

# **International Protection**

## **The latest thinking**

*By Mark Symes*

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## General Introduction

This is an eBook that is intended to address issues that are frequently met by lawyers representing asylum seekers. We deal with

- Appeals, clearly unfounded certificates and fresh claims in the international protection context
- Developments in international protection procedures
- The latest case law on protection status determination
- The detention of asylum seekers
- Some common issues that have recently arisen often in the context of asylum claims: the new visa for domestic workers who have been accepted as victims of slavery/human trafficking, and the Restricted Leave policy

## Appeals and asylum (“protection”) claims

### Introduction

When a person claims their removal would lead to persecution for a reason protected by the Refugee Convention (or cause them to face serious harm as defined in the Qualification Directive and the Immigration Rules transposing that Directive) is made, they will have made a ‘protection claim. We aim to use the term “protection claim” throughout this course but the fact that sometimes we refer back to older guidance and case law, and to the EU legal system, often makes it confusing to do so, so you will see references to asylum claims below quite often.

The refusal of a protection claim will bring a right of appeal. This is the full text of section 82 as it now reads:

#### *82 Right of appeal to the Tribunal*

*(1) A person (“P”) may appeal to the Tribunal where—*

*(a) the Secretary of State has decided to refuse a protection claim made by P,*

*(b) the Secretary of State has decided to refuse a human rights claim made by P, or*

*(c) the Secretary of State has decided to revoke P's protection status.*

However, the Home Office can bar a right of appeal by making various kinds of certificate: particularly “clearly unfounded” certificates, usually under s94 NIA 2002, or “repetitive claim” certificates under s96 NIA 2002. Where there is no appeal right, because a claim has been certified, then the sole remedy from within the UK will be judicial review – there may be, the latter probably only being appropriate once any alternative route such as administrative review has failed.

Protection claims are defined as those made under the Refugee Convention or engaging humanitarian protection obligations. **CLICK [HERE](#) TO SEE THE FULL TEXT OF S82 NIA 2002.**

*(2) For the purposes of this Part—*

*(a) a “protection claim” is a claim made by a person (“P”) that removal of P from the United Kingdom—*

*(i) would breach the **United** Kingdom's obligations under the Refugee Convention, or*

*(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*

*(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—*

*(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;*

*(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;*

*(c) a person has “protection status” if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;*

*(d) “humanitarian protection” is to be construed in accordance with the immigration rules;*

*(e) “refugee” has the same meaning as in the Refugee Convention.*

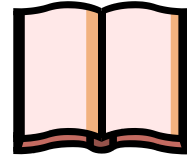
A “human rights claim” means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998) as being incompatible with his Convention rights (s113 NIA 2002). Note the present definition:

*“human rights claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 ...*

Revocation of protection appeals have specific provisions as to where they are heard:

- they will be “in-country” where the person previously granted protection is within the UK when the decision was made
- But otherwise must be brought (ie lodged and pursued) from outside the country: NIA 2002 s92(5).

- Out-of-country appeals are to be considered as *if* they remained in the UK, which should avoid the Home Office arguing that by pursuing appeal they have avoided suffering persecution/serious harm, which would itself doom their appeal (s92(7))



## Examples

Siva is a citizen of Sri Lanka. He applied for asylum when he arrived in the UK a few years ago. His claim was refused but he was granted discretionary leave to remain for two years until he reaches the age of 17.5.

Siva has now applied to extend his leave and has included Refugee Convention arguments along the way. The application is refused. This is an appealable decision. The fact of the grant of DLR is incidental and the modern statutory scheme (s82 NIA 2002) gives it no relevance.

Mustafa was granted asylum four years ago because of his political views which had led to his arrest, detention and ill treatment. The Home Office have decided that circumstances in his country of origin have improved in the last few years. They accordingly revoke his refugee status because of their belief in a change of circumstances.

Mustafa has received a revocation of protection status which carries the right of appeal.

Khurshad is a citizen of Pakistan. He was granted asylum three years ago because of his religious beliefs. He is suspected of presenting a national security risk though the Home Office have never gone further than write his representatives letters seeking further information from him. Khurshad travels to the Middle East for two months. The Home Office issue a decision revoking his protection status whilst he is abroad.

This is an appealable decision under s82(1)(c) but the right of appeal is from abroad (s92(5)).

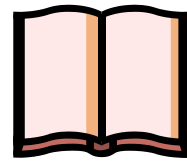
## Disputes as to whether there is a right of appeal

Where there is a debate as to whether there is a right of appeal to the FTT, normally an attempt should be made to bring such an appeal, whereby the FTT may determine its own jurisdiction – see [Merriman-Johnson](#) [2010] EWHC 1598 (Admin), and more recently in [Khan](#) (IJR) [2015] UKUT 353 (IAC) (upheld on appeal in [Khan](#) [2017] EWCA Civ 424), whose headnote states:

*Although each case must be determined on its own facts, in cases where a person seeks to dispute the Secretary of State's assertions as to the availability of an appeal to the First-tier Tribunal, the appropriate course is for such person to lodge a notice of appeal with the First-tier Tribunal requesting that it determine this issue. Given the existence of this suitable*

*alternative remedy, it will only be in exceptional circumstances that the Upper Tribunal will exercise its discretion and grant relief to a person who seeks to raise this same issue before it in judicial review proceedings brought against the Secretary of State.*

In practice a Designated (senior) judge of the FTT usually decides whether to let appeals of this nature proceed. Usually the Home Office will not have notice of the possibility, so there is always the possibility that they may try and contest jurisdiction to entertain the appeal at the listed appeal hearing. The 2014 appeals procedure rules (r 4(3)(e)) provide for appeals to be listed for a preliminary issue, so one could always apply for a decision on this basis.



## Examples

Look at the scenarios above again.

Imagine the refusal notice in Mustafa's case above does not include notification of a right of appeal. He could nevertheless lodge a notice of appeal arguing that the FTT should evaluate the existence of a right of appeal for itself.

This possibility would not be available where a s94 "clearly unfounded" certificate was made, as a certificate clearly precludes the right of appeal leaving no room for argument as to whether a decision is appealable.

## Section 120 notices

Section 120 of the NIA 2002 is a central element of government policy in addressing the reasons why a migrant is in the UK.

