

## **APPLYING FOR LEAVE TO REMAIN: VALIDITY AND TIMING**

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Applying for leave to remain is becoming an ever scarier process. The Home Office continues to invent new ways of rejecting, voiding and invalidating applications, such that the process of getting a substantive decision has become a minefield. And with the government's 'increasingly hostile environment' now in full play, innocent mistakes by advisors can pitch their client headlong into disaster.

In this vital new course, we will look at issues concerning the validity and timing of applications and further applications, including recent changes to section 3C leave, the new paragraph 39E, variation of applications, and how all this weaves together with administrative reviews and appeals. We will show you how to get through the minefield intact, ensuring your applications are never again rejected, voided or invalidated, and provide you with a full set of tools to protect your client's leave when applying to extend.

## **Automatic extension of leave (also known as 'continuing leave' or '3C leave')**

The Home Office takes several weeks or months (or even years in some cases) to decide an application for an extension of stay. For a person who has made an in-time application (ie before their leave ran out), this delay will usually result in the person's leave expiring while the application is awaiting an initial decision.

Section 3C of the Immigration Act 1971 was enacted to deal with this problem. It creates the concept of 'continuing leave', that is leave which continues to run even when the person's leave that was granted to them has run out. The person's leave just continues, through the operation of the law, even though it will appear (from any glance at the leave document or BRP) to have expired

Section 3C serves to extend a person's leave throughout the three separate stages of the application process:

- firstly, where the person's leave runs out whilst the HO are deciding the application, section 3C automatically extends that leave until the application is either decided or withdrawn
- secondly, if the application is refused, section 3C further extends that leave by the period allowed to lodge an in-country appeal or an application for Administrative Review.
  - An application for Administrative Review must be lodged within 14 days of the person receiving the HO's decision to refuse the application (r34(1)(a)).
  - An appeal must be lodged within 14 days of the HO decision being sent to the applicant (Rule 19, The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014)
- lastly, where the appeal or Administrative Review has been lodged in-time, 3C continuing leave continues whilst the appeal or Administrative Review remains pending.

Section 3C also extends the conditions attached to the previous grant of leave, so that a person who could previously work or study or claim benefits can continue to do so.

Where an out of time appeal or Administrative Review is lodged, 3C leave will not be resurrected if an extension of time is granted by the Tribunal or Home Office. This reflects a recent change in Home Office policy on 3C leave (as now provided in the current Home Office guidance: [3C and 3D leave](#) in the Modernised Guidance).

## Situations where 3C does not apply

It is important to understand how 3C works, and how it doesn't:

- Section 3C does not kick in at any stage if the person's leave as granted to them expires *after* they have received a decision from the HO to refuse their application: that is, if they still have leave at the date the decision is made

In that case, they will not benefit from 3C leave at any stage. They will become an overstayer as soon as the leave that was granted to them runs out, and will remain an overstayer unless and until they are granted further leave or depart from the UK. The fact that they have lodged an in-time appeal or Administrative review against the decision will not change the fact that they will become an overstayer when their leave runs out.

They will not benefit from section 3C because their leave ran out *after* rather than *before* they received the refusal decision. Their crime was to make the application too early. They could well be caught out even if making an application at a Premium Service Centre (PSC) on the last day of their leave, because if they are refused on the spot, they will still have leave until midnight of that day, and arguably will not then benefit from 3C leave whilst they challenge the decision. Consequently, the risk of refusal before the person's leave runs out will be a good reason not to apply in person at the PSC.

The Home Office suggests that if a person caught by this anomaly wants the protection of section 3C, they can make (yet) another application shortly before their leave expires, so that they will have 3C leave to cover them for the appeal or AR application that will already be pending.

To avoid this problem, a person who wants to extend or vary their stay should wait until their leave has almost expired before applying to extend or vary that leave, and should do so by post, to ensure that their leave has run out by the date of decision. If the application is then refused, they will benefit from continuing leave whilst they challenge the decision.

- As there is no longer a right of appeal against curtailment, a person whose leave is cancelled or curtailed by the HO does not benefit from continuing leave. They will become an overstayer immediately on their leave being cancelled or curtailed. Consequently, section 3D of the Immigration Act 1971, which worked in a similar way to section 3C leave for those whose leave was curtailed, was deleted by the Immigration Act 2016.
- Section 3C does not apply to applications for judicial review (unless the court is persuaded to suspend the effect of the decision pending the judicial review being resolved). So, a client thinking about judicial review needs to understand that if it fails, any further application under the Rules may be ruled out because of lengthy overstaying; and that they if further leave is ultimately granted, they may have lost their continuous leave (a requirement for indefinite leave applications), resetting the settlement clock to zero.

## Confirming 3C leave

An adviser may have to help their client persuade an employer, landlord, bank or the DVLA that they are lawfully in the UK with continuing leave under section 3C leave and, consequently, that their job, home, bank account, and car should not be taken away from them. It will be easy for those with section 3C leave to fall foul of the hostile environment for illegal migrants whilst they remain wholly lawfully resident in the UK. Employers and landlords are now very nervous at the sanctions and penalties that can be levied against them if they get it wrong. Whilst they have access to HO guidance, which explains 3C leave to them and the circumstances in which they

can rely on 3C leave to avoid sanctions, they may not understand it or may simply not bother with it when dismissal or eviction appears the easier and safer option.



## Top Tip

Remind the reluctant employer that the Home Office's 'An employer's guide to right to work checks' states, at page 21, that:

*"If, on the date on which permission (as set out in the document checked) expires, you are reasonably satisfied that your employee has either:*

- *submitted an in-time application to us to extend or vary their permission to be in the UK; or*
- *made an appeal or an administrative review against a decision on that application;*

*your statutory excuse will continue from the expiry date of your employee's permission for a further period of up to 28 days to enable you to obtain a positive verification from the Employer Checking Service".*

Unfortunately, problems can arise even where the employer or landlord does ring the HO 'hotline' - the checking services for employers and landlords. The information available to HO staff on the hotline is often out of date or inaccurate. It may be the application, though made in time, has not yet been logged on the HO computer system, or has been logged, but in a name other than your client (ie where they are a dependant on someone else's application). Evidence that the application did reach the HO will be useful in these circumstances. The adviser must remain calm so as not to antagonise those they are negotiating with. Hopefully, the employer can be persuaded to contact the HO again to clarify things with any new information you are able to provide them.

One way of opening a channel of communication to the HO in these cases is for the person to contact their local MP's office.

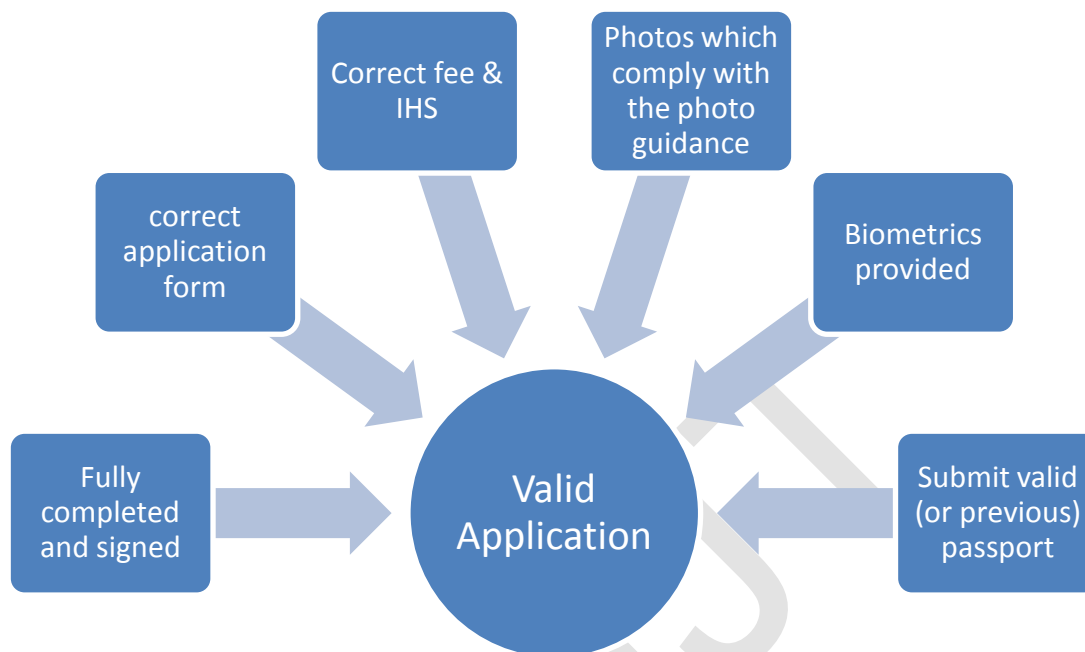
Where all else fails in such cases, the employer should be reminded that an action could be brought for wrongful dismissal or discrimination if your client is sacked for reason of their immigration status when they have provided the employer with sufficient evidence to show that they are in the UK lawfully and entitled to work.

