on the disputed document when she first made her application from abroad. She can properly be refused leave under R321A when subsequently examined at the port of entry.**

**Cancellation and Curtailment of Leave**

Paragraphs 321, 321A, concerning the *cancellation* of visas on arrival in the UK, and paragraph 323, permitting *curtailment* of a period of leave that has already begun but has a period left to run, provide another route under which the General Refusal



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reasons may impact on a migrant. These powers apply generally, including family life routes under Appendix FM.

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.

**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, linked to common mishaps in Points Based System cases. They bite on a person:

- 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

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There is an express policy that addresses the circumstances in which curtailment of leave to remain may be appropriate, Guidance – Curtailment of leave (at the time of writing, marked as "archived": so watch this space!). 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
- Decisions should be proportionate – ie "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.

Curtailment decisions have given rise to various remedies over time:

- Under the old style appeal system, they gave rise to a right of appeal under s82(2)(e) of the saved provisions of the NIA 2002, being a decision to vary leave which had the effect that the individual was left without any leave
- Under the new style appeal system, they will only attract a right of appeal if at the same time a human rights application is refused and not certified - given that they are actions taken at the instance of the Home Office in many cases, rather than in response to an application, there will inevitably be no application refused at the same moment
- They are not defined as eligible decisions for administrative review purposes
- So the remedy against curtailment will now generally be judicial review (or a further application within the tolerated period of overstaying under Rule 39E)

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.



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So it is always worth checking carefully as to what information was in front of the Home Office decision maker: if the material overtly suggests dishonesty, then they cannot be criticised for failing to take further steps, but where the material is equivocal, then they should make further enquiries before taking curtailment action.

A few points to be aware of regarding curtailment decisions:

- The Administrative Court has found that there has to be *actual notice* removal directions made under section 10 of the Immigration and Asylum Act 1999, which is the usual way by which individuals subject to curtailment will face removal: see Iqbal [2017] EWHC 79 (Admin).

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

- Similar thinking can be seen decisions such as Mohibullah [2016] UKUT 561 (IAC), where the UT makes it very clear that the Home Office must have regard to their published guidance in these cases. That is a decision made in relation to the old appeals and removal regime, when rights of appeal were significantly more generous than they are these days. However, given the complexity of modern immigration law, it will always be important to investigate the precise route under which a particular decision was made, particularly where there may be some difference in the remedy available

## Mandatory or Discretionary Grounds for Refusal

As has already been indicated, the General Refusal reasons 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, even mandatory refusal cases may be less cut and dried that might seem at first sight:

- The decision maker always has discretion to depart from the Rules

- It may not be appropriate to refuse an application where the decision contravenes fundamental rights, for example where refusal would be disproportionate to family life established in the UK

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 been applied without consideration of the exercise of discretion. In the latter circumstance, the decision may be unlawful.



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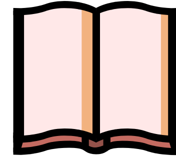

## Example

**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.**

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## Common General Refusal Scenarios

### 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.

Relevant Home Office guidance can be found in the entry clearance guidance *When can I refuse on the grounds of criminality?* and the *General grounds for refusal (modernised guidance)*.

### Mandatory Refusal for Prison Sentences

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.*



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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.

**Criminality and Exceptions to the Mandatory Ban where Compelling Circumstances Prevail**

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.*



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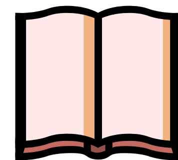
The guidance goes on to state that a non-exhaustive list of circumstances which might be considered exceptional:

- *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 former 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.



**Example**

**Katya is a citizen of Russia. She applies for entry clearance to come to the UK. Her application is refused because the Secretary of State notes that she has a conviction for fraud and was sentenced to imprisonment for four years. Accordingly her application is refused on the basis of 320(2)(b). She tells you that the conviction did not take effect after a Russian court cancelled its effect some months before she made her application.**

**An expert witness writes a report explaining that Katya's explanation is accurate. Such a conviction has no effect.**

**Foreign law is proved in English legal proceedings via evidence, as the courts and tribunals have no inherent expertise in interpreting foreign (rather than UK) law. So the expert witness's evidence is important. Given their opinion is that the conviction has no effect, then Katya should not be treated as having a four year sentence; that particular general refusal reason does not apply to her. Indeed, none of the criminality provisions can now realistically bite on her case.**

**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:

- Has been convicted of an offence but not sentenced to prison in the last 12 months (paragraph 320(18A)
- Is considered to have caused serious harm (paragraph 18B(a))
- Is a persistent offender (paragraph 18B(b))



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- Exclusion deemed to be in the public good for example because of poor character, conduct or associations (paragraph 320(19))

So where this level of offending is arguably present:

- 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.

- In other words, it is *likely* that one of these cases will be refused but it *may be possible* to persuade the decision maker to accept there are exceptional circumstances present by way of a compelling case for discretion to be exercised

- If the application is refused on one of these grounds, and a legal challenge is brought then a judge will need to consider

  - On judicial review, whether the discretion was lawfully exercised, ie having regard to the application made and the explanation given, applying relevant guidance or exercise the discretion him or herself

  - On a modern statutory appeal, whether the refusal is disproportionate to the private and family life interests with which it interferes

**Paragraph 320(18A) - Non custodial sentences**

This Rule permits refusal for non-custodial sentences and other recorded criminal disposals that have taken place in the last year:

- *fines (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" adjudications, as this will not form part of a person's criminal record.

**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.

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



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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 involve 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.*

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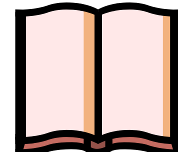

## Example

**Anastasia wishes to come to the UK as a Tier 4 student. She has previously been present here as a visitor, during which period she was convicted of a public order offence and fined £500. This happened two years ago.**
**She does not face a mandatory refusal under 320(2), because she did not receive a sentence of imprisonment. Nor does she face discretionary refusal under 320(18A) as the offending was more than a year ago. However her case could still be refused under 320(19) for "conduct (including convictions which do not fall within paragraph 320(2)), character, associations, or other reasons". Her application would do well to give reasons why discretion should not be exercised against her: eg she was young at the time, the offence was a single misdemeanour, she is of good character generally.**



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**Poor character, conduct or associations**

**Discretionary exclusion under Rule 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 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 or 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*



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- *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.

**Mandatory exclusion under Rule 320(6)**

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, communty 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.