### ***120 Requirement to state additional grounds for application etc***

*(1) Subsection (2) applies to a person ("P") if—*

*(a) P has made a protection claim or a human rights claim,*

*(b) P has made an application to enter or remain in the United Kingdom, or*

*(c) a decision to deport or remove P has been or may be taken.*

*(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—*

*(a) P's reasons for wishing to enter or remain in the United Kingdom*

*(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and (c) any grounds on which P should not be removed from or required to leave the United Kingdom.*

*(3) A statement under subsection (2) need not repeat reasons or grounds set out in—*

*(a) P's protection or human rights claim,*

*(b) the application mentioned in subsection (1)(b), or*

*(c) an application to which the decision mentioned in subsection (1)(c) relates.*

*(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—*

*(a) P requires leave to enter or remain in the United Kingdom but does not have it, or*

*(b) P has leave to enter or remain in the United Kingdom only by virtue of [section 3C of the Immigration Act 1971] 2 (continuation of leave pending decision or appeal).*

*(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—*

*(a) additional reasons for wishing to enter or remain in the United Kingdom,*

*(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or*

*(c) additional grounds on which P should not be removed from or required to leave the United Kingdom,*

*P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.*

*(6) In this section—*

*"human rights claim" and "protection claim" have the same meanings as in Part 5;*

*references to "grounds" are to grounds on which an appeal under Part 5 may be brought (see section 84).*

Key aspects of the section 120 regime are these:

- The provision empowers the immigration authorities to serve a notice on a person who has made an application to enter or remain here, or who has made a human rights or protection claim, or who has received a removal/deportation decision,

requiring them to state any grounds or reasons entitling them to remain in the UK, beyond those which have been dealt with in their existing application

- Where the notice is provided to the Home Office before they make a decision on any outstanding application, then they should consider the contents of that notice
- If the original decision carried the right of appeal, then matters raised in the one stop notice can be raised in an appeal – *if* the Home Office have considered them by the date of the hearing or *if* they consent to the matter being considered (see further below where we address *Fresh evidence and issues on appeal*)
- Under the old (pre-April 2015) appeals regime, an attempt was made to oblige the Home Office to serve section 120 notices: however, at least under that system, the Court of Appeal found in [Lamichhane](#) [2012] EWCA Civ 260 that s120 *permitted* but did not *demand* service of a s120 notice. Although the court stated that ‘*good and efficient administration is furthered by the service of a section 120 notice*’, that did not amount to a legal requirement that one be served on an applicant, or even that one should be served unless there was a good reason not to do so. However, that decision was based on the former position regarding s120 notices (it may be that there was no clear policy at all at that time): whereas now, as cited below, all indications are that there will be universal service of s120 notices when applications are refused. For example the [Rights of appeal](#) guidance now states that:

*the new process under the Immigration Act 2014 requires that a section 120 notice is served in every case.*

- Sometimes an application form may include a s120 notice, such as the long residence form SET(LR)
- Once a s120 notice has been served, the individual is under an ongoing duty to update the Home Office with any further developments in their case – as explained in the Guidance, there may be a time limit in a s120 notice: but this does not prevent the subsequent raising of further information

*A time limit may be specified on the section 120 notice. This time limit indicates the period after which a decision may be made. However, once this limit has expired, a person is still under an ongoing duty to provide the SSHD with any new or additional reason or ground. If the time limit has expired, the SSHD must still consider the matter or grounds raised but if appropriate may be able to certify any claim under section 96*

Depending on the imminence of scheduled or possible removal, it is probably more important to put a cogent evidence-backed case in front of the Home Office than it is to rush off a s120 response within the deadline: as missing the deadline does not mean the application will be refused, whereas a hurried and imperfect application invites refusal and subsequent representations will have to hurdle the “fresh claim” threshold

The mere fact of service of a s120 notice does not avoid the requirement by the preferred means – so a protection claim cannot be made simply via a s120 notice: as the appeals guidance puts it,

*Where the person makes a statement in response to a section 120 notice the person may be told that in order to have the matter considered they must make an application on a specified form or follow a specified process, for example, by attending an asylum screening unit to make an asylum claim.*

Section 120 is an integral part of the Home Office policy regarding removal, which now contemplates removing individuals without further notice. The Home Office Guidance [Judicial reviews and injunctions](#) (formerly *EIG ch 60*, now under 'returns preparation') under heading *Notice of a removal window* sets out that

- there will be no removals within seven days of the service of a s120 notice (72 hours if the individual is detained; five working days if the matter is a third country case): but
- after that, there may be removal without further notice.
- However, if more than three months have passed since notice of liability for removal was given, then a further period to access legal advice will be given.

The removal window policy has been the subject of some litigation already, which has led to the improvements in the policy below such as the recognition that a remove may need a reasonable opportunity to instruct a representative.

#### The notice period

The removal window begins when the notice period ends.

The removal window will run for a maximum of three months from the time the “Notice of Liability for Removal” or “Deportation Decision Letter” is served.

- If a removal window has not yet expired, it can be extended by way of reminder for a further 28 days. This can be done by way of a removal reminder (RED0004 extension) which will also remind the individual of their obligation to raise any further issues with the Home Office
- If the person makes an asylum, human rights or EU free movement claim, involving issues of substance which have not been previously raised and considered, or a further charged application for leave, the window ends.

Where notice is given of a removal window under this policy the notice period is 7 calendar days if at the point notice is given the person is not detained.

Otherwise, subject to certain exceptions described in this guidance (see: deferral), the notice period must be of the following minimum time periods:

- normal enforcement cases – minimum 72 hours (including at least two working days)
- third country cases and cases where the decision certified the claim (see section 2.4.3) - minimum five working days (unless the case has already been reviewed by JR: see NSA cases already reviewed)

...

#### Consideration of deferral of notice period

Whether or not they are detained, individuals must be allowed a reasonable opportunity to

access legal advice and have recourse to the courts. The purpose of the notice period is to enable individuals to seek legal advice. If, during the notice period, an unrepresented person is yet to instruct a legal representative you must always consider deferring the removal window for an additional period. It is reasonable to expect individuals who are aware that they have not been successful in an immigration claim and/or appeal and/or that outstanding representations may be or have been rejected to act promptly in seeking legal advice. Each case for deferral must be considered on its individual merits. The key consideration is whether the person has had a reasonable opportunity to access legal advice and recourse to the courts.