## Making a *Valid* Application

Applications for leave to remain are made from within the UK by post or courier or, for some types of applications, by appointment at the UKVI's premium service centre, or on-line.

It is particularly important that an application is 'valid'. If the application is not valid, the HO will not decide it. They will return it to the applicant with a 'Notice of Invalidity' and treat it as if it had never been made.

A 'valid application' is defined in paragraph 6 of the rules as an application made in accordance with the requirements of Part 1 of the rules. There are several elements to making a valid application:



As discussed below, if an application does not comply with the required formalities, even down to wrongly sized photographs, there may be very serious consequences for the applicant.

The provisions as to validity for **in-country** applications can be found at Immigration Rules 34 to 34E. These were amended for applications made from 24 November 2016 ([HC667](#)), and amended again from 6 April 2017 ([HC 1078](#)). This section refers to the Rules as they are from that date. HC667 removed the separate requirements for postal and in-person applications.

HO policy and guidance on these provisions is in Applications section of the Modernised Guidance, and is currently '[Specified application forms and procedures](#)' (version 18: 18 March 2016, hereafter referred to as the 'Applications Guidance').

The mandatory requirements are:

- **Use of the specified form**, and the most up to date version of it (see list of forms below). The forms state on their front page the purposes for which they can be used, and the date of issue

Always download the forms directly from the UKVI website, and check that they are the correct form for the specific application being made. Check also that it is still the most up to date version of the form before finalising and submitting the application. Note though that rule 34(1)(c) allows for an old version of a form to be used for up to 21 days after a new version goes on-line. Note also that the Applications Guidance states that;

If the application was received more than three months ago and does not meet the specified form requirements, you must use discretion and accept it as valid. This is because the applicant may be unfairly disadvantaged if you reject their application after this length of time

The implications of making an application on the wrong form may sometimes be mitigated by the judgment in *JH (Zimbabwe) v SSHD [2009] EWCA Civ 78*. The Court of Appeal held that an application made on the wrong form (e.g. on a SET form rather than an FLR form) may in fact be a valid immigration application, even though it was hopeless on its merits, so long as, for example, a SET form was used for an application for indefinite leave to remain

- **The payment of a specified fee.** Ensure, if the payment page is used, that the account remains in funds until the fee is collected. A full list of fees can be found at: <https://www.gov.uk/government/publications/visa-regulations-revised-table>
- **The payment of the Immigration Health Surcharge**, where applicable, in accordance with the process set out on the GOV.UK website (<https://www.gov.uk/healthcare-immigration-application/pay>)
- **Parental consent:** where the main applicant is under the age of eighteen, their parent or legal guardian must provide written consent to the application
- **Two photographs** as described in the photo guidance. Ensure you keep a photocopy of the photos, paper clipped to the form, so you will be able to prove they have been sent with the application if the Home Office alleges they have not
- **Completion** of all the 'mandatory' sections of the form
- **Compliance with biometric requirements**, i.e. attending the Home Office or a post office for face and fingerprint scans within a specified timeframe
- **Biometric information** must be provided in accordance with the process set out in the biometric enrolment letter and any subsequent warning letter issued in accordance with the Code of Practice about the sanctions for non-compliance with the biometric registration regulations.
- **Attendance at a premium service centre:** where the application is made on-line, and the person must attend a premium service centre as part of the process, they must do so within 45 business<sup>1</sup> days of it being made (rule 34(9)(ii))
- **An original, valid passport**, travel document or (unless the applicant is a Points Based System Migrant) national ID card issued to the applicant and to any dependant included in the application must be provided (rule 34(5)). The rule also allows the person to provide their most recent passport or national ID card if they do not have a current one. There are some exceptions, including (rule 34(5)(c)):
  - those whose document is with the Home Office
  - where it has been permanently lost or stolen and there is no functioning national government to issue a replacement
  - where it has been retained by an employer or other person, where the applicant is a victim of trafficking

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<sup>1</sup> 'business' inserted for applications made from 6 April 2017 (HC 1078)

- the applicant has made an application under the domestic violence rules (or under the destitute domestic violence (DDV) concession)
- or as a stateless person or their family member or by a person in the UK with refugee leave or humanitarian protection
- or the applicant provides a good reason beyond their control why they cannot provide proof of their identity

Home Office guidance on validity, in the Modernised Guidance: [Specified application forms and procedures](#), suggests:

**Reasons beyond the applicant or any dependant's control may include:**

- if there is no longer a functioning national authority to approach and provide a new document, or because there is no Embassy or consular service in the UK
- if there is a national authority to apply for a document but they have run out of documents, or they have made their application for a replacement document but the issuing authority cannot provide a document in time for the applicant to make their valid application before their leave expires
- if the applicant cannot obtain a document for reasons of national or personal security
- if the national authority is unreasonable and refuses to provide a document, for example:
- if the national authority will only provide a passport if they apply in person but there is no provision to apply in person in the UK
- if the national authority puts unreasonable barriers in place based on unsubstantiated claims

Where an exception applies, the Home Office may ask the applicant to provide alternative satisfactory evidence of their identity and nationality; which can include, but is not limited to, a full birth certificate, driving licence, national health card or national service document (r34(6) and Applications Guidance).

## Opportunity to correct an invalid application

Very importantly, where a person makes an invalid application, ie that does not comply with para 34, the Home Office *should* contact them before rejecting it as invalid, to give them an opportunity to correct the error or omission (Rule 34B). An applicant will have 10 business days to correct the application from the date on which the notification was sent. They only get one chance to do so, so if they miss that opportunity the application will be invalid, and the applicant will receive a Notice of Invalidity.

Although the rule states only that the HO *may* contact the applicant to give them this opportunity, the Application Guidance says they *must* do so. This is a mandatory requirement and the only alternative the HO has in these circumstances, if they do not give the applicant an opportunity to correct the error, is to treat the application as valid despite the error. It is very important to study that guidance closely, because it sets out the appropriate procedure for the decision maker to follow depending on the type of flaw in the application, and a failure to follow the correct procedure may also lead to an unlawful decision being made.

If the HO decide that the application is invalid, and reject it *without having given the person the opportunity to correct it* in accordance with r.39B, that decision may itself be unlawful for failure to apply the rules. Where the person has become an overstayer as a result, they will need to challenge the HO decision on invalidity. They will need to do so, firstly, because they have become an overstayer. As such, they will be subject to all the prohibitions of the *hostile environment*, including losing their employment (upon which they may have been relying for the application). And secondly, because they may not be able to make a further application in these circumstances. As explained below, making an application as an overstayer is governed (in most categories of the rules) by the requirements of paragraph 39E (for applications made on or after 24 November 2016) which limits overstaying to 14 days. If a person who has become an

overstayer because the application they made was rejected as invalid, it is unlikely that any fresh application will meet the requirements of para 39E. As the HO notes in their [Applications from overstayers \(non family routes\) Guidance](#) (in the Modernised Guidance), they will have become an overstayer from the date their leave expired and not from the date the application was rejected as invalid. By the time they have been informed the application is invalid, they may well have overstayed more than the 14 day maximum period. They may then have no option but to leave the UK. Note that in these circumstances a person who overstays more than 90 days (reduced to 30 days from 6 April 2017) before leaving the UK may face a re-entry ban when seeking to return.