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**Refusal due to Incompatible Information being given to HMRC and SSHD**

One common scenario presently encountered arises with respect to those immigration categories where extensions of leave are granted on the basis of criteria including declarations of earnings. When settlement applications come to be made, the Home Office routinely checks whether the earnings put forward to support an application for further leave are consistent with the sums subsequently declared to HMRC.

Given that there is a question routinely asked during the application process "Are you satisfied that the self assessment tax returns submitted to HMRC accurately reflected your self-employed income?", it is clear that an applicant may find themselves refused for having made false representations where discrepancies come to light.

These cases are customarily refused under Rule 322(5), addressing character and associations, rather than under Rule 320(7A) and dishonesty.

- This may make an attack on the decision more difficult, because it is less clear-cut that the authorities that the Home Office have to show outright deceit are strictly applicable (you can find them below under *Mandatory Refusal for Dishonesty*)

- Eg the SSHD could take the position that a person who is cavalier about their tax returns is of dubious character whether or not they are actively dishonest

- Administrative review of a Rule 322(5) decision does not bring with it the possibility to provide fresh evidence, unlike express accusations of false representations under 320(7A)

- However, it remains the case that the *General grounds of refusal* guidance, when it comes to address Deceitful or dishonest dealings with Her Majesty's Government, expressly says that it is not appropriate to refuse someone for a genuine mistake, or for claiming something to they reasonably believed, or were advised, they were entitled

Relevant considerations in these cases may be:

- Was there a mixture of self-employed and employed earnings that has caused confusion?

- Has a Director of a company (who would normally be paid via Director's salary and dividends if they are a shareholder too) also been registered in the same tax year as self-employed: people are known to be refused on HMRC discrepancy grounds for not having made a self-employment assessment, although on analysis it transpires they had no self-employed earnings in the relevant year

- Is the discrepancy down to a real difference between the sums declared to the SSHD and HMRC, or is the difference between the relevant periods responsible: eg the immigration application will be made based on earnings in the year preceding the date of application, whereas the tax year runs from 6 April of one year to 5 April the next: it is perfectly possible that legitimate business expenses were incurred within the tax year that overlapped with the



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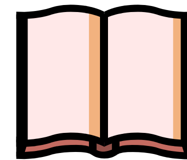
"application year" but were not foreseeable until after the application was made

- Is the error down to the Accountants, and is misunderstanding that resulted credible: plainly the tax system requires taxpayers to sign off accounts, and may be hard to believe that an entrepreneurial individual running their own business could possibly believe that significant profits could result in very small tax bills

- In a case where the Accountants are said to be to blame, will they admit this in writing? Have they compensated the client for their negligence?

- Have sums due been declared retrospectively? The Home Office standard position is that even taking this step "*is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest* …"



## Example

**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 tells you that it was an Accountant's error with regard to his HMRC return.**

**There will be a right of administrative review against this decision. Jon can rely on fresh evidence, and of course unless he does so, there is unlikely to be anything to support his side of the story. He needs to obtain clear evidence from his Accountant admitting the error and should volunteer to pay any tax which is due: rectification is possible.**

**Frankly his case would be stronger had he realised the error before making the application, declared the matter to HMRC and the SSHD, and paid any tax due.**

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**Mandatory Refusal for 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. 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).

This is a heavily used and extensively litigated refusal reason, as a result of which there is a volume of associated case law. This establishes certain key principles:



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- **Deception requires active dishonesty** – see for example AA (Nigeria) [2010] EWCA Civ 773. Or as it was put in Ozhogina [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*

- **A false document is one that is forged or has been altered to give false information**: see eg Agha [2017] UKUT 121 (IAC):

> there must have been an element of dishonesty in its creation and if this is not immediately obvious in a case of an inaccurate document then that element must be engaged with in any refusal.

- **The burden of proof in establishing dishonesty is on the decision maker** - JC China [2007] UKAIT 27 (unless of course the allegation is admitted, or has been judicially determined to have been made out in earlier judicial proceedings)

- **The standard of proof is the balance of probabilities having regard to the severity of the allegation being made** - Giri [2015] EWCA Civ 784). Giri also shows, however, that the more serious the allegation, the more cogent the evidence supplied in support of it must be in order to make good an allegation that can have serious consequences for a person's future. Evidence of "sufficient strength and quality" is required, having appropriate regard to "inherent probabilities": see also Shen [2014] UKUT 236 (IAC)

- Minor misrepresentations can be overlooked. As the guidance cited in Neshanthan [2017] UKUT 77 (IAC) puts it:

> Minor representations which have no bearing on the case can be ignored as long as the passenger is generally acceptable for their purpose of entry

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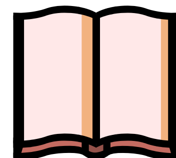

## Example

**Jane was present in the UK for two years as a student. She returns to her country of nationality, the USA. Her passport is wrongly date-stamped by the immigration officer there and so she appears to have entered the US in October 2016. In reality she returned in September 2016.**
**Her application to return as a Tier 2 worker is refused. The decision maker notes the covering representations clearly state that she returned to the US in September 2016, inconsistently with the passport stamp. She is considered to have made false representations or provided a false document and Rule 320(7A) is invoked against her.**
**Jane is the victim of an innocent error. She needs to persuade the administrative reviewer (or a judge thereafter, on judicial review) of the fact that this was an innocent mistake.**



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### Deception and interview records

Sometimes the alleged deception can arise from the contents of an interview. In such a case it will be essential to obtain disclosure of the interview record, and any recording (though it seems these are rarely made). It would be a very good idea for any applicant who is worried about how an interview went to write up a note of their own recollection of the exchanges at the very first opportunity after the event, as otherwise any subsequent challenge will be weakened by the obvious fact that recollections fade over time.

Sometimes administrative review or judicial review applications have to be lodged without sight of the official record: in these cases disclosure should be sought at the first opportunity.

### Genuine documents

There is specific Guidance on the circumstances in which the Home Office will seek to verify the bona fides of documents supporting the application:

> **Reasonable doubt**
> **7.** There are many reasons why we may doubt that specified document is genuine and what we consider to be a reasonable doubt will depend on each individual application. However, our judgments will be based on the facts we have.

The investigation that follows may vindicate the document, or may confirm the document is false, in which case a general refusal reason will be added to any other concerns that the decision maker has with the application. If the check is deemed "inconclusive" then that particular document will be ignored by the decision maker, which may or may not then doom the application, depending on whether or not alternative documents were supplied that address the criteria in question.

### Mandatory Refusal for Deception: English Language testing cases

Many kinds of immigration application require proof of English language proficiency. There are various ways of satisfying this requirement: being a national of a majority English speaking country, or having studied a degree in English, may suffice.