This guidance is complex and there are various exceptions therein, so there is no substitute for reading and considering its implications in every individual case. The relevant notice will be given via either a refusal letter or a RED0001 notice.

To prevent removal in this situation, an urgent application to the Upper Tribunal for an injunction may not work. What will work is an indication that the detainee wishes to claim asylum, but where the claim is not meritorious it risks certification as 'clearly unfounded'. Any future application to return to the UK could then be refused under para 320(11), [Part 9](#) of the rules, which includes "making frivolous applications" as one of the "aggravating circumstances" for which an application 'should normally' be refused (along with failure to meet reporting restrictions - another course of action that is not recommended in this situation!)

The guidance may well be challengeable because its consequences may sometimes threaten the right of access to a court: particularly where a person is within a removal window and may receive a decision on an outstanding application over a weekend or holiday period. There are various legal authorities questioning the legality of this:

- In [Witham](#) the Divisional Court held that the common law constitutional right of access to the courts could not, in the absence of express statutory authorisation, be abrogated by subordinate legislation
- In [Medical Justice](#) [2010] EWHC 1925 (Admin) and [2011] EWCA Civ 269 the Courts upheld a challenge to the effect that the Secretary of State had acted in unlawfully by failing to include provisions in her removal policies ensuring access to the courts
- Lord Dyson in [Al Rawi](#) [2011] UKSC 34 at [12]: "A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side."

#### **Raising further grounds on appeal**

There is a major difference between the old-style and new-style appeals systems, in that new sub-sections 85(5)-(6) of the 2002 Act prevent an Immigration Judge from considering new grounds of appeal after an application has been refused unless the Secretary of State has given the Tribunal consent to do so.

*(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.*

*(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.*

*(6) A matter is a “new matter” if—*

*(a) it constitutes a ground of appeal of a kind listed in section 84, and*

*(b) the Secretary of State has not previously considered the matter in the context of—*

*(i) the decision mentioned in section 82(1), or*

*(ii) a statement made by the appellant under section 120.*

For many years Appellants enjoyed a generous system in the FTT whereby they could raise further grounds of appeal in the course of the appeal process. This was described as a citizen of the “one-stop” policy of the appeals system, which encouraged all issues to be raised and determined at one hearing. But under the new sub-sections (5) and (6) of NIA 2002, the Tribunal can only consider a new matter once the Home Office consents. There has been a debate about the scope of this provision, which for now has been answered by Mahmud [2017] UKUT 488 (IAC). This holds that a “new matter” is a factual matrix not previously considered by the Secretary of State in the course of determining the application whose refusal led to the right of appeal.

This effectively upholds the interpretation given by the Home Office Guidance, which gives examples of new matters as a private life claim when previously only family life had been raised, or vice versa, or a family life claim that had previously been based on relationship between partners where there has now been a child born to the family.

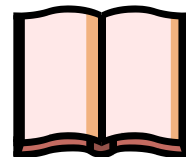
The Tribunal noted that the Home Office Guidance encouraged active steps to be taken to ensure that an appeal proceeded considering new matters with consent where reasonably possible, but was of the view that any failure to follow that Guidance could be challenged only by judicial review.

The [Rights of Appeal Modernised Guidance](#) explains that

a “new matter” is something factually distinct from the claim previously made by the appellant, as opposed to further or better evidence of an existing matter.

- a “new matter” does not include further risk factors in a protection claim
  
- However, the policy also states that where “there is a human rights claim based on a relationship and the couple have now had a child and this has not previously been considered by the SSHD, because the existence of the child adds an additional distinct new family relationship (with a requirement to consider the best interests of the child) which could separately raise or establish a ground of appeal under Article 8 ECHR

- “considered” means a decision has been made on the merits of the matter raised
- the SSHD should endeavour to consider a new matter raised in the grounds of appeal before the appeal hearing, including “quickly” where the new matter is identified “only shortly before or at the hearing”
- whilst it is undesirable to slow the process leading to removal or a grant of leave by withholding consent, it should nevertheless be refused (unless there are exceptional circumstances such as an urgent need for decision due to the appellant’s ill health, or where they are faultless as to a delay of more than six months in the SSHD’s consideration of the matter
  - where consideration of the new matter requires considering evidence or verifying documents
  - the new matter is an asylum claim and it is not confirmed that the UK is the responsible state for its determination
  - additional checks into criminal convictions or a forthcoming prosecution are necessary
- where there has not been consideration by the time of the appeal hearing, if the Tribunal does not agree to an adjournment for the matter to be considered, it may be appropriate either to refuse consent or to withdraw the decision (in accordance with guidance): the SSHD may exercise his right of appeal where an appeal is determined on a ground where consent is refused
- consent should be given where the substance of the claim remains unchanged but the ground have altered: eg raising an Article 3 claim in relation to an asylum claim, or bringing up Article 8 ECHR arguments in relation to a health case first brought on Article 3 grounds
- if consent is refused, written reasons will be provided, within two working days of the decision being made or by 4pm on the day before the hearing if it is considered within two working days of the hearing



## Example

Eden is a citizen of Mauritania with an appeal due for hearing next week against the refusal of his human rights claim, which was based on his family life with his British citizen spouse. Eden has just informed you that he also fears persecution in Mauritania because of his political beliefs and wants to raise that before the First-tier Tribunal.

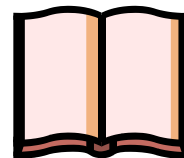
This is clearly a new matter which requires consent. It is very hard to see consent being given, not least because no protection claim has been made so far, and the Home Office like to be the original decision maker in these cases: hence they require such claims to be made via the appropriate process, usually including an “in person” appointment at their offices, and additionally it would be necessary for them to check whether some third country including an EEA Member State might be responsible for the claim.

However, it is usually possible to raise private and family life issues in an appeal based on protection grounds, so long as a human rights ground of appeal has been lodged against the refusal decision: because Home Office practice is to consider any conceivable private and family life claim in their letter that refuses the protection claim. Accordingly a human rights claim will have been treated as having been made, and will have been refused. However it will still be necessary to obtain consent where there is a significant change in the UK connections that underlie the human rights relied on.