## How to challenge decisions on invalidity

The Home Office sometimes make mistakes in assessing the validity of applications, and valid applications can be wrongly rejected as being invalid. This can be, for example, where the UKVI loses photos or passports from an application, and then accuses the applicant of not having provided them in the first place. It can also happen where the UKVI state that they have not been able to collect the fee from the applicant's bank.

In the reported decision of [Basnet](#) (*validity of application - respondent*) *Nepal* [2012] UKUT 113 (IAC), the Upper Tribunal (IAC) held that the burden of proof on showing that an application is invalid lies on the Home Office if, as in this case, the HO claim that the applicant's bank had refused to forward them the fee.

As stated above, the Home Office also sometimes fail to give applicants an opportunity to correct an error. This routinely happens, for instance, where an application for a fee waiver (see below) is rejected, and the HO declare the application for leave to be invalid for want of a fee, giving the applicant no opportunity to pay the fee.

The question as to whether the application was invalid can be critical to the person's immigration situation. If the application was not in fact invalid but was declared so, or if the HO did not give the applicant an opportunity to correct the application, then the applicant should challenge the HO rather than simply make a new application. As explained above, making a new application in these circumstances may be impossible. Even if the applicant can make a new application, they may be significantly prejudiced by doing so as they will remain an overstayer unless and until they are granted more leave.

Because of the urgency of the situation, and the implications of the hostile environment, the HO need to be informed immediately of their mistake. That can be done by a letter of representations, but the HO do not always respond to letter unless submitted under the *pre-action protocol* for judicial reviews. So prepare the letter as a PAP letter. Send a copy to the decision maker, but also to the dedicated email address for PAP letters. Ultimately, as there is no right of appeal or Administrative Review against the rejection of an application due to invalidity, the remedy will be judicial review.

Caseworkers in the applicant's MPs office may be willing to use their hotline to the UKVI to help in these cases. An advisor might want to prepare a letter for the client to take to their MP explaining, clearly, the mistake the HO has made. Whilst sometimes happy to ignore letters from applicants and their advisers, the HO cannot ignore representations from MPs and their caseworkers.

A person whose extension application has been properly rejected as invalid, but who on the date they receive the Notice of Invalidity has not overstayed more than 14 days, will be able to make a further application within that period if they can show *good reasons beyond their and their adviser's control, provided in or with the application, why the application could not be made in-time* (see section on para 39E(1) of the Rules, below). Note though (as referred to above), the date from which they are judged to have become an overstayer will be the day their previous grant of leave expired, not the date the application was rejected as invalid. The Supreme Court

decided in *Mirza v Secretary of State for the Home Department* [2016] UKSC 63, that an invalid application does not extend leave under section 3C of the Immigration Act 1971.

## Timing of application

For a person with current leave who wishes to extend their stay in the UK, the date of making that extension application is critical. For applications made from 24 November 2016, the Rules (but for some exceptions such as family applications under Appendix FM) require that the applicant is lawfully in the UK at the date of application. That means they must not have overstayed that leave. Otherwise, if they apply as an overstayer, their application will be refused.

The HO suggests a person applying for an extension of stay makes the application no more than 28 days *before* their current leave expires. Although there is no prohibition on applying at any time during the person's leave, a person applying too early may not meet all the requirements of the category (e.g. as to length of cohabitation with an unmarried partner, or length of necessary residence under that category). A person who applies too early may also lose out on the benefit of continuing leave (see section on 3C leave, above).

The rules tell us when the application is treated as having been made (r34G):

- a postal application for an extension of stay is treated as having been made on the date of posting (rule 34G(i)). It is vital therefore to send application by recorded delivery and to keep evidence of the date of posting in case of later dispute. The HO will take the date of posting as the date as shown on the tracking information provided by Royal Mail or, if not tracked, by the postmark date on the envelope (so an application will not be made merely by putting it in a post box)
- Where made in person at the Public Service Centre, the application will be treated as being made on the day of the attendance. In either case, if made by no later than the last day of a person's leave it will be an 'in-time' application

## Applying as an overstayer – the new paragraph 39E

Whilst an applicant must normally apply for an extension of stay whilst their leave remains current, paragraph 39E provides for two limited exceptions to this rule. Under the first exception, an application made no later than 14 days after the person's leave has expired will be accepted and decided by the HO if the decision maker is satisfied that there was a *good reason beyond the control of the applicant or their representative*, provided in or with the application, why the application could not have been made in-time (r39E(1)).

What is a *good reason beyond the control of the applicant or their representative*? Some examples are provided in the HO guidance, [Applications from overstayers \(non family routes\) Guidance](#) (in the Modernised Guidance). These are:

- the applicant was admitted to hospital for emergency treatment (evidenced by an official letter verifying the dates of admission and discharge and the nature of the treatment)
- a close family bereavement
- an educational institution was not sufficiently prompt in issuing a Confirmation of Acceptance for Studies

When considering the reason given, the HO decision maker must give thought to:

- the plausibility of the reasons
- whether the reason was genuinely outside the applicant's control or whether the applicant is describing difficulties that could realistically have been surmounted
- the credibility of evidence provided

Under the second exception, at para 39E(2), where an application for an extension (which was made in-time or accepted under the provisions of rule 39E(1)) has been refused, a further extension application can be made within a 14-day period (without the requirement to show good reason for the delay).

That 14-day period under para 39E(2) will begin on the day immediately following *one* of the events below:

- the refusal of a previous application, or
- the expiry of a period of 3C leave, or
- following the time limit for submitting an administrative review or appeal, or
- the conclusion of an administrative review or appeal

The question as to which one of the above events is relevant in any particular case is a complex one, but necessary in order to work out when the 14-day window for making a further application begins. To do so, it you will need to understand how 3C leave operates in the context of appeals and Administrative Review procedures. It is also important to understand that following a refusal of an extension application, a person cannot make a further application for an extension whilst they still have leave which continues by reason of section 3C, IA 1971. They *must* become an overstayer in order to make the application.

## SOME WORKED EXAMPLES:

### The refusal of a previous application made in time:

#### **Example 1: eligible decision**

The applicant makes an initial in-time application to extend their stay. Their leave runs out whilst waiting for a decision, so they then have continuing leave under section 3C from the date their leave runs out until the date of decision (the first stage of their 3C leave). The application is refused. The refusal is an 'eligible' decision and therefore comes with a right of Administrative Review. The person's section 3C leave is automatically extended (under the second stage of 3C leave) for a further 14-day period from the date they received the decision to allow them to lodge an application for AR.

The person has several options now. To maintain their 3C leave, they will need to lodge the AR application within the 14-day period. The third stage of 3C leave will then cover them until they get a decision from the AR. If the AR is refused, their 3C leave will end on the day after they get the decision. They will then have 14 days from the date of receiving the AR refusal to lodge a new application relying on para 39E(2).

Alternatively, if the person does not want to apply for an AR, they can make a further application in reliance on para 39E(2) during the 28-day period following receipt of the refusal. The 28-day period will be made up of the 14-day period by which their leave will be automatically extended under section 3C, and the additional 14-day period of overstaying allowed for under para 39E(2).

This is confusing! It is important to understand in this example that a person can only make a fresh application during the 14-day period in which they have their second stage of 3C leave because the Rules governing the AR process operate to bring that 3C leave to an end automatically on the lodging of a new application for leave. That provision is at Appendix AR2.10(b). The person's 3C leave will be treated as having ended on the day before the new application is lodged. Alternatively, the person can wait 14 days from the date of decision, after which the second stage will have run out automatically, and the person will then have the further 14-day window to apply as an overstayer.

Note though that there is no similar provision relating to appealable decisions, so it is not possible to make a further application for leave during that second stage of 3C leave (ie during the 14-day period they have to lodge an appeal). If the person tries to do so, it will be a 'void' application and will be rejected (see example 2, below).