Where neither of those options is open to an applicant, however, they may sit an English language test. The requirements vary between different classes of immigration application (Appendix B of the Rules provides the requirements for many applications and Appendix O lists the approved providers of the tests – the test is often called the "TOEIC" ("Test of English for International Communication") and is designed specifically to measure the everyday English skills.

The alleged faking of English language test results has become one of the biggest issues in immigration law, ever since this announcement was made following a television programme.

> The Home Office has suspended English language tests run by a major firm after BBC Panorama uncovered systematic fraud in the student visa system. ...


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> Panorama saw candidates for tests set by ETS, one of the largest language testing firms in the world, being replaced by "fake sitters" and having answers read out to them.

ETS signifies Educational Testing Service Limited, one of the approved Home Office suppliers of “secure” English language testing. Following the media exposure of dishonesty in some of their test centres, they decided to review all their test results with a view to identifying and cancelling test scores apparently secured by dishonesty.

Many applications have now been refused because English language test results provided are considered to have been improperly obtained following information received from ETS (there were 2,359 judicial review claims alone as at December 2015; in 2017 the UT mentioned there being 33,000 decisions based on TOEIC fraud). Typically the refusal letter simply references such information: sometimes a single page print-out is supplied in which the migrant’s details appear together with the ETS conclusion that their test should be treated as “invalid”.

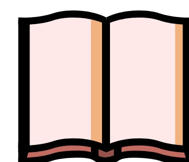
Doubtless most applicants go through the testing process honestly. However, given the advantage that a guaranteed pass bestows on an applicant, the Home Office has become increasingly suspicious of the use of “proxies” to sit the test on behalf of an applicant for leave to remain, and their policy so far has been to automatically adopt the conclusion of ETS.

Where dishonesty is suspected, based on an ETS notification to the Home Office, the Secretary of State may raise a general refusal reason at any time in the application and decision making process:

- Refusing an extant application
- Curtailing a person’s leave whilst they are in the UK
- Cancelling leave when they return to the UK and the matter is noted at the border

Usually an ETS invalidity notification is invoked as evidence of dishonesty, for example under the false information/representations provisions of the suitability routes under Appendix FM, or using deception in relation to the present application or a supporting document under the non-Appendix FM routes. However, it could in theory be relied upon to refuse under “character and conduct” grounds.

It is not always an ETS document on the present application that is relied upon: the Home Office may have been advised that ETS results are to be treated as invalid in relation to an older qualification, whether or not it was used in support of the present (or indeed any) application.



**Example**

**Ahmed is a student present under Tier 4 with leave until November 2016. Returning from a trip abroad he is stopped by the immigration service who tell him that they have information from the Home Office**

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**that ETS have declared a test result that he has used in the past to secure leave to remain to be invalid. Accordingly they have decided that false representations were made in the course of securing that last leave which is accordingly curtailed under Rule 321A(2). As he is a person who requires leave but does not have it, he can now be removed under section 10 of the 1999 Act.**
**He has no right of appeal against this decision (as the refusal does not amount to the refusal of a human rights claim: where a hostile decision comes "out of the blue" like this, he will have no human rights claim outstanding)**

**Ravi has applied for entry clearance as a Tier 1 Entrepreneur. His application is refused because the Home Office have taken issue with the ETS test result on which he relied to show his English language proficiency. They say that the use of false test results shows that false information has been submitted in support of his application and rely on Rule 320(7A).**
**Ravi could exercise his right of administrative review against this decision. Admin review applications under 320(7A) may rely on fresh evidence, so are not subject to the limitation on further evidence which so often limits the value the remedy.**

Where the Home Office put forward evidence, it tends to take the form of

(a) a single page print-out provided by ETS identifying that a particular candidate's test results have been found to be flawed ("a flimsy spreadsheet" as it was styled in Qadir);

(b) a generic witness statement evidence from Ms Collier and Mr Millington of the Home Office who went on a fact finding mission to inspect the adequacy of the ETS testing results. They explain that the ETS system appeared impressive in their opinions, and that it includes a two stage system whereby computer software first trawls through the ETS database to identify possible sound recordings of tests where the voices appear to match other test results to a suspicious degree, those results then being taken forwards and assessed by human voice analysts.

Juxtaposed against that material will be any evidence from the client, if they have had the opportunity so far to put anything forward (eg because they had some notice of the Home Office concerns before receiving an adverse decision). This may take the form of English language proficiency shown by other means, good character evidence, and the ability to give a detailed account of the propriety of their ETS test process.

The available arguments have been set out in the two lead cases on these issues:

- Gazi (IJR) [2015] UKUT 327 (IAC) (27 May 2015)
- Qadir (UKUT: unreported) [2016] UKAITUR IA313802014 (21 April 2016)


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## Casework Tip

**If your client has received a hostile decision from the Home Office "out of the blue" regarding ETS, they need to think carefully whether this is the moment to challenge the decision. For example, cancellation of leave at the port of entry on a return to the UK brings a right of administrative review in which post-decision evidence may be relied upon, presuming the decision was made under 321A(2) in which case AR2.11(a)(ii) permits this.**

**However, curtailment of leave within the UK does not bring a right of administrative review. Any judicial review application would be dependent on the information before the decision maker: and they would presumably have *some* information from ETS, whereas the client will have had no opportunity to engage with the process. Accordingly it may be more productive to make an application, even if outside the Rules, putting forward all relevant material: in the event a human rights claim is refused then there may be a right of appeal at which oral evidence can be given, but at the very least there will be positive evidence in the client's favour against which to measure the Home Office assertions.**

Some consideration was given to the processes involved in ETS's fraud detection systems in Gazi essentially a test case with the support of the National Union of Students, albeit in the context of determining whether "in-country" judicial review was more appropriate than "out-of-country" appeal, for which reason the evidential issues were not resolved. It was noted that at one time ETS classified suspect results as either "invalid" or "questionable": the latter connoted cases where they were confident there had been malpractice, the latter referenced cases where investigation of the test centre had turned up many invalidated results casting doubt on the processes generally.

In Gazi the expert witness Dr Harrison gave evidence. He is a forensic consultant with a First Class honours degree in the field of acoustical engineering who currently holds research and teaching appointments; he was described in Gazi as

> "clearly an experienced expert witness and has worked on over 1,000 cases in the areas of "authentication, enhancement, transcription and speaker comparison". His expertise was not disputed ..."