### **Arguments at the appeal hearing – the “protection” ground of appeal**

As will by now be very clear, the only ground of appeal in non-asylum cases will be the human rights ground. The main consequence of this is that the focus of the judges of the FTT will ultimately be on

- whether the Refugee Convention or the Rules on Humanitarian Protection are breached by the decision appealed against
- NOT on procedural failings: following the demise of “not in accordance with the law” as an appeal ground, it is now rather more difficult to see how a judge could allow an appeal because, for example, the child safeguarding duty set out in section 55 of the Borders, Citizenship and Immigration Act 2009 had not been taken into account



### **Example**

A Home Office decision letter makes no reference to section 55 Borders, Citizenship and Immigration Act 2009 when refusing a protection claim for a child asylum seeker; the decision goes on to find that their private life would not be infringed by removal.

When lodging notice of appeal, both the human rights and international protection grounds of appeal are available. However, it is difficult to see that the appeal could be allowed simply because of the failure to consider the statutory duty, given there is no “not in accordance with the law” grounds of appeal. The UT will in due course have to consider whether, for example, section 55 represents part of the procedural aspect to protecting a child’s Article 8 rights.

## “Clearly unfounded” certificates: section 94 NIAA 2002

Within s94 (full text [here](#)), there are essentially two kinds of “clearly unfounded” case:

- clearly unfounded asylum claims
- clearly unfounded human rights claims

We deal with private and family life claims in detail in our course *Human rights claims and remedies*.

Where one of these certificates is made, then the right of appeal is out-of-country. It may only be lodged out of country: it must be lodged not later than 28 days after their departure (Rule 19(3) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) [Rules 2014](#)).

As usual there is Home Office [Guidance](#) on certification. It explains that there will always be an overview of a decision to certify by a second pair of eyes.

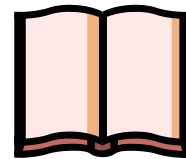
There is a list of designated states contained in S94(4) where there is considered to be in general no risk of persecution arising:

- Regardless of gender, citizens, nationals and those entitled to reside in these countries are subject to this form of certification: Albania, Jamaica, Macedonia, Moldova, Bolivia, Brazil, Ecuador, South Africa, Ukraine, India, Mongolia, Bosnia-Herzegovina, Mauritius, Montenegro, Peru, Serbia, Kosovo and South Korea
- Other states are designated though only with respect to claims from men: Ghana, Nigeria, Gambia, Kenya, Liberia, Malawi, Mali, and Sierra Leone
- S94(3) provides that when refusing a protection and/ or human rights claim from a person entitled to reside in one of the listed states, the Secretary of State must certify the claim unless satisfied that the claim is not clearly unfounded: this creates a kind of presumption in favour of certification
- The Guidance suggests that there may be certification of a private and family life claim from nationals of these states – whilst it is obviously possible that a human rights claim of this nature may be intrinsically weak and so liable to certification in its own terms, it is difficult to see that it could be lawful to certify a strong Article 8 claim unrelated to risks of serious harm in the country in question simply because of a person’s entitlement to reside there. The Guidance appears to recognise this when it states that certification will not be appropriate “if an individual makes both a protection and human rights claim and only one of these claims is clearly unfounded”
- Bangladesh was added to the list but has been removed, as was Sri Lanka. In [Husan \[2005\]](#) EWHC 189 (Admin), Wilson J concluded that the inclusion of Bangladesh on the list was unlawful, posing the question in this way:

...whether in July 2003, when it was added to the list, or at any time since then, no rational decision-maker could have been satisfied that there was in general in Bangladesh no serious risk of persecution of persons entitled to reside there or that removal of such persons thither would not in general

contravene the UK's obligations under the Human Rights Convention. The objective material drove and drives only one rational conclusion; and it is to the contrary.

- In [JB \(Jamaica\)](#) [2013] EWCA Civ 666, the Court of Appeal found that the designation of Jamaica as a country in which there is in general no risk of persecution was unlawful. The Supreme Court subsequently upheld this decision in [Brown \(Jamaica\)](#) [2015] UKSC 8, holding that for a serious risk of persecution to exist in general, ie as a general feature of life in the relevant country, it must be possible to identify a recognisable section of the community to whom it applies, but to require it to be established also that the relevant minority exceeds any particular percentage of the population was objectionable.



## Examples

### Example 1

Fabrice is a citizen of Cameroon. His protection claim is based on his fear of retribution of family members because of a business dispute. It is certified under s94 because it is considered that he could find solutions by way of state protection or internal relocation.

Fabrice may pursue an appeal from abroad, which can only be lodged once he has left the country. His only “in-country” remedy would be to bring judicial review proceedings against the certificate, with a view to setting it aside: if it was quashed by the UT or withdrawn via a settlement offer from the Home Office, then there would be no barrier to a right of appeal from within the UK.

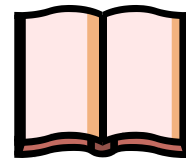
A lead case on clearly unfounded certificates, which helpfully summarises most of what went before, is [FR \(Albania\)](#) [2016] EWCA Civ 605. It only really adds one significant principle, but it is a very useful one-stop shop summarising the earlier case law. Relevant points arising from the decision include these:

- The supervisory jurisdiction by judicial review is exercised in an intensive way albeit “*the jurisdiction remains a supervisory and reviewing one*” – doubtless as always it will be easier to succeed in alleging a decision failed to take account of relevant evidence/considerations than to demonstrate irrationality
- the judge on judicial review must essentially pose the question whether “*the claim cannot on any legitimate view succeed*”
- It noted that Home Office guidance presently stated: “*Credibility should not be taken into account when considering whether to certify a claim unless the claim is so incredible that it is incapable of belief*” - or unless “*nobody could believe the appellant's story*” – accordingly merely identifying doubts (eg “you had no problems before leaving the country”) , weaknesses and inconsistencies does not justify certification (as opposed to mere refusal carrying the right of appeal)

- Subject to generating a reconsideration of the case and amendment of grounds in the course of the judicial review proceedings, the challenge is limited to evidence before the decision maker (although this presumably includes those sources to which it is known the Home Office have regard: eg OGNs and CG decisions)
- Most cases turn, risk aside, on the believed availability of state protection or internal relocation: it is worth looking at quite how ropey the claim was in *FR* itself on this score, eg the internal relocation case was essentially a claim of unparticularised and unspecific assertions as to the applicant's antagonists' political connections
- "it is important that those considering certification keep in mind and give separate consideration to the different requirements of the decision on the application for asylum and the decision on certification" – ie this approach is unlawful:
 

"because I have rejected the asylum claim therefore I certify as clearly unfounded"
- In a case where there is a bare certification without any additional reasoning, it will be necessary to revert to the original decision on the substance of the claim to see if the application is rejected to the "clearly unfounded" level rather than the bare refusal standard

Whilst in an old-style appeal there could be no certification of an appeal as "clearly unfounded" once it was lodged, in new-style appeals a certificate may be made after the appeal has been brought - then the appeal must be continued from outside the United Kingdom (s92(6) NIAA 2002).