### **Example 2: appealable decision**

The applicant makes an initial in-time application to extend their stay. Their leave runs out whilst waiting for a decision, so they then have continuing leave under section 3C from the date their leave runs out until the date of decision. The application is refused. The refusal is an 'appealable' decision and therefore comes with a right of appeal. The person's section 3C leave is automatically extended for a further 14-day period from the date the decision was sent to them to allow them to lodge an appeal with the First-tier Tribunal (IAC).

The person *cannot* make an application during this second stage of 3C leave. To maintain their 3C leave, they will need to lodge an in-time appeal and pursue that appeal to its conclusion. If they want to make a further application instead of appealing, they will need to wait until their 3C leave runs out, 14-days after being sent the decision. They will then have the 14-day period of overstaying in which to lodge the new application relying on para 39E(2).

If the person does lodge an appeal and then decides to make a further application before the conclusion of the appeal, they will need to withdraw the appeal. They will then become an overstayer from the day after the appeal is withdrawn, and can then make a fresh application relying on the 14-day window of overstaying provided under para 39E(2). Alternatively, if the appeal is refused and they decide not to challenge that decision by making an application to the FTT(IAC) for permission to appeal to the Upper Tribunal (IAC), they will need to wait for the 14-day period in which their 3C leave continues following the refusal of the appeal, and then will have a further 14 days (following that initial 14-day period) to make their fresh application.

## The refusal of a previous application made out of time:

### **Example 3: eligible or appealable decision**

The applicant makes an initial application to extend their stay, but makes it late. The application was made within 14 days of the person's leave expiring, and the HO accepted that the delay was for good reason beyond the control of the applicant or adviser, so that para 39E(1) applied to that application. The application is refused for other reasons. The person can make a fresh application within 14 days of receiving the refusal (relying on para 39E(2)) whether the decision is eligible or appealable as they will not at any point have 3C leave. If they choose instead to apply for AR or appeal that decision, and those challenges are ultimately unsuccessful, they will have 14 days from the date that the appeal or AR was no longer pending in order to make a fresh application.

But the applicant may in fact have longer than 14 days following receipt of the HO refusal of the application to make the fresh application. The Rules are not clear here, but it appears that the person can lodge a fresh application either within the 14 days following the refusal of the application, or the 14-days following the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable), so, in effect, at any time within the 28 days following the HO refusal.

## The rejection of an invalid application:

#### **Example 4:**

The applicant makes an initial in-time application to extend their stay. Their leave runs out whilst waiting for a decision, so they then (appear to) have continuing leave under section 3C from the date their leave runs out until the date of decision. But the application is found to be invalid (e.g. because the person did not submit a passport). They do not use the opportunity provided by the HO to correct the omission. The HO serve on the applicant a Notice of Invalidity. That brings the person's 3C leave to an end, but the decision will apply retrospectively and the person will be treated as never having had 3C leave (see reference to the SC case of *Mirza*) above.

So, by the time the person has received the Notice of Invalidity, they will in all probability have overstayed by more than 14 days. Therefore, they will not be able to make a further application in reliance on para 39E(1). Nor will they be able to make a further application relying in para 39E(2) because that provision only allows a further application to be made following a refusal (and not following the application being rejected for invalidity).

If the person is seeking to extend their stay in a category to which para 39E applies, they will not be able to apply again from within the UK.

Whether under the first or second exception, if the application was made *more than* 14 days after the person's leave expired or beyond one of the events in r39E(2), the HO will not accept it under the Rules (although the HO always has discretion to do so outside the Rules in very exceptional circumstances).

For applications made before 24 November 2016, the rules generally provided for late applications made up to 28 days after the person's leave had expired, without having to provide an explanation for the delay. The explanatory memorandum to HC667 explains:

This 28 day period was originally brought in so that people who had made an innocent mistake were not penalised, but retaining it sends a message which is inconsistent with the need to ensure compliance with the United Kingdom's immigration laws

The withdrawal of the 28-day period reflects the government's ever toughening approach to irregular migrants.

Where accepted by the HO, the application made within the 14 day period (or the 28 day period as existed before) will be considered under the Immigration Rules in the normal way. But the applicant will still have become an overstayer. That may have serious consequences, at least until further leave is granted. This may include all of the privations provided for by the 'hostile environment', including (but not limited to):

- Losing their right to work and to receive benefits as they do not have the benefit of a statutory extension of leave under s 3C of IA 1971
- They have potentially committed a criminal offence albeit one that seems rarely to be prosecuted, in that they have knowingly remained beyond their limited leave (IA 1971 s 24(1)(b))
- They will commit a further offence if they continue to work or drive
- As a person without leave to remain they may be vulnerable to detention and removal and even if they would have a right of appeal, they may not get the chance to exercise it

if they lack ready evidence of their links here. Under the 'relevant provisions' regime they will be a person who requires leave but does not have it, and so are liable to removal without notice under the 'single decision' procedure (see section on Administrative Removal in Chapter 13).

The guidance to employers makes it clear that they cannot continue to employ a person who has overstayed, even if they have a current application awaiting consideration under the Immigration Rules. Every effort must therefore be made to make an in-time application, even if that means making an application that is invalid (ie whilst the person awaits a new passport) or before all the relevant documents are to hand. A person should be given time to correct an invalid application, and missing documents can be submitted after the application is made if necessary (on the basis that the HO should consider all the documents they have at the date of decision). The 14-day period under the Rules should only be relied on where there is absolutely no other option.

## Varying an application

A person with an application pending at the Home Office can apply to vary that application to something else. For example, a person with an outstanding application for an extension of stay as a Tier 4 Migrant may clock up ten years of lawful residence whilst awaiting a decision. They will want to vary that application so that they can instead be considered for ILR under the lawful long residence category. It is possible to vary an application up until the date that it is refused. Any such further application must be made complying with all the formalities as to fees and forms (r34E), and will be decided 'in accordance with the immigration rules in force at the date such variation is made' (r34F). For section 3C purposes, the application will be treated as having been made at the date of the original application, so the person will keep their 3C leave in these circumstances.

It is not clear the extent to which the phrase 'vary the purpose' under para 34E would allow a person to make the same application again, as a variation of the first application, merely to rely on more up to date evidence. Certainly, such a variation under 34E could include a Tier 4 student deciding to change their sponsor whilst a Tier 4 extension application is being considered by the Home Office. They will then need to make a wholly new application under Tier 4 based on the new sponsorship, rather than simply submit their new CAS ([Khan](#) [2016] EWCA Civ 137). The phrase 'vary the purpose' under para 34E should not be given a narrow or technical reason ([Khan](#)), but whether it would allow a person to submit an application to vary a previous application for exactly the same purpose, but in order to rely on more recent evidence remains a moot point.

### Example:

A person submits an application to extend their stay as a spouse under Appendix FM. At the date of application, they are not earning the required minimum specified gross annual income. The application is likely to be refused. Some weeks later, however, before they get a decision on the application, they now do meet the financial requirement. They cannot simply send to the Home Office evidence of their new financial circumstances, because the Rules require that the requirement is met at the date of application. Can they send in a whole new application to extend their stay as a partner, relying on their new financial circumstances, such that the requirements of para 34E are met? Well. they can certainly try!

## Prohibition on multiple applications

From 6 April 2017, the Rules make it clear that a person can only have one outstanding application at a time. The explanatory statement to HC 1078 explains that:

*A new paragraph 34BB is being added to provide that an applicant can only have one outstanding application for leave to remain at a time, and that any subsequent application for leave, submitted when an applicant already has an outstanding previous application which has not yet been decided, will be treated as a variation of the previous application. If an applicant submits more than one application on the same date, all the applications will be invalid unless the Secretary of State writes to the applicant asking them to withdraw one or more of the applications and the applicant responds in the specified time confirming which application(s) they will withdraw.*

Therefore, an applicant will not be able to make two simultaneous applications and ask the HO to consider them in the alternative (ie to consider one of them first, but if that is refused, the other). Where there is more than one basis upon which a person can apply to extend their stay, they will need to submit one application, but request that the HO also considers the other basis for stay under the section 120 procedure.