The UT President identified a number of concerns with witness statement evidence provided from the Secretary of State: for example

- There had been no disclosure of the critical testing software or its provider
- There seemed to have been rather a hasty redeployment of staff into the checking role some of whom lacked aptitude
- the fact that the Home Office invariably accepts ETS information as establishing fraud in the testing process,

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- that Mr Millington of the Home Office (who observed demonstrations of the ETS fraud detection process) lacked any expertise in voice recognition, and that

> They [ETS] acknowledged that the technology they used was imperfect and that samples could be incorrectly flagged as matches (ie false positives). This could occur due to noise in the background of a recording (eg an air conditioning system) or the detection of another noise in the background which matches another test taker (although ETS notes that test takers should not be sitting so close to one another that they can overhear each other's responses).

The President in Gazi also addresses the expert report from Dr Harrison:

> 20. Dr Harrison summarises his opinion in the following terms:
> (i) In principle, the ETS methodology constitutes "a reasonable approach". However, the specifics of its implementation are insufficiently particularised in the Respondent's evidence, which suffers from "a lack of technical information and detail".
> (ii) The Secretary of State's evidence fails to acknowledge that the human verification mechanism "is almost certain to have resulted in false positive results".
> (iii) The fact of an unknown number of false positive results in "an unknown number of test takers who have been incorrectly identified as having fraudulently taken the TOEIC test".
> (iv) The accuracy and reliability of the ETS results overall cannot be gauged in the absence of sufficient technical knowledge of the process.
> (v) This inadequacy could be rectified to some extent by disclosure of the audio material from individual tests, which would facilitate independent auditing through the auditory-acoustic phonetic testing methodology.

However, as judicial review was not an appropriate remedy where an out-of-country right of appeal was envisaged, it was unnecessary for the Upper Tribunal in Gazi to resolve the issue of the reliability of the ETS evidence.

Further points made by Dr Harrison become clear in Qadir:

- Whilst the best automatic testing systems were able to reduce error rates to 1%-3%, systems performing in "non-ideal conditions" might err 30% of the time due to factors such as background sound, the duration and quality of samples, and conducting comparisons across speakers with different language backgrounds [28], [30];

- The shortcomings in the technical information available meant that one cannot have confidence in the reliability of either the automated testing results or those relating to the human intervention stage [34];

- Fatigue, distraction, indisposition and quality of training may all impact on human voice analysis, which even at its best can be expected to generate an error rate around 20% (and recent studies have produced an average false negative rate of 36%) [33];

- There remained very significant concerns as to the ETS process notwithstanding that the Home Office had now had a significant period of time to respond to Dr Harrison's evidence: in particular as to the technical



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standards of the test recordings, the performance of the automatic system, the material used as a basis for comparison, the operation and configuration of the automatic system, the performance, expertise, training, knowledge and familiarity with foreign-accented English of the human analysts including the training given to the newly recruited ETS employees [36];

- As there were an unknown number of false positive results, there was inevitably an unknown number of test takers who had been incorrectly identified as having fraudulently taken the TOEIC test [37].

You can see that there is a significant battery of useful material in the decision of Gazi which is available for citation whether or not Qadir is additionally relied upon. Where Qadir is especially useful is in showing the way in which the Tribunal approaches the question of English language proficiency when there is a conflict of evidence between the Home Office evidence including the notice of invalidity they have been given by ETS, and the evidence of a client whose credibility has been impugned.

In Qadir the UT concludes that the Home Office evidence had significant shortcomings, in particular [63]:

- Lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made

- Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own

- The lack of any expert evidence backing up the opinion of the staff who visited ETS

- Voice recording files had never been put forward pertaining to the appellants themselves

Overall the UT in Qadir finds that

- The Home Office had put forward just enough evidence to discharge the evidential burden upon them regarding raising the general refusal reasons

- Accordingly the question would be whether the Home Office had made good the legal burden on them to demonstrate the underlying asserted dishonesty

- There was then a question as to whether an Appellant had discharged the evidential burden upon them to raise an innocent explanation – relevant considerations would be:

> 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 … how [he] performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated



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- The Home Office evidence about ETS processes generally, given its failings (see Qadir at [70]: "*In the sporting world a verdict of no contest would have been appropriate*"), did not rebut the innocent explanations put forward

One should bear in mind that judicial review focuses on the material before the decision maker at the time their decision was originally made. So where one has a client who received a decision prior to Gazi and Qadir there will be an issue about how to get the post-decision reasoning of the UT into the proceedings. It may be necessary to write representations inviting the Home Office to reconsider their decision in the light of those cases.

There are also a series of subsequent decisions also involving ETS:

- The critical evidence which satisfies the minimum material which can discharge the evidential burden of proof on the Home Office to show dishonesty is the "ETS look-up tool" linking the person whose honesty is challenged with a declaration of invalidity from the Home Office: see the relevant principles discussed for example in Iqbal [2017] EWHC 79 (Admin)

- In Sood [2015] EWCA Civ 831 the applicant sought to rely on the statement made in correspondence with the Home Office that their application would be put on hold during the investigation of their ETS results and that they were welcome to take an English Language test with an alternative provider – they duly put forward an alternative test result and sought to rely on that in progressing their application. However it was found that this was no more than a representation that the moratorium on considering the application would be lifted if an alternative test result was provided, not that a new test result could be substituted for the one alleged to be dishonest

- The Home Office has produced further expert evidence from one Professor French, which may encourage judges to give greater weight to the likelihood that the reasoning in ETS decision making truly discharges the burden of proof that is on the Secretary of State: however whilst this has been noted by judges on judicial review (see eg Abbas [2017] EWHC 78 (Admin), it has not been evaluated in an authoritative statutory appeal so far

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**Disclosure**

The lawyers representing ETS, Jones Day, decline to made audio recordings available to migrants and their lawyers for forensic analysis, stating that they do not consider that disclosure was appropriate because section 29 of the DPA 1988 justified withholding of the requested information (which relates to "Personal data processed for the prevention or detection of crime" and similar purposes). The Home Office are also known to decline to provide such materials, on the grounds that disclosure to the individual would be likely to prejudice the prevention or detection of crime and/or the apprehension or prosecution of offenders.

Consideration might be given to making such requests and then lodging appeals (to the Information Tribunal and thence on to the Administrative Appeals Chamber) against a refusal to disclose the relevant material. However, given the shredding of the Home Office evidence in Qadir one might take the view that there is no need to seek further information.