## Example 2

Shakeel is a citizen of Pakistan. He claims asylum four years after arriving in the United Kingdom as a student. His claim, based wholly on his own statement and interview and some letters from angry family members, is based on the disapproval that his family have shown for the "love match" marriage he entered into just before arriving in this country which defied their wishes that he enter into an arranged marriage.

The application is refused because the Home Office say that the timing of his asylum claim, only after his Sponsor college lost its licence, suggests that it is not credible, whilst in any event both state protection and internal relocation should be available against risks from a family whose influence could only be limited and local. They additionally certify his claim as "clearly unfounded".

The Home Office have a point here. Possibly their decision on credibility is vulnerable to challenge because it is inconsistent with taking his case at its

highest; however, in their alternative reasoning they have assessed his case as if it is true so that is not a material error on their part. Where non-state actors whose influence is very unlikely to be national are the source of feared harm, only the strongest objective country evidence as to their possession of powerful contacts across the whole territory could establish an asylum claim (obviously there is a very significant difference between the capacity of aggrieved family members as opposed to organisations with national networks like the Taliban). There is no sign that such evidence was before the decision maker and so no judicial review could be brought until further representations had been made and refused (or ignored).

### Example 3

Sunil is a citizen of India. He is gay and fears social ostracism and physical violence if he returns there. He claimed asylum after studying in the UK for one year as a Tier 4 student. His claim is refused because of the possibility of state protection and internal relocation. The Home Office certify it as clearly unfounded.

You review his claim against the Country Guidelines decision of [MD \(same-sex oriented males: risk\) India CG \[2014\] UKUT 00065 \(IAC\)](#). Whether or not the Home Office rely on this decision it will obviously be of central importance to your consideration of the viability of the claim. From the headnote you will see that there is no general risk of violence and that internal relocation to cities where same-sex relationships are tolerated is generally available: so the case against “clearly unfounded” certification can only get off the ground if you can find evidence to counteract those general assumptions: relevant considerations may be as the attitude of his family, his profile, and his ability to work in the self employed sector.

Given the likelihood that the central issues in “clearly unfounded” certificates will turn on internal relocation and state protection issues, it is essential

- To be aware of the latest relevant country evidence (and ensure it is part of any further representations that seek to get a fresh claim recognised)
- To be aware of the substantive law: eg
  - state protection has to be available and effective
  - internal relocation involves 3 questions: the existence of a safe haven, its accessibility, the reasonableness of life there including its durability

### “Late raising of claim” certificates: Section 96 NIAA 2002

As well as clearly unfounded certificates, a certificate can be issued under NIA 2002 section 96. Note that s96 certificates bar the right of appeal altogether: they do not simply lead to an out-of-country appeal like their statutory cousins under s94 and s94B.

Certification is likely to follow:

- where the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against an old immigration decision (s96(1)), or
- the appeal seeks to rely on a ground that should have been, but was not, raised in a s120 notice (s96(2)) and
- (in either case) there is no satisfactory reason for failing to do so

Before April 2015 the provision was very rarely used. Practitioners are now seeing it rather more. It reads as follows:

#### 96 Earlier right of appeal

(1) [A person may not bring an appeal under section 82 against a decision (“the new decision”)] 2 if the Secretary of State or an immigration officer certifies—

- (a) that the person was notified of a right of appeal under that section against another [...] 3 decision (“the old decision”) (whether or not an appeal was brought and whether or not any appeal brought has been determined),
- (b) that the claim or application to which the new decision relates relies on a [ground] 4 that could have been raised in an appeal against the old decision, and
- (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that [ground] 5 not having been raised in an appeal against the old decision.

(2) A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies—

- (a) that the person has received a notice under section 120(2),
- (b) that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and
- (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in a statement under section 120(2) or (5).

(4) In subsection (1) “notified” means notified in accordance with regulations under section 105.

(5) [Subsections (1) and (2) apply to prevent] 7 a person's right of appeal whether or not he has been outside the United Kingdom since an earlier right of appeal arose or since a requirement under section 120 was imposed.

(6) In this section a reference to an appeal under section 82(1) includes a reference to an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) which is or could be brought by reference to an appeal under section 82(1).

(7) A certificate under subsection (1) or (2) shall have no effect in relation to an appeal instituted before the certificate is issued

The operation of the old version of s96 NIAA 2002 was considered in [J \[2009\] EWHC 705 \(Admin\)](#), a decision which remains relevant as the statutory scheme remains generally the same, and which identified the relevant questions as whether:

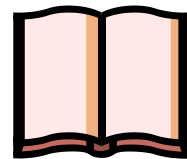
- the individual was notified of an earlier right of appeal
- the matters now relied upon could have been raised earlier
- if they could have been raised earlier, whether there is a satisfactory reason for not doing so

- in all the circumstances, if there is no good reason for the late raising of the claim, certification is appropriate as a matter of discretion (for example, having regard to considerations such as the section 55 duty to secure the best interests of children, even if a parent has failed to act in a timely fashion)

It might be thought rather strict to bar a right of appeal regarding a protection claim. However, where the claim is weak and the excuse given for lateness really does not hold water, this is still a possibility: thus the Home Office [Late Claims Guidance](#) states:

*For example, in an asylum claim an explanation on reasonable but very weak grounds is given. If the weak explanation is inconsistent with a genuine fear of persecution you are entitled to conclude that the explanation was not satisfactory. For example if an individual said that they didn't raise Article 3 at their appeal because they forgot, this is a reasonable explanation but is inconsistent with someone who claims to be in fear of torture on return as it is unlikely that they would forget to raise that issue at appeal.*

*Contrast this with an explanation given in an asylum claim on reasonable but more substantial grounds where an individual did not raise certain issues at his appeal because he was too traumatised at the time to discuss them. The reason given for not raising the grounds earlier also supports the asylum/human rights claim. You are entitled to conclude that the explanation is satisfactory.*



## Example

Jamil is a citizen of Pakistan who entered the UK unlawfully. Five years after arriving here he was apprehended by the immigration service and made a claim that his removal from the UK would infringe his family life with his wife and British citizen daughter. He was served with a one-stop notice warning him to bring to the attention of the Home Office any new grounds for remaining in the UK. His human rights claim failed and appeal rights became exhausted. He has now made a protection claim based on his fear of the authorities in Pakistan, who he says have long had an interest in him because of political speeches he made when a student in Pakistan a decade ago.