## Withdrawing an application

Where an applicant applies for their passport's return for travel purposes, the application is deemed withdrawn at the date of the request: Rule 34J, unless the individual is a Premium Sponsored Tier 2/Tier 5 Migrant.

## Application forms and fees: in-country extension and regularisation applications

Forms, and a list of current fees can be found on the GOV.UK website at: <https://www.gov.uk/immigration-operational-guidance/fees-forms>

**Dependants:** Where explicitly stated on it, an application form can include dependants, including, where applicable, children over 18 (rule 34C). Otherwise, the dependant must use their own form.

The main application forms (excluding PBS and EEA forms) are as follows:

### Form NTL (No Time Limit)

Use this form to apply for a Biometric Residence permit confirming the person has indefinite leave (or Form TOC for limited leave). This will be necessary, for example, where the grant of leave was in a passport that has now expired.

### Form FLR (M)

Use this form to apply for an extension of stay as the partner (together with any dependent children) of a person present and settled in the UK, or of a person with limited leave in the UK with refugee leave or humanitarian protection. This will usually be for a partner application under Appendix FM on the five-year route.

### Form FLR (O)

**Note that this form is no longer in use. It was withdrawn for applications made on or after 1 December 2016. It has been replaced by forms FLR(HRO) and FLR(IR) – see below**

Prior to it being withdrawn, this form was used to apply for an extension of stay for applications in any of the following categories:

- Academic visitor
- Domestic worker in a private household
- Academic visitor
- UK ancestry
- Visitor for private medical treatment
- Dependant of a person who has limited leave to enter or remain in the UK other than under the points based system
- General visitor
- Other purposes/reasons not covered by other application forms (including an extension of DL when the applicant had not previously been refused asylum)

### Form FLR (FP)

Use this form to apply for an extension of stay for applications in any of the following categories:

- Private life in the UK
- Family life as a partner (10 year route)
- Family life as a parent of a child in the UK (5 year & 10 year routes)
- Dependent child of a person who has, or is at the same time applying for limited leave to enter or remain in the UK other than under the points based system or UK Ancestry (10 year route)
- Leave outside the Rules on the basis of family or private life

### Form FLR (IR)

Use form [FLR\(IR\)](#) for these types of application:

- visitors (except transit, Approved Destination Status and Permitted Paid Engagements visitors)
- UK ancestry
- domestic worker in a private household
- domestic worker who is a victim of slavery or human trafficking
- parent of a Tier 4 (child) student
- dependant joiners who are applying separately from the main applicant – dependants of a person who has limited leave to enter or remain in the UK, not including dependants of a person with leave under the points based system or dependants of a person in the UK with leave on the basis of family or private life
- relevant civilian employee
- member of an Armed Force who is subject to immigration control (course F)
- dependant of a member of Armed Forces which are not HM Forces (dependants of a member of HM Forces should complete FLR(AF))
- locally engaged staff of a diplomatic mission
- representative of an overseas business
- retired person of independent means
- any other application for leave to remain that is within the Immigration Rules but is not covered by another form

### Form FLR (HRO)

Use form [FLR\(HRO\)](#) for these types of application:

- discretionary leave (DL) if you have previously been granted DL but have not previously been refused asylum, granted less than 4 years exceptional leave)
- medical grounds or ill health
- human rights claims (not to be used for claims on the grounds of family or private life, including on the basis of family dependencies between a parent and a child, or for protection (asylum) claims)
- leave outside the rules under the policy concessions in the leave outside the rules guidance claims for leave outside the Immigration Rules because of compassionate and compelling circumstances
- other claims not covered by another form

### Form FLR (LR)

This form is to apply for an extension of stay in the UK under the 10 year long residence rule.

### Form FLR (AF)

Use this form to apply for an extension of stay for applications in any of the following categories:

- Limited leave as a HM Forces member on discharge
- Limited leave as the partner and child of a British or foreign or Commonwealth HM Forces sponsor under Appendix Armed Forces
- Limited leave as the partner or child whose sponsor was discharged from HM Forces
- Limited leave as the partner and child of a British HM forces sponsor applying under transitional arrangements under Part 8 of the Immigration Rules
- Limited leave as the partner and child of a foreign or Commonwealth HM forces sponsor applying under transitional arrangements under Part 7 of the Immigration Rules

For settlement the form is SET(AF).

### Form FLR (P)

Use this form to apply for an extension of stay in the UK as a child under the age of 18 of a relative with limited leave to enter or remain in the UK as a refugee or beneficiary of humanitarian protection. Or as parents, grandparents or other dependent relatives aged over 18 of persons with limited leave to enter or remain in the UK as a refugee or beneficiary of humanitarian protection and for a biometric immigration document.

### Form FLR (BUS)

Use this form to apply for an extension of stay as a Retired Person of Independent Means or as a Representative of an Overseas Business.

### Form FLR (DL)

Form FLR (DL) is for anyone who, following refusal of asylum, has been granted Discretionary Leave, and is now applying for a further period of Discretionary Leave or settlement, in accordance with the published Home Office Asylum Instruction on Discretionary Leave. Note that the refusal of asylum does not to have been followed immediately by the initial grant of DL. There may have been many years between those decisions. This form must not be used by applicants applying for further leave on Article 3 medical grounds who must use the FLR(HRO) form (although the current FLR(DL) form incorrectly refers to the defunct FLR(O) form for these purposes).

### Form FLR (S)

This form is to apply for leave to remain in the UK, and a biometric residence permit, as a stateless person.

### Form SET (M)

Use this form to apply for indefinite leave to remain in the United Kingdom as the spouse (husband or wife), civil partner or unmarried partner of a person who is present and settled in the UK.

### Form SET (DV)

This form is used specifically for applying for settlement under the Immigration Rules for victims of domestic violence whose relationships have broken down during the probationary period because of that domestic violence.

### Form SET (F)

Use this form to apply for indefinite leave to remain as the:

- Child under age of 18 of a parent, parents or a relative present and settled in the UK
- Adopted child under the age of 18 of a parent or parents present and settled in the UK
- Child aged over 18 of persons present and settled in the UK

### Form SET (BUS)

Use this form to apply for indefinite leave to remain as a Retired Person of Independent Means or as a Representative of an Overseas Business.

### Form SET (O)

Use this form to apply for indefinite leave to remain in the United Kingdom when approaching five years of continuous leave to remain in the United Kingdom in one of the following categories:

- work permit holder or dependant
- employment not requiring a work permit
- businessperson, innovator or investor
- highly skilled migrant, highly skilled migrant under the terms of the HSMP indefinite leave to remain (ILR) judicial review policy document
- self-employed lawyer
- writer, composer or artist
- Tier 1 migrants
- Tier 2 migrants
- PBS dependants
- UK ancestry
- bereaved partner
- other purposes/reasons not covered by other application forms

### Form SET (P)

Use this form to apply for indefinite leave to remain in the United Kingdom when approaching five years of continuous leave to remain in the United Kingdom as a refugee or person granted humanitarian protection,

## Form SET (LR))

Use this form to apply for indefinite leave to remain (settlement) in the UK under the 10 year long residence rules.

These forms must be accompanied by the correct fee, where applicable. Fees are reduced for applications from citizens of countries that are signatory to the European Social Charter. The most commonly encountered fees, which must be paid for each applicant, including dependants, as of 18 March 2016, are as follows:

Application	Fee
ILR postal	£1875
LTR postal	£811
Tier 1 (Entrep/Inv/GE/ET) postal	£1204/£1530/£465/£287
Tier 2 (G/ICTLTS/SP/MOR)) postal*	£664
Tier 4 postal	£448
Tier 5 postal	£230

\*Different fees apply under Tier 2, dependent upon whether the job is in a shortage occupation, and the length of extension applied for.