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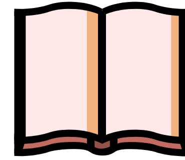

## Example

**Ahmed has leave to remain as a student. ETS inform the Home Office that his results from a test taken four years ago have now been identified as invalid. The Home Office curtail Ahmed's leave.**

**Ahmed now has no leave. As there is no right of appeal or of administrative review in relation to a curtailment decision, his only option is to make a further application or bring judicial review proceedings. Qadir holds that reliance on the bare information provided by ETS (so long as the look-up tool results are provided) suffices to discharge the evidential burden upon them, so he may have a hard task in persuading a judge that the Home Office stance is unreasonable.**

**Casework tip**

*If taking instructions in an ETS case, think about the following lines of enquiry:*

- *the steps the client has taken to obtain advice and assistance to prove their bona fides*
- *the steps they have taken to seek disclosure of the full Home Office case and to put a positive case on their own behalf to the Home Office*
- *the quality of description they can give of the test centre and the processes they went through on the day of the impugned test*
- *their choice of a particular test centre and what is otherwise known of its record and reliability (some centres became notorious because of the exceptionally high rate of dishonesty established during the post-Panorama investigations and some of those involved in their administration were subject to criminal proceedings)*
- *other evidence as to their general good character and conduct, particularly from figures of authority from work or academia*
- *their English language proficiency as shown by other English test results, and via documentary evidence of qualifications taught in English, or professional work conducted*
- *their present degree of English language fluency: bearing in mind that the FTT is not an expert in language analysis and that language skills can improve over time*

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We discuss remedies in general refusal reasons cases generally below. However, some points arise in the particular context of ETS refusals:

- If the client has a right of appeal, they are in a strong position, as the First-tier Tribunal can take account of evidence including post-decision and oral evidence

- Where the only remedy is judicial review, the UT decision of Qadir shows that in general the Home Office will have discharged the evidential burden on them to establish dishonesty by putting forwards the information from ETS regarding their conclusion that the test results have been declared invalid, so



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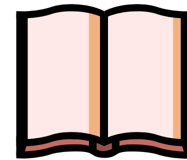
long as that allegation is clearly linked to the evidence put forward by the applicant

- The conduct of the Home Office in judicial review litigation and the quality of their refusal letters has been strongly criticised, see eg Saha [2017] UKUT 17 (IAC)

**Mandatory Refusal for 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. Relatively minor omissions and misunderstandings can be taken very seriously once applications come to be revisited years down the line.



**Example**

**Tamsin is a Venezualan 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 Venezualans and her travel agent had not advised her of the need to secure entry clearance. Tamsin was held at the airport for 6 hours and then removed back to Venezuala. In October 2016 Tamsin sought a visa to enter under the Tier 2 general category, preparing the application herself. She left the bit of the form requiring disclosure of previous removals from the UK blank, honestly believing that she had not been "removed" previously; she thought she had just been denied entry. She is refused entry under R320(7A) on the grounds of non-disclosure.**

**A refusal under R320(7A) carries a right of administrative review providing post-decision evidence. So the decision maker must give consideration to any explanation now provided. It will be very important to ensure that any further explanation is wholly consistent with everything else that was written in the original application form.**

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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 detailed 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.



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## Casework Tip

***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.***

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**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-tier Tribunal found that the Home Office had discharged the burden of proving dishonesty. However the Upper Tribunal disagreed. They made these points:

- The three stage process identified above in applies in these, as in other, general refusal reason cases: ie
    - First the Home Office must point to evidence showing a prima facie possibility of dishonesty
    - Then the applicant must show a plausible explanation for why the application form mishap was in truth down to innocent error/omission rather than deliberate dishonesty
    - Then the Home Office bears the ultimate burden of showing dishonesty: ie in demonstrating that the case put on plausible omission is outweighed by all the evidence in the case pointing to deliberate dishonesty
- Relevant factors include
    - How recent the conviction actually was: it is much harder to persuade a judge that a recent conviction could be forgotten



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- A genuine misunderstanding as to whether a minor matter, such as a traffic offence, had proceeded to the stage of criminal proceedings

## Casework Tip

***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.***

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**Contrived in a Significant Way to Frustrate the Intentions of the Rules**

The phrase, 'previously contrived in a significant way to frustrate the intentions of the Rules' (rule 320(11), is explained in the Entry Clearance Guidance (at RFL07). We might summarise the general idea as

*Breaking the Rules **Plus*** …

To put it another way, something beyond a bare breach of the Rules is required, by way of some **aggravating feature.** The Guidance makes this clear:

> It is not sufficient to have been in breach of immigration law or to be an immigration offender.

Some misbehaviours are expressly identified:

- Overstaying; or
- Breaching a condition attached to his leave; or
- Being an illegal entrant; or



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➢ Using deception (either within the application itself or in order to obtain supporting documents)

In order to reach the magnified threshold required by 320(11), 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: because in that scenario it would not appear that one has "miconduct plus aggravation", but simply "misconduct".

The RFL07 guidance lists examples of the obtaining of services or support to which the person is not entitled which are capable of amounting to an aggravating feature, 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.


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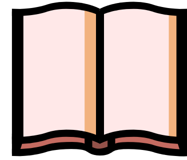

## Examples

**James was present in the UK from 2010 until 2014 as a Tier 4 student. After his original college lost its licence, he was given sixty days within which to find a new Sponsor, but subsequently overstayed that grace period, before making a voluntary departure some time after his leave had expired.**

**James now wishes to return to the UK as a Tier 1 Entrepreneur. He has a very strong application under Part 6A and the Appendices of the Rules for Entrepreneurs, but he is concerned about the impact of this prior period of overstaying.**

**James has certainly overstayed, so has committed an immigration misdemeanour. But query whether there are aggravating circumstances. The circumstances leading to his overstaying are ones of which he appears to have been innocent. There is no suggestion of any additional component of dishonesty, such as failing to comply with removal directions, absconding, or working in breach of conditions. His advisor should take instructions against the Rule and the RFL07 Guidance in order to ensure that no aggravating circumstance is present.**

**The use of 320(11) in family cases**

It is often thought that applicants seeking to return to the UK on family grounds are immune to the consequences of any earlier period of overstaying. This thinking arises from the fact that Rule 320(7B) does not apply to Appendix FM cases: A320 says as much.

However, 320(11) is applied to Appendix FM cases: see A320 itself. So where one has Rule 320(7B) behaviour plus an aggravating circumstance, then the general refusal reason can bite.

In PS India [2010] UKUT 440 (IAC*)* the UT warned that the "contriving to frustrate" refusal ground should be used with great care in Appendix FM cases:

> 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.

## Casework Tip

***ECOs are known to interview 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).***



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> ***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 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.