His new claim is liable to certification under s96 because he previously has received a one stop notice at a time when the claim could have been raised. When taking instructions, it will be essential to investigate why he did not raise this relationship sooner.

## Asylum procedures

### Introduction

In this section we look at some of the new procedures introduced by the Immigration Rules and Home Office guidance. In particular we address returns to third countries beyond those provided for by the Dublin 3 Regulation.

Changes to the Immigration Rules are introduced by House of Common papers called Statements of Changes, The latest relevant to these particular areas of asylum are [HC895](#) and [HC667](#), the latter of which contained transitional provisions:

“The changes to Part 11 shall take effect from 24 November 2016. The changes set out in paragraphs 11.122 and 11.123 shall apply to all asylum claims made on or after 24 November 2016. All other changes to Part 11 shall apply to all decisions made on or after 24 November 2016.”

So the new third country provisions entered force for claims *made* after 24 November 2016; the date of claim; other new provisions enter effect for *decisions* made after 24 November 2016. The one change in HC895 applied to all decisions from 6 April 2018 (see [explanatory memorandum](#)).

### Third country/inadmissibility provisions

There is a batch of Rules [in Part 11](#) that mean claims will be ruled inadmissible and thus any consideration of them is ruled out, because the applicant has already been granted leave with equivalent rights to protection status and where another country is considered responsible for the asylum claim. Some of the Rules aim to tidy up the treatment of asylum claims, just to make it clear that the UK is not considered to be the responsible country for assessing some claims where protection has been granted elsewhere.

- Rule 345E provides for the run-of-the-mill Dublin return to a European Union Member State which an asylum seeker has transited, whether or not they claimed asylum there
- Rule 345A(i) addresses returns of persons granted international protection (since HC895 including also subsidiary protection in addition to refugee status) to European Union Member States: this is consistent with the Home Office view that the Dublin 3 Regulation does not apply to cases where the third country has granted refugee status, but nevertheless the claim will be considered inadmissible as protection has been granted elsewhere. The reasons for the addition of subsidiary protection to this paragraph are set out in the [explanatory memorandum to HC895](#) as follows:
  - 7.1. The change to Part 11 is being made to provide that an asylum claim will be deemed inadmissible, and will not be substantively considered by the UK, if another EU Member State has granted either refugee status or subsidiary protection (known collectively as international protection). This change is in line with both the UK's established policy on safe third countries, and the EU's objective in reducing the secondary movements of those granted international protection.
  - 7.2. Article 25(2)(a) of Council Directive 2005/85/EC on minimum standards on

procedures in Member States for granting and withdrawing refugee status (“the Procedures Directive”) permits a Member State to apply the principle of inadmissibility to asylum claims in certain circumstances.

7.3. The rule change is made further to the Procedures Directive, in line with the stated aim of the European Union to limit secondary movements of applicants for international protection.

7.4. The UK has operated a safe third country policy for many years. Broadly, this means the identification of circumstances in which an individual has arrived in the UK and sought international protection, but where there is an alternative country that would be regarded as capable of granting sufficient protection. This policy is a key element of the UK’s asylum policy and allows the UK to prevent misuse of the asylum system.

- Rules 345A(ii) and (iii) explain that, for returns to countries beyond the European Union, asylum claims will be considered inadmissible where
  - (ii) A person will be readmitted to a country where they have been granted refugee status or would otherwise receive sufficient protection there, which includes the requirement that the “non-refoulement” obligations under the Refugee Convention are respected (ie that a person will not be sent onwards to another country where they would be in danger). The meaning of “sufficient protection” will have to be considered – for example, does this imply residence rights equivalent to “the rights akin to nationality” which justify exclusion under Article 1E of the Refugee Convention
  - (iii) A person will be readmitted to a country where their life and liberty will not be threatened for a Convention reason, there will be no return to another country contrary to Article 3 ECHR or the Refugee Convention, there is a *possibility* of applying for refugee status and of receiving protection in accordance with the Refugee Convention, and there is a sufficient degree of connection between the asylum seeker and the country in question for return there to be reasonable (having regard to the considerations in 345D: time spent there, relationship with nationals and persons habitually resident there including family members seeking status there, family lineage beyond close family, and cultural or ethnic connections
- Rules 345A(iv) and (v) provide that an asylum claim will be deemed inadmissible where
  - (iv) the person had been granted status equivalent to the *rights and benefits* of a refugee or
  - (v) is allowed to remain in the UK *on some other grounds which protect them against refoulement* whilst the suitability of a non-EU third country is assessed
- The rest of this part of the rules reads as follows:

#### **“First Country of Asylum**

**345B.** A country is a first country of asylum, for a particular applicant, if:

- (i) the applicant has been recognised in that country as a refugee and they can still avail themselves of that protection; or
- (ii) the applicant otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement; and
- (iii) the applicant will be readmitted to that country in either case.

**Safe Third Country**

**345C.** A country is a safe third country for a particular applicant if:

- (i) the applicant’s life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;
- (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;
- (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country;
- (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country;
- (v) there is a sufficient degree of connection between the person seeking asylum and that country on the basis of which it would be reasonable for them to go there; and
- (vi) the applicant will be admitted to that country.

**Safe Third Country connectivity**

**345D.** In order to determine whether it is reasonable for an individual to be removed to a safe third country in accordance with paragraph 345C(v), the Secretary of State may have regard to, but is not limited to:

- (i) any time the applicant has spent in the third country;
- (ii) any relationship with persons in the third country which may include:
  - a. nationals of the third country;
  - b. non-citizens who are habitually resident in the third country;
  - c. family members seeking status in the third country;
- (iii) family lineage, regardless of whether close family are present in the third country; or
- (iv) any cultural or ethnic connections.