The fees above are for postal applications. For applications made in person at the Premium Service Centre, there is an additional fee of £500 (which includes a £100 appointment booking fee). For premium appointments, booked for early morning or evening (ie outside normal office hours), there is an additional fee of £63.00. A Super Premium service, where a mobile Home Office unit comes to you, costs an additional £8750.

Some individuals are exempt from paying fees for applications:

- people applying for Indefinite Leave to Remain on the grounds of domestic violence where, at the time of making the application, the applicant appears to be destitute (or has been granted leave under the DDV concession);
- children under 18 and receiving local authority support;
- persons granted limited leave to remain whilst they were under 18 on the rejection of their claim for asylum and who are now applying for further leave to remain;
- nationals of Turkey and their dependants who are applying for leave to remain under the terms of the Turkish European Community Association Agreement; (the 'Ankara Agreement');
- those applying for leave to remain where the basis of their claim is asylum or Article 3 ECHR.

There is a flat rate fee of £65.00 for EEA residence documents for EEA nationals and their family members. Family permit applications remain free.

### Premium Service and online applications

It is possible to make an application in person by attending a Premium Service Centre (previously called Public Enquiry Office) by appointment. This service aims to give the applicant a decision on the same day. However, only some classes of application can use this route: amongst those excluded are Tier 1 Investors and Entrepreneurs, cases which are 'complex because of personal circumstances' and applications outside the Rules.

Those seeking an extension of stay under Tier 4 must use the online service (which is also now available for Tier 2 applications). Some applications for extensions made on forms [FLR\(M\)](#) and [FLR\(FP\)](#) can be made using an online form and payment service, but the form must then be printed off and sent or delivered to the Home Office in the normal way.

## Fee waivers

Those applying for leave on Article 8 grounds will usually have to pay a fee, but if they are destitute, they can apply for a fee waiver on form Appendix 1 FLR(FP) FLR(O) The form can be found at:

<https://www.gov.uk/government/publications/application-to-extend-stay-in-the-uk-appendix-1-flr-fp-flr-o>

Guidance on fee waiver applications can be found in the IDIs at:

<https://www.gov.uk/government/publications/chapter-1a-applications-for-fee-waiver-and-refunds>.

The guidance explains that a person is destitute if either:

*"a) They do not have adequate accommodation or any means of obtaining it (whether or not their other essential living needs are met); or*

*b) They have adequate accommodation or the means of obtaining it, but cannot meet their other essential living needs".*

A useful fact sheet on apply for [fee waivers for immigration applications](#) has been published by the Migrant Children's Project, covering the types of immigration applications that are eligible for a waiver and the circumstances in which a waiver may be granted.

In the case of [Carter, R](#) [2014] EWHC 2603 (Admin), the Administrative Court found the HO's fee waiver guidance to be unlawful, for being too restrictive. That decision is currently being appealed by the Secretary of State to the Court of Appeal. The current guidance, dated April 2015, however states (controversially) to have taken careful account of the decision in *Carter*.

When deciding whether to make a fee waiver application, the client will need to understand that if the fee waiver application is refused, the accompanying application for leave is likely to be rejected as invalid because no fee has been paid. This will have a massive impact on those who have made an in-time application to extend their stay because, on receiving the Notice of Invalidity, they will have become an overstayer, losing their right to claim benefits or to work etc. They will then of course have become actually destitute, as a direct result of the HO's refusal to waive the application fee, but may not be able to submit a further application for leave if caught by the provisions of para 39E (see above). In these circumstances, fee waiver applications should only be made where absolutely necessary, and be extremely well evidenced.

Where the person is on benefits or in low paid employment when applying for a fee waiver, they will have a difficult job to persuade the HO they are destitute. They are unlikely to be destitute at the point of making the application, and must therefore show that they would be rendered destitute by payment of the fee, or there are exceptional circumstances relating to their financial circumstances and ability to pay the fee such that the fee waiver should be

granted (see Guidance, para 5). That will require the person's finances to be laid out in detail with schedules of all income and expenditure, and receipts/bills to verify each item of expenditure.

Where a fee waiver application has been refused and, as a consequence, the application for leave is declared to be invalid, the HO *should* then give the applicant an opportunity to pay the fee under para 34B of the Rules. If the HO does not do so, it will be possible to challenge their Notice of Invalidity (see above).

## The health surcharge

A NHS "health surcharge" was introduced for applications for entry clearance or leave to remain (but not ILE/R) made on or after 6 April 2015. Some exceptions apply. The charge is £150 per year for students (and under the Youth Mobility Scheme) and £200 per year for all other types of application. A charge is payable for each dependent as well as the main applicant. There is guidance available [here](#) and also here at [Immigration Health Surcharge](#). Payment must be made online as an applicant will require the "IHS reference number" in order to make the application for leave.

Liability for the charge is as follows:

- All applications for entry clearance other than for indefinite leave to enter, fiancés, and visits of 6 months or less (visitors will be expected to pay for NHS treatment at the point of use)
- All applications from within the UK for any period of time other than indefinite leave to remain

If an application is made for ILR but limited leave is granted, the surcharge will become payable and the Home Office will require payment before the BRP is issued. The [Guidance](#) sets out the exemptions thus:

You still need to use the service to get an immigration health surcharge (IHS) reference number but you won't need to pay if:

- you're applying for a Tier 2 (Intra-company Transfer) visa (or you're their dependant)
- you're a child under 18 who has been taken into care by a local authority
- you're the dependant of a member of the UK's armed forces
- you're the dependant of a member of another country's forces who is exempt from immigration control
- you're a relevant civilian employee employed by North Atlantic Treaty Organisation (NATO) or the Australian Department of Defence in the UK (or you're their dependant)

The service will tell you that you don't have to pay anything and will give you your healthcare surcharge reference number for your application.

The exemption for Australians and New Zealanders was [withdrawn](#) from 6<sup>th</sup> April 2016. Further [amendments](#) take effect from 6 April 2017, including the removal of the exemption that applies under Tier 2 (Intra-company Transfer).

## Decisions

A well prepared and properly evidenced application which meets the requirements of the Immigration Rules *should* be granted by the Home Office. In practice, applications may be refused for all kinds of reasons, many of which may be unexpected and unwarranted. Decision

makers may overlook documents that have been submitted, ignore representations and witness statements, and adopt interpretations of the law that may be inconsistent with their own guidance.

Advisors should always warn clients that they may receive a disappointing decision and that appeals, where available, are routinely allowed by immigration judges. Where there is no right of appeal, an Administrative Review may secure a favourable result.

Where an applicant may have the choice of challenging a decision or applying again, it will be necessary to factor in not only the relevant costs and timescales, but also a careful consideration of section 3C of the Immigration Act 1971, the consequences of overstaying and, where para 39E applies, whether a further application can be made at all.

It will always reduce the chance of a left-field decision if the application is well prepared, in form as well as in content. The documentation should be easy to find and well ordered. Every application must be supported by a covering letter laying out the basic law relied upon, usually a category of the Immigration Rules or a provision of the Immigration (EEA) Regulations 2016, listing the enclosures, and explaining the purpose of them. Witness statements are useful to put each document into context and show that each of the requirements of the rules is met.

On receipt of a negative decision advisers should look carefully at the validity of the Notice of Decision, and the reasons of refusal, and then consider the availability of an appropriate remedy, if any. Currently, it is rare that the Home Office will simply review a decision on polite request unless there is a specific policy to do so (see e.g. the [Alvi policy](#), the [Reconsiderations policy](#) in the Modernised guidance/other cross-cutting information, and [Requests for reconsideration of old human rights claims that were refused before 6 April 2015 with no right of appeal](#)). So a request for a review, outside the policy, is likely to be a waste of time unless it is accompanied by a formal complaint, or comes from an MP, or is put in the form of a pre-action protocol letter (i.e. one informing the Home Office that you will seek judicial review if the decision is not changed), or the Parliamentary and Health Service Ombudsman gets involved.