## General principles relevant in General Refusal Reason Cases

### The duty to investigate where deception is alleged

In Shen [2014] UKUT 236 (IAC*)* the UT looked at an appeal where the First-tier Tribunal had accepted that the Home Office had discharged the burden of proof on them to demonstrate dishonesty, with respect to a failure to disclose criminal convictions. The failure was explained by the Appellant as being down to not having received notification of a traffic conviction despite having notified the police of a change of address, and having made enquiries at her old address as to whether any post relating to the issue had turned up.

The UT found that the FTT had failed to direct itself as to the implications of the burden of proof and the material put forward by the Appellant. The Home Office had made an assertion of dishonesty. She had replied to it. The Home Office had not produced any evidence to undermine her version of events, which was on its face plausible. As they put it, her

> credible and unchallenged [evidence] was more than sufficient to switch the burden of proof back to the SSHD to prove her case on deception and dishonesty

### The interests of fairness

Entry clearance posts and in-country decision makers have the power to invite applicants for interview if there are matters that concern them. Given the fundamental requirement for fairness, it may well be necessary for them to exercise this power in order to give an applicant the chance to understand and refute any suspicions held regarding their case.

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*



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*a favourable result; or after it is taken, with a view to procuring its modification; or both.*

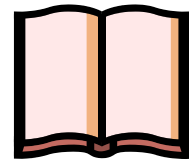
As stated by Wyn Williams J in New London College [2011] EWHC 856 (Admin) §60:

> *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 we can see that

- Whatever the procedure, there is a common law requirement for fairness

- Whatever the processes laid out in the Rules and Guidance, they may have to be supplemented by: ie policy and Rule is a starting point for assessing fairness, not the whole picture



## 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.**

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**Departing from the course of refusal – Human rights; and 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. Indeed, the existence of such a discretion is central to the lawfulness of the "general refusal" regime. As was said in Thebo [2013] EWHC 146 (Admin):

> [A] policy which has the safety net of a residual discretion cannot be described as a policy which binds the decision-maker to refuse to listen provided that the residual discretion is meaningful and not just an empty gesture [so long as the discretion] is not just false air and lives on in a meaningful and active way.



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Beyond that specific exception the UKVI Guidance General grounds for refusal identifies a more general discretion which there is good reason why a general refusal reason should not be implemented. The governing test is whether re there are

> **compelling factors that amount to an exceptional reason**
>
> *or*
>
> **where Human Rights Convention issues, such as private and family life, would make refusal disproportionate**

Where an application would require departure from the Immigration Rules to be granted, then it may well be necessary to show that there is a *compelling* case on private and family life grounds. So the threshold for the two situations may not be very different.

These are two distinct routes, a point made in decisions such as Sehwerert [2015] EWCA Civ 1141:

> It is clear from the wording of paragraph 320(2), however, that the question of exceptional circumstances is distinct from the question whether refusal of entry clearance would be contrary to the ECHR.

**Procedural safeguards in the decision making process**

The UKVI Guidance General grounds for refusal makes it clear that some kind of general refusal decisions should be reviewed by an Entry Clearance Manager.

> 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)

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:

## The Mandatory Bans

Rule 320(7B) has an overarching effect, in that it bites on more than one class of case, and it prevents a person's return to the UK for a significant period. It is not the only "mandatory ban", of course: we have already seen various periods of exile that will normally be enforced in entry clearance cases. It applies where an adult migrant has previously breached the UK's immigration laws in the following ways:

- Overstaying; or
- Breaching a condition attached to his leave; or
- Being an illegal entrant; or
- Using deception (either within the application itself or in order to obtain supporting documents) (past deception is to be evidenced by an electronic


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copy of an earlier decision which concluded that dishonesty took place, which was not overturned on appeal: absent a copy of a successful appeal determination, then the benefit of the doubt has to be afforded to the applicant: guidance RFL05)

There are then a series of periods of ban (and one let-off for speedy departees), which are expressed by reference to a period of time since the misdemeanour occurred. Should there be multiple provisions potentially applicable, the one giving rise to the longest ban will operate.

For dishonesty and expulsion cases:

- Deception took place more than 10 years ago
- 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: this scheme was introduced from April 2013, whereby a person admitting a criminal offence agrees to comply with the conditions imposed which normally includes leaving the country within 16 weeks

For overstaying:

- No ban where overstaying was followed by voluntary departure at the migrant's own expense
    - If overstaying began before 6 April 2017, less than 90 days
    - For overstaying beginning on or after 6 April 2017, less than 30 days followed by voluntary departure at the migrant's own expense
- Some periods of overstaying will be disregarded (320(7BB))
    - up to 28 days prior to 24 November 2016 where an application was made and under consideration or under appeal/administrative review
    - after 24 November 2016, where Rule 39E applies: ie up to 14 days are tolerated, sometimes requiring the consent of the Secretary of State
    - any period in relation to a decision that was subsequently withdrawn, or quashed, or reconsidered due to court/Tribunal order, unless the challenge leading to that result was brought more than 3 months after the date of that decision

For breaching conditions and illegal entry, where:

- A voluntary departure was made more than 2 years ago
- A voluntary departure was made at direct or indirect public expense, more than two years ago, so long as departure was no more than six months after receiving notice of a refusal decision or of exhausting appeal rights against one



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- 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)

**When do re-entry bans not apply?**

Re-entry bans do not apply to applications in these circumstances:

- Family migration under Appendix FM (A320) or the Appendix for Armed Forces (Immigration Rule B320)
- Returns made via EEA family permit applications asserting EEA free movement rights
- Where the applicant was a minor when the misdemeanour occurred (320(7B))
- Where the applicant has been accepted by UKVI as a victim of trafficking (RFL5.4)
- Where the applicant was in the UK illegally on or after 17 March 2008 and left the UK voluntarily (ie without being removed) before 1 October 2008 (RFL5.4)
- Where the applicant was not aware that the documents they submitted or the representations made with previous applications were false
- Where UKVI has condoned the breach by issuing a visa in the past despite a re-entry ban being in place

But beware – an applicant who dodges the mandatory ban might still be caught by the discretionary ability to refuse under 320(11) if they are thought to have "previously contrived in a significant way to frustrate the intentions of the Rules".

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**Remedies in relation to the General Refusal Reasons**

**Introduction to remedies**

As in most immigration scenarios, there are several remedies potentially available in a general refusal case. 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 the remedy cannot succeed beyond that limited goal, because of some fundamental flaw with the substance of the application, general refusal reasons aside.