**Dublin Transfers**

**345E.** The Secretary of State shall decline to substantively consider an asylum claim if the applicant is transferable to another country in accordance with the Dublin Regulation.”

The thinking in these Rules was foreshadowed in the decision of the UT in [TG](#) [2016] UKUT 00374 (IAC). An ethnic Tibetan Chinese national claimed to fear persecution in his country of origin, China; but it was argued by the Secretary of State that he could reside in India given he had a residence document which had previously entitled him to reside there, and that he faced no threat of removal from India to China §4-6. As it happens, the Home Office conceded that he was a refugee with respect to his country of nationality.

The Secretary of State nevertheless argued that he was admissible to India and that the burden lay upon him to establish this, in line with [MA \(Ethiopia\)](#) [2009] EWCA Civ 289 where it was held that the “Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return.”

The UT accepted the arguments advanced by TG, which were that given he was accepted to be a refugee vis-à-vis his country of nationality, India fell to be treated as a safe country.

Thus the relevant question became whether he was admissible there. They concluded that “as a Tibetan exile from China he does not have the rights and obligations which are attached to Indian nationality or rights and obligations equivalent to those” §32.

However, the asylum seeker in *TG* benefited from the very significant factor that the Secretary of State conceded their entitlement to refugee status vis-à-vis their country of nationality. So there was no need for judicial assessment of that issue.

Now the President has revisited the issue in *Wuso* [PA/13474/2016] (which is likely to be reported). There an Iranian national lived much of his life unlawfully in Iraq, without gaining nationality. He lived in the Kurdish north. He was taken there as a baby having been taken by his mother following his father’s murder by the Iranian security forces for political reasons. He claimed to have fled Iraq because of the aftermath of a blood feud.

The credibility of his claim to fear persecution in Iraq was rejected by the Home Office and First-tier Tribunal. However, the treatment of his asylum claim in Iran was extremely brief: both the Secretary of State and the Tribunal concentrated on his admissibility to Iraq and his safety there. Both found that he was admissible to Iraq, because of the country evidence cited in *AA Iraq* which indicated that a Kurd with a significant footprint in Iraq would be accepted back by the authorities there.

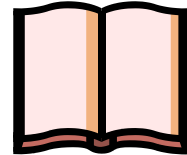
The UT finds

- Under the Refugee Convention, the key question is whether a person’s removal would infringe Article 33 of the Refugee Convention (ie the prohibition on refoulement to a country where life or freedom would be threatened – there is no duty to determine status vis-à-vis a person’s country of nationality if there is another state to which they can be admitted)
- However, refugee law in the EU requires a more nuanced approach because of the express provisions of the Procedures Directive, which lays down the criteria for determining whether a particular destination is an acceptable first country of asylum (which requires them to have been recognised as a refugee or otherwise to receive sufficient protection there, including benefitting from the non-refoulement principle) or a safe third country
- These issues can be considered on appeal (even though the right of appeal is focussed on breach of the Refugee Convention rather than EU refugee law norms) not just on judicial review: so the FTT would need to assess matters such as connectivity for itself
- If the proposed country for removal satisfied one of those tests, then the FTT would not need to consider the asylum seeker’s entitlement to refugee status: because the removal would not breach the Refugee Convention or EU refugee law
- If the proposed country for removal does not satisfy one of those tests, then the FTT would need to consider refugee status vis-à-vis the country of origin
- On the facts of this case, as a Kurd who originated from the KRG for relevant purposes having lived there most of his life, the Appellant was returnable there

In *Bashir* [2017] EWCA Civ 397 the Court of Appeal looked at the issue of applications for asylum lodged in the territory of the British Sovereign Base Areas in Cyprus. Although the Charter of Fundamental Rights did not apply to the British Sovereign Base Areas, as a matter of public international law, the Refugee Convention continued to apply in those parts

of the Colony of Cyprus which continued, with the status of Colony or British Overseas Territory, to be the British Sovereign Base Areas.

Individuals recognised as refugees in those Areas were owed direct obligations by the UK, and it seemed unlikely that leaving the applicants there in admittedly unsatisfactory conditions could be consistent with the duty under Article 34 of the Refugee Convention that the responsible State should “as far as possible facilitate the assimilation and naturalisation of refugees”.



## Example

Goodluck is a citizen of Zimbabwe. He was granted asylum in Botswana before travelling to the UK. The Home Office wish to declare his protection claim inadmissible and return him to Botswana under Rule 345B on the basis that he has been granted asylum in a country which respects Refugee Convention standards, without considering his asylum claim substantively in the UK.

The Home Office decision may be challenged by way of judicial review (as there will have been no decision to refuse a protection claim, only a decision to declare a claim inadmissible). To defend their decision, it will be necessary for the Home Office to show that Goodluck

- would be able to resume his entitlement to refugee status in Botswana and
- would not be at any practical risk of being returned to Zimbabwe, whether or not he was formally able to enter Botswana as a refugee in the first place and
- would be readmitted to Botswana

Goodluck’s judicial review claim would need to be based on evidence that had been before the decision maker that indicated an opposite conclusion.

Now imagine that Goodluck had not been granted asylum in Botswana. However he had spent six months there living with his cousin, a national of the country.

The Home Office wish to return him to Botswana under Rule 345C on the basis that he faces no threat to his life and liberty there for a Convention reason and will not be sent on elsewhere to a place where such dangers or risks of Article 3 violations exist, there is a possibility of requesting refugee status which if granted would be accompanied by appropriate protection, and that there is sufficient connection there between the asylum seeker and the country in question (via his cousin).

His cousin certainly represents at least some form of family lineage in the country. It may be that the better line of attack will be Botsana’s record on asylum. When researching the case, you could look at sources such as the US State Dept Report on the relevant country (these reports routinely, at section 2d, address *Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons*): the relevant one for example shows that Botswana “generally” respects Refugee Convention standards but that it has a

strict “first country of asylum” policy itself, whereby it returns people to transit countries: so it would be important to see whether this posed any dangers. Connectivity criteria under Rule 345B include both the presence of family members and “family lineage” more generally.