Acting in the best interests of your client, it will always be necessary to give them an honest assessment of the merits of their case. There is no point embarking on lengthy and costly applications and remedies, and it might be a breach of your professional duties to do so, if they are likely to fail (unless your client has given fully informed consent for you to do so).



## Top Tip

**A legal professional never assumes that the law remains the same since they last made a particular kind of application. A policy can be withdrawn at any moment, and Immigration Rules can be altered without very much notice at all. Remember**

- **Always check the legal framework as it is *now* regarding a current/future application (and remember that the legal framework may include HO guidance/policy documents)**
- **Check whether there are any published forthcoming Statements of Changes of the Rules or Statements of Intent regarding clients you are advising on future applications (and never let any client think the Rules are set in stone)**

- Always check the legal framework as it *was at the date of decision* regarding cases where you are pursuing an appeal or judicial review

And they *always* know the foundation for any legal principle that they rely upon. For many years, for example, there was a policy that applied to children allowing them to remain in this country if they had resided here for seven years and their removal would be unreasonable; this was withdrawn several years ago, and was not resurrected until Appendix FM was introduced; now it has an even firmer footing, as it is found in section 117 of the NIA 2002. Vague references to the 'seven year rule' might well fail to appreciate the differing legal basis of its foundation, moving as it did from policy, then disappearing, then being resurrected via the Rules before moving onto the statute book.

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## Materials

### Section 3C, Immigration Act 1971

3C Continuation of leave pending variation decision

- (1) This section applies if—
  - (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
  - (b) the application for variation is made before the leave expires, and
  - (c) the leave expires without the application for variation having been decided.
- (2) The leave is extended by virtue of this section during any period when—
  - (a) the application for variation is neither decided nor withdrawn,
  - (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
  - (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act), or
  - (d) an administrative review of the decision on the application for variation—
    - (i) could be sought, or
    - (ii) is pending.
- (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
- (3A) Leave extended by virtue of this section may be cancelled if the applicant—
  - (a) has failed to comply with a condition attached to the leave, or
  - (b) has used or uses deception in seeking leave to remain (whether successfully or not).
- (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
- (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
- (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations—
  - (a) may make provision by reference to receipt of a notice,
  - (b) may provide for a notice to be treated as having been received in specified circumstances,
  - (c) may make different provision for different purposes or circumstances,
  - (d) shall be made by statutory instrument, and

(e) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) In this section—

“administrative review” means a review conducted under the immigration rules;

the question of whether an administrative review is pending is to be determined in accordance with the immigration rules.

## **Immigration Rules (as from 6 April 2017)**

### **Paragraph 34**

#### **Specified forms and procedures for applications or claims in connection with immigration**

#### **34. An application for leave to remain must be made in accordance with sub-paragraphs (1) to (10) below.**

(1) (a) Subject to paragraph 34(1)(c), the application must be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.

(b) An application form is specified when it is posted on the visa and immigration pages of the GOV.UK website.

(c) An application can be made on a previous version of a specified paper application form (and shall be treated as made on a specified form) as long as it is no more than 21 days out of date.

(2) All mandatory sections of the application form must be completed.

(3) Where the applicant is required to pay a fee, this fee must be paid in full in accordance with the process set out in the application form.

(4) Where the applicant is required to pay the Immigration Health Surcharge, this must be paid in accordance with the process set out on the visa and immigration pages of the GOV.UK website.

(5) (a) Subject to paragraph 34(5)(c), the applicant must provide proof of identity as described in 34(5)(b) below and in accordance with the process set out in the application form.

(b) Proof of identity for the purpose of this Rule means:

(i) a valid passport or, if an applicant (except a PBS applicant) does not have a valid passport, a valid national identity card; or

(ii) if the applicant does not have a valid passport or national identity card, their most recent passport or (except a PBS applicant) their most recent national identity card; or

(iii) if the applicant does not have any of the above, a valid travel document.

(c) Proof of identity need not be provided where:

(i) the applicant's passport, national identity card or travel document is held by the Home Office at the date of application; or

(ii) the applicant's passport, nationality identity card or travel document has been permanently lost or stolen and there is no functioning national government to issue a replacement; or

(iii) the applicant's passport, nationality identity card or travel document has been retained by an employer or other person in circumstances which have led to the applicant being the subject of a

positive conclusive grounds decision made by a competent authority under the National Referral Mechanism; or

(iv) the application is for limited leave to enable access to public funds pending an application under paragraph 289A of, or under Part 6 of Appendix Armed Forces or section DVILR of Appendix FM to these Rules; or

(v) the application is made under Part 14 of these Rules for leave as a stateless person or as the family member of a stateless person; or

(vi) the application was made by a person in the UK with refugee leave or humanitarian protection; or

(vii) the applicant provides a good reason beyond their control why they cannot provide proof of their identity.

(6) Where any of paragraph 34(5)(c)(ii)-(vii) applies, the Secretary of State may ask the applicant to provide alternative satisfactory evidence of their identity and nationality.

(7) Two passport sized photographs must be provided in accordance with the requirements set out in the application form and accompanying guidance notes.

(8) Where the main applicant is under the age of eighteen, their parent or legal guardian must provide written consent to the application.

(9) (a) Where the application is made:

(i) on a paper application form, it must be sent by pre-paid post or courier to the address on the application form or, where permitted, submitted in person at a Home Office premium service centre;

(ii) on-line and the applicant chooses to or is subsequently required to attend an appointment at a place specified by the Home Office as part of the application process, the applicant must make and attend the appointment within 45 business days of submission of the on-line application.

(b) Application types permitted in person at a Home Office premium service centre are listed on the visa and immigration pages of the GOV.UK website.

(10) Where the applicant is required to provide their biometric information, this must be provided in accordance with the process set out in the biometric enrolment letter and any subsequent warning letter issued in accordance with the Code of Practice about the sanctions for noncompliance with the biometric registration regulations.

### **Invalid applications**

34A. Subject to paragraph 34B, where an application for leave to remain does not meet the requirements of paragraph 34, it is invalid and will not be considered.

34B. (1) Where an application for leave to remain does not meet the requirements of paragraph 34(1)-(9), the Secretary of State may notify the applicant and give them one opportunity to correct the error(s) or omission(s) identified by the Secretary of State.

(2) Where paragraph 34B(1) applies, the error(s) or omission(s) identified must be corrected within 10 working days of the date on which the notification was sent.

(3) Subject to paragraph 34B(4), where an applicant does not comply with paragraph 34B(2), the application is invalid and will not be considered.

(4) The Secretary of State may exercise discretion to treat an invalid application as valid as long as the requirements of paragraph 34(3), (5) and (10) have been met.

(5) Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

## **Multiple Applications**

- 34BB (1) An applicant may only have one outstanding application for leave to remain at a time.
- (2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.
- (3) Where more than one application for leave to remain is submitted on the same day then subject to sub-paragraph (4), each application will be invalid and will not be considered.
- (4) The Secretary of State may give the applicant a single opportunity to withdraw all but one of the applications within 10 working days of the date on which the notification was sent. If all but one of the applications are not withdrawn by the specified date each application will be invalid and will not be considered.
- (5) Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

## **Dependent applicants applying at the same time as the main applicant**

34C. A dependent applicant can be included on a main applicant's application form where the application form allows the dependant to be included.

34D. Where the main applicant wishes to include applications or claims by any members of his family as his dependants on his own application form, the applications or claims of the dependants must meet the following requirements or they will be invalid and will not be considered:

- (i) the application form must expressly permit the applications or claims of dependants to be included, and
- (ii) such dependants must be:
  - (a) the spouse, civil partner, unmarried or same-sex partner of the main applicant; and/or
  - (b) children of the main applicant aged under 18; and/or
  - (c) where permitted by the Rules for the immigration category under which the applicant wishes to apply, any dependants of the main applicant aged 18 or over.

## **Variation of Applications or Claims for Leave to Remain**

34E. If a person wishes to vary the purpose of an application for leave to remain in the United Kingdom, the variation must comply with the requirements of paragraph 34 (as they apply at the date the variation is made) as if the variation were a new application. If it does not, subject to paragraph 34B, the variation will be invalid and will not be considered.