These may be:

- Best of all, a right of appeal: though this will arise only
  - if there is the refusal of a human rights claim that is not certified
  - where there is an old style appeal under the "saved provisions" of NIAA 2002: these are increasingly rare as the last cut-off date for entering the system was 6 April 2015. These days these are likely to arise where an application was made on non-human rights grounds before that date but refused after it, or down to very slow decision making
- A right of administrative review – generally available where there is no right of appeal, although subject to the fact that curtailment decisions do not bring a right of administrative review
- The opportunity to apply for judicial review – restricted to evidence that was before the decision maker in most cases
- The possibility of making a further application – which shifts the date of decision forwards allowing for the admission of the further evidence which supported the latest application to support the client's case

HJT offers courses on appeals, administrative and judicial review, and what follows is intended to be a summary of the relevant principles in so far as they apply particularly to General Refusal cases, rather than being an exhaustive guide to relevant considerations.

The President explains, in a case called Muhandiramge (section S-LTR.1.7) [2015] UKUT 675 (IAC), that decisions in general refusal reason cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote more of his evocative words directly:

> (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

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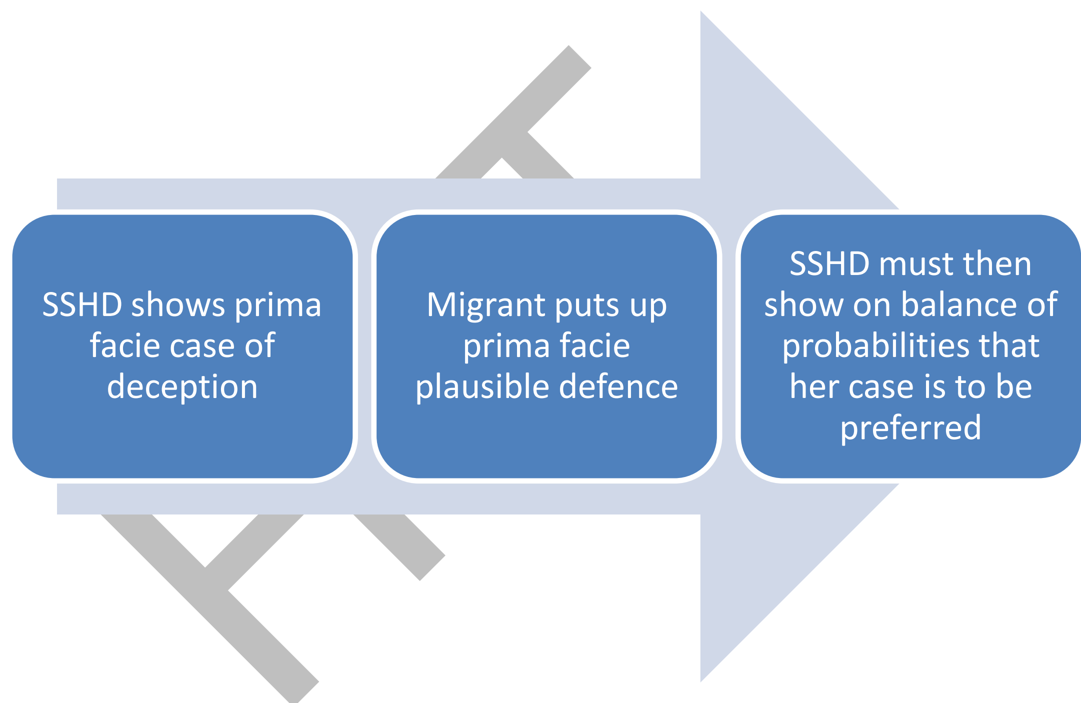
explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
A veritable burden of proof boomerang!

Although he was writing in the context of statutory appeals, the approach he lays down is equally apposite for any challenge to an original Home Office decision. When assessing the cogency of the Home Office case, there is a need to identify evidence of "*sufficient strength and quality*" and having appropriate regard to the "*inherent probabilities*" of the case at hand (see generally Giri [2015] EWCA Civ 784 at [36]-[38]).

Here are the three stages pictorially:




**Appeals**

The importance of an appeal is that the substance of the Home Office allegation can be freely contested, with the Tribunal being able to make findings on all relevant issues for themselves. Appeals allow the factual contention behind the general refusal reason to be challenged. For example, Appellants who have had human rights applications refused on ETS fraud grounds can run their cases on the same basis as the appellants in Qadir, putting forward evidence that supports their case and offering themselves for cross examination.

There is no doubt that many FTT judges have been unreceptive to the Home Office approach in ETS cases, often finding at the single-line printout titled "ETS Search" recording that a candidate with a client's name and birth date took the test on a particular date and had their test results subsequently declared "invalid" represents precious little evidence given that the ultimate burden of proof is on the Home Office,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and that many individuals whose ETS results have been challenged can produce cogent evidence of good character and English language proficiency.

### Appeals under the "saved provisions" of the NIAA 2002

Various points arise under the very best kind of appeal, ie the "old style" one relating to decisions made before the new-style human rights appeals entered force. The general refusal reasons often featured in these appeals, but they are a dying breed. But where you have a case with a significant history, particularly where an earlier decision has been identified on appeal as "not in accordance with the law", it is worth checking: because if the most recent decision responds to an application *not on human rights grounds*, pre-dating 6 April 2015, then there will remain an old-style right of appeal.

- 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 decision letter raises issues that touch on the general refusal reasons without expressly citing them, the judge may consider them, subject to fairness (MO 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

- 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 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 Bangladesh [2008] UKAIT 00008).

### New Style Appeals under the "relevant provisions" of the NIAA 2002

Where the application included a human rights claim, hopefully the Home Office will have recognised a right of appeal. If they fail to do so notwithstanding that their decision appears to be the refusal of such a claim, then the right of appeal will follow – unless the Home Office certify the claim as "clearly unfounded", which they are likely to do in many cases as their own guidance discourages recognising an appealable claim based on private life interests.

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.