### Audio recording of interviews

Representatives are not funded to attend interviews unless the asylum seeker is a minor or particularly vulnerable. As a consequence of this funding bar, the Home Office should, on request, tape record the interview: see the case of [Dirshe \[2005\] EWCA Civ 421](#). It is strongly advisable that asylum applicants make use of this facility, which is available on demand but is not automatic, at least where there is a dispute as to credibility.

A provision for audio-recording of personal interviews then entered the Rules, though only where “considered necessary” (presumably including the situation where the Secretary of State is persuaded that this is the case).

“**339NE** The Secretary of State may require an audio recording to be made of the personal interview referred to in paragraph 339NA. Where an audio recording is considered necessary for the processing of a claim for asylum, the Secretary of State shall inform the applicant in advance that the interview will be recorded.”

The Home Office has guidance addressing this issue, [Asylum Policy Instruction: Asylum Interviews](#), which at 6.1 addresses their *Recording policy*:

The Home Office is required to allow claimants, with some exceptions, to have their asylum interviews audio recorded on request. The exceptions are those entitled to publicly funded legal representation at interview, or the resources to fund their own legal representation. Interviews should not normally be recorded where a legal representative is present, or where claimants with self-funded legal representation choose not to have their legal representative present.

Whether or not the interview is recorded, it is important to ensure that any challenge to the interview record is made in a timely way: judges on appeal will be much more impressed.

### Fresh Claims

The key considerations identified by [Rule 353 in Part 12](#) are:

- The Rule applies both regarding previously determined claims where appeal rights have been exhausted but also those where a claim has been expressly withdrawn: or deemed as withdrawn (ie express withdrawal via a disclaimer, or departing the UK during the claim process or failing to complete a questionnaire/attend an interview, unless the failure is due to reasons beyond their control)

- The material upon which the fresh claim is based has not previously been considered by the Home Office
- Such material is significantly different from any previous material that has been considered
- The new material must be considered together with and in the light of the previous claims and decisions that have been made in the case
- and, everything considered together, must now create a realistic prospect of success on appeal

To show that the legal test has been met, it will usually be necessary to show that:

- there is new evidence that suggests that the previous decision was wrong and any appeal was incorrectly decided, or
- there are new grounds, such as the person now having established family life in the UK whereas previously only private life existed, or
- the law has changed requiring, for instance, a different approach to be taken to the claim than the legal understanding that was in place at the time of a previous appeal hearing (for example, before the decision of *HJ Iran* which recognised that asylum seekers could not be expected to be “discreet” regarding factors material to their personal identity)

The full rule reads as follows:

**353.** When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.

**353A.** Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

The Home Office guidance [Asylum and human rights policy instruction: further submissions](#) provides as follows:

- Any non-protection based further representations must go via a fee-paid application, by post or in person (para 3.3) (subject to the dispensations in the Rules for people who are detained)
- Medico-Legal Reports are to be considered in the context of the previous decisions in the case, including findings on credibility (para 3.7)
- Decision making will be suspended for Medico-Legal Reports only where a senior caseworker agrees that there is a good reason for one not having been provided on the original application (para 3.7)
- Asylum seekers returning from abroad who have previously made an asylum claim in the UK will be treated via the “further representations” route (para 3.12), unless
  - they are returned under Dublin 3 “third country” arrangements for the UK to take responsibility for the asylum claim and where it has not previously been determined or treated as withdrawn under Rule 333C
  - their claim was treated as withdrawn under Rule 333C

That rule reads as follows:

#### **Withdrawal of applications**

**333C.** If an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued. An application will be treated as explicitly withdrawn if the applicant signs the relevant form provided by the Secretary of State. An application may be treated as impliedly withdrawn if an applicant leaves the United Kingdom without authorisation at any time prior to the conclusion of their asylum claim, or fails to complete an asylum questionnaire as requested by the Secretary of State, or fails to attend the personal interview as provided in paragraph 339NA of these Rules unless the applicant demonstrates within a reasonable time that that failure was due to circumstances beyond their control. The Secretary of State will indicate on the applicant’s asylum file that the application for asylum has been withdrawn and consideration of it has been discontinued.”

- Asylum seekers whose original claim was processed under the DFT may still be subjected to the fresh claims process, but regard will be had to the fact their case may have been determined in an unfair procedure. Any additional evidence they now provide will be assessed as to whether it could have been provided under during non-DFT appeal they have had, and the reasons for evidence coming to light only now will be considered carefully (para 4.1) (note that the practice of the First-tier tribunal is to set aside DFT decisions of its own motion under rule 32 of the 2014 Procedure Rules)

- Either limb of a claim on international protection and human rights grounds may pass the fresh claim test, though if only one limb passes the threshold then a right of appeal will be recognised only with regard to that dimension of the case
- If a person failed to attend their appeal hearing for good reason, then discretion may be exercised to give them a further right of appeal (para 6.6)

The Rule withdrawing claims is of some interest. Fairly modest failings can take on significant consequences, as where a detainee is misadvised as to the importance of completing a questionnaire. The supporting Guidance states:

**“Policy intention behind treating claims as withdrawn**

The underlying policy objective in treating an asylum claim as withdrawn is to:

- maintain the integrity of the asylum process by focusing efforts on those claimants whose behaviour demonstrates they are serious about pursuing their asylum claim
- treat claims as withdrawn where the claimant shows no real interest in pursuing their claim by failing to comply with the process, absconding or leaving the UK without permission before a decision
- demonstrate a commitment to make sure genuine refugees are given the protection they need quickly whilst robustly pursuing removal action against those who make unfounded claims and subsequently abscond

**No acceptable explanation**

If the explanation is not acceptable, or no response is received, the asylum claim should normally be treated as implicitly withdrawn. The claimant must be informed that the claim is being treated as implicitly withdrawn using template letter ASL.3725.

If necessary, explain why any reason provided was not accepted. If the claimant is represented, covering letter ASL.4826 must be sent to the legal representative along with a copy of the ASL.3725.

Although it will normally be appropriate to treat asylum claims as implicitly withdrawn where the claimant has either failed to provide a reasonable explanation, or has replied after the deadline without a reasonable explanation for the delay, there may be circumstances where discretion should be exercised, and further investigation may be required. Template letter ASL.3725 must be issued to obtain specific further information from the claimant and/or legal representative before a decision is taken in such cases.

**Asylum claims made before 7 April 2008**

Implicit withdrawal under paragraph 333C can only be applied to asylum