34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made.

## **Determination of the date of an application or claim (or variation of an application or claim) for leave for remain**

34G. For the purposes of these rules, the date on which an application (or a variation of application in accordance with paragraph 34E) is made is:

- (i) where the application form is sent by post by Royal Mail, the date of posting as shown on the tracking information provided by Royal Mail or, if not tracked, by the postmark date on the envelope; or
- (ii) where the application is made on a paper application form and is submitted in person, the date on which it is received at a Home Office premium service centre; or
- (iii) where the paper application form is sent by courier, or other postal services provider, the date on which it is delivered to the Home Office; or

(iv) where the application is made via the online application process, the date on which the online application is submitted whether or not a subsequent appointment is made at a Home Office premium service centre.

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### **Withdrawn applications or claims for leave to remain in the United Kingdom**

34J. Where a person whose application or claim for leave to remain is being considered requests the return of his passport for the purpose of travel outside the common travel area, the application for leave shall, provided it has not already been determined, be treated as withdrawn on the date that request is received by the Home Office.

34K. Paragraph 34J does not apply to an applicant who is applying as a Tier 2 Migrant or a Tier 5 Migrant and whose application is supported by a Certificate of Sponsorship from a Premium Sponsor.

### **Specified forms and procedures in connection with applications for administrative review**

#### **Notice of an eligible decision**

34L. (1) Unless sub-paragraph (2) applies, written notice must be given to a person of any eligible decision. The notice given must:

(a) include or be accompanied by a statement of reasons for the decision to which it relates, and

(b) include information on how to apply for an administrative review and the time limit for making an application.

(2) Sub-paragraph (1) does not apply where the eligible decision is a grant of leave to remain.

#### **Making an application**

34M. An application for administrative review must be made in accordance with the requirements set out in paragraphs 34N to 34S. If it is not it will be invalid and will not be considered.

34N. (1) Unless sub-paragraph (2) applies only one valid application for administrative review may be made in respect of an eligible decision.

(2) A further application for administrative review in respect of an eligible decision may be made where the outcome of the administrative review is as set out in paragraph AR2.2(d) of Appendix AR of these Rules.

34O. (1) Where the eligible decision is either a decision on an application for leave to remain or a decision to cancel leave to enter or remain which is in force on a person's arrival at the UK, the application for administrative review must be made in accordance with paragraph 34U or paragraph 34V.

(2) Where the eligible decision is a refusal of an application for entry clearance, the application for administrative review must be made in accordance with paragraph 34VA.

34P. The application must be made in relation to an eligible decision.

34Q. The application must be made:

(a) when the administrative review is in relation to an eligible decision on an in country application, as defined in paragraph AR3.2 of Appendix AR, while the applicant is in the UK;

(b) when the administrative review is in relation to an eligible decision made on arrival at the United Kingdom, as defined in paragraph AR4.2 of Appendix AR, while the applicant is in the UK, unless the eligible decision is made in the Control Zone (as defined in Appendix AR of these Rules), in which case administrative review may not be applied for and will not be considered until after the applicant has left or been removed from the Control Zone;

(c) when the administrative review is in relation to an eligible decision on an application for entry clearance, as defined in paragraph AR5.2 of Appendix AR, while the applicant is outside the UK.

34R. (1) The application must be made:

(a) where the applicant is in the UK and not detained, no more than 14 calendar days after receipt by the applicant of the notice of the eligible decision;

(b) where the applicant is in detention in the UK under the Immigration Acts, no more than 7 calendar days after receipt by the applicant of the notice of the eligible decision;

(c) where the applicant is overseas, no more than 28 calendar days after receipt by the applicant of the notice of the eligible decision; or

(d) where the eligible decision is a grant of leave to remain, no more than 14 calendar days after receipt by the applicant of the biometric immigration document which states the length and conditions of leave granted.

(2) An application which is permitted under paragraph 34N(2) of these Rules must be made within the relevant time limit stated in paragraph 34R(1) as if it was an initial application, and the notice of the outcome of the previous administrative review will be treated as the notice of the eligible decision.

(3) But the application may be accepted out of time if the Secretary of State is satisfied that it would be unjust not to waive the time limit and that the application was made as soon as reasonably practicable.

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(5) For provision about when an application is made see paragraph 34W.

34S. An applicant may only include an application on behalf of a dependant of the applicant if that dependant:

(a) was a dependant on the application which resulted in the eligible decision; or

(b) was previously granted leave to enter or remain as a dependant of the applicant and that leave is being cancelled at the same time as that of the applicant.

#### **Notice of invalidity**

34T. A notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

#### **Online applications for administrative review**

34U. (1) In this paragraph:

"the relevant online application process" means the application process accessible via the gov.uk website and identified there as relevant for applications for administrative review; and

"specified" in relation to the relevant online application process means specified in the online guidance accompanying that process.

(2) An application may be made online by completing the relevant online application process.

(3) Where an application is made online:

(a) any specified fee in connection with the application must be paid in accordance with the method specified;

(b) any section of the online application which is designated as mandatory must be completed as specified; and

(c) documents specified as mandatory on the online application or in the related guidance must be submitted either electronically with the online application and in the specified manner, where this is permitted, or received by post and in the specified manner no more than 7 working days after the day on which the online application is submitted.

#### **Postal applications for administrative review**

34V. (1) An application may be made by post or courier in accordance with this paragraph.

(2) Where an application is made by post or courier:

- (a) it must be made on the application form as specified within the meaning of paragraph 34 (but see paragraph 34Y);
- (b) any specified fee in connection with the application must be paid in accordance with the method specified in the application form, separate payment form or related guidance notes (as applicable);
- (c) any section of the application form which is designated as mandatory in the form itself or related guidance notes must be completed;
- (d) the form must be signed by the applicant or their representative;
- (e) the application must be accompanied by the documents specified as mandatory in the application form or related guidance notes; and
- (f) the application must be sent to the address specified on the form.

### **Applications for administrative review of entry clearance decisions**

34VA. (1) An application may be made by post, courier, hand, fax or email in accordance with this paragraph.

(2) Where an application is made by post, courier, hand, fax or email:

- (a) it must be made on the application form as specified within the meaning of paragraph 34 (but see paragraph 34Y);
- (b) any section of the application form which is designated as mandatory in the form itself or related guidance notes must be completed;
- (c) the form must be signed by the applicant or their representative;
- (d) the application must be accompanied by any documents specified as mandatory in the application form or related guidance notes; and
- (e) the application must be delivered to the postal address, email address or fax number specified on the form.

### **Determining the date of an application**

34W. (1) An application for administrative review is made:

- (a) where it is made by post in accordance with paragraph 34V, on the marked date of posting;
- (b) where it is made by courier in accordance with paragraph 34V, on the date on which it is delivered; and
- (c) where it is made online in accordance with paragraph 34U, on the date on which it is submitted.

(2) Accepting an application has been made does not mean that it is accepted as being valid.

### **Withdrawal of applications**

34X. (1) An application which may only be brought from within the UK and has not been determined will be treated as withdrawn if the applicant requests the return of their passport for the purpose of travel outside the UK.

(2) An application which may only be brought from within the UK and which has not been determined will be treated as withdrawn if the applicant leaves the UK.

(3) The application for administrative review may be withdrawn by the applicant. A request to withdraw an application must be made in writing to the Home Office at the address provided for that purpose on the visas and immigration pages of the gov.uk website. The application will be treated as withdrawn on the date on which the request is received.

## **Transitional arrangements for specified forms used in postal and courier applications**

34Y. Where an application is made no more than 21 days after the date on which a form is specified (within the meaning of paragraph 34) and on a form that was specified immediately prior to the date of the new specification, the application is deemed to have been made on the specified form (and is therefore not to be treated as invalid by reason only of being made on the “wrong” form).

## **Paragraph 39E**

### **Exceptions for overstayers**

39E. This paragraph applies where:

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

(2) the application was made:

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

(b) within 14 days of:

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

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

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

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