Of course, new style appeals can only be brought on human rights or asylum grounds



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- Where there is cogent evidence available to rebut the Home Office's *prima facie* allegation of dishonesty, FTT judges may find that the Respondent had not justified her conclusion (applying the three stage test set out above)

- The Judge is not focussed on the Rules so much as upon Human Rights Convention issues. Nevertheless, 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, having regard to the general principle in human rights appeals that the positions struck by Rules with the endorsement of Parliament carry special weight in the balancing exercise

- So if the only ground of refusal is based on ETS reasoning, then the argument will be need to be voiced with reference to Article 8 ECHR: ie one must argue that family and/or private life is established in the UK with which the decision represents a significant interference, and that removal would be disproportionate. The fact that a person's residence was *precarious* rather than settled may count heavily against them, and they have to show a *compelling* case outside the Rules. A bare ETS refusal might well be found disproportionate if all other aspects of the Rules are satisfied. However the real battle may be in showing that private life is established where the individual is present in a short-term migration route and has limited personal connections in this country

- When you appear in the FTT it is important to encourage a judge to make findings of the appropriate detail, bearing in mind that the Home Office has in fact provided *some* evidence that requires reasoned engagement. They should not simply find the Home Office have not done enough to raise a general refusal reason case whatsoever without making findings on the cogency of the appellant's evidence. You can see the principle being recognised in Qadir.

It is uncertain what would happen where the judge (a) dismisses the appeal because there is not a disproportionate interference with private life shown by the immigration decision yet (b) along the way finds that the Home Office have not established dishonesty. This would seem to leave the matter outstanding before the Home Office could lawfully remove a person whose presence here is now shown still to be consistent with the immigration rules and that the refusal of leave was wrong: but would they demand a further fee-paid application for leave to be reinstated?

### Administrative Review

Absent a human rights claim, there will be no right of appeal. The obvious remedy will be administrative review, which is available in relation to refusals invoking some of the general refusal reasons – though you will need to read Rule AR2.11 with some care to check whether your precise situation is catered for, as not every general refusal reason brings a right of administrative review.

Any general refusal is apparently amenable to review under the all-encompassing definition at AR2.11(c):

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> 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. It must be arguable that the considerations identified in Qadir (which include a need for case-specific assessment of the evidence) strongly suggest that the Rules have not been correctly provided where there has been automatic reliance on ETS information without considering the facts of the case individually.

If an administrative review decision adds a new refusal reason, there there is a further right of administrative review: see Rule 34N(2) read with Appendix AR para AR.2.2(d).

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.

If the refusal reason in question does not carry a right of administrative review, then the remedy will be judicial review, with the considerations set out below.

**Judicial review**

Judicial review will be available in various scenarios:

- Where there is no human rights or asylum refusal, and Administrative Review has failed
- Where the refusal in question did not carry the right of administrative review: eg because it involves visitors or curtailment of leave

**Old style judicial review applications of curtailment/cancellation of leave**

Those who received immigration decisions by way of cancellation or curtailment of their leave because a general refusal reason issue came to light would not enjoy the right of in-country appeal if removal directions are made against them before their classes of case entered the new system. This represents a diminishing class of case largely involving those who received a stay on removal for one reason or another, before April 2015. Normally it is possible to seek an injunction against removal during judicial review proceedings (arguing that for removal to proceed will cause serious damage to the applicant's interests, possibly rendering their whole challenge meaningless).

This situation has arisen most commonly vis-á-vis individuals accused of breaching the conditions of their leave (eg students working excess hours), or in false representations cases (eg ETS allegations).


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Following Lim [2007] EWCA Civ 733, in Mehmood [2015] EWCA Civ 744 and Sood [2015] EWCA Civ 831 the Court of Appeal joins with the President in Gazi in finding that the alternative remedy of out-of-country appeal is sufficiently effective, and represents the will of Parliament as to the appropriate remedy, so as to justify refusal of judicial review.

This would mean that they would

- lack the right of appeal, because they would normally receive removal directions under section 10 of the Immigration and Asylum Act 1999, a decision that would only carry an "out-of-country" appeal unless a human rights claim had been made pre-decision – presumably it will be very rare for any human rights claim to predate a decision which reacts to the discovery of information by the Home Office rather than being made in response to a client's application

- lack the right of "in-country" judicial review, because the case law has so far been strict on enforcing the thinking that it would be wrong to undermine Parliament's intention to permit only out-of-country appeal as a remedy

However if a person is challenging their *present detention* on the grounds that the decision making is unlawful then there might be a right of "in-country" judicial review whilst they remained without liberty: Sood at [39]-[40].

In ETS cases, it is certainly worth writing representations inviting the Home Office to reconsider their decision in the light of Gazi and Qadir as those must represent relevant considerations which the decision maker should take into account before proceeding with a removal.

In Qadir at [104] the President states:

> We are conscious that some future appeals may be of the "out of country" species. It is our understanding that neither the FtT nor this tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination.

His warning doubtless has all the greater force these days, now that we have had judgment from the Supreme Court in Kiarie and Byndloss [2017] UKSC 42. The Judges concentrate on the question of the effectiveness of the right of appeal. They make a number of important points, about how difficult it may be to give evidence as to a person's character. They are discussing the complex issue of reform and rehabilitation, particularly where expert evidence may need to be gathered, but their reasoning may carry over to questions of dishonesty in general refusal reason cases.

So it may be that automatic removal is no longer appropriate for those individuals whose leave was curtailed or cancelled on ETS grounds in the old era and who have somehow managed to remain here: they can make representations that the kind of case they need to put forward precludes the effectiveness of an out-of-country appeal.

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The many migrants who were required to leave the country pursuant to non-appealable removal directions will need to consider their position as to whether or not they pursue some action to secure their return to the United Kingdom. They may consider pursuing ETS for defamation though there is (normally) a relatively short twelve months time limit for such actions.

**New style administrative and judicial review of curtailment of leave**

Where the client has received a "modern" decision curtailing leave (ie one made under the "relevant provisions" of the NIAA 2002, ie, in general, one post-dating 6 April 2015), you might think the remedy would be straightforward. However, whereas decisions to cancel leave, and to refuse applications on "false representations" grounds, are subject to administrative review, curtailment decisions do not do so.

If the refusal reason in question does not carry a right of administrative review, then the remedy will be judicial review.

- In these cases, the argument about judicial review not being appropriate from within the United Kingdom (because it undermines the Parliamentary intention to afford only an appeal from abroad) is not present – because there will be no out-of-country appeal available whose purpose is undermined by "in-country" judicial review. So the line of authority set out above running from Lim through to Sood etc does not apply

- If the decision challenged involves a decision to remove the client under section 10 of the Immigration and Asylum Act 1999, there is authority indicating that this is a challenge on what is often called "precedent fact" grounds: see Giri [2015] EWCA Civ 784 (you can read an example of this principle being applied in Iqbal [2017] EWHC 79 (Admin). This means that the Judge on judicial review has to decide whether the facts which the relevant statutory provision requires to operate are established: so it has to assess the evidence for itself, contrary to the general position in judicial review proceedings, when the court simply assesses whether the government decision maker acted reasonably having regard to all relevant considerations and without making any legal error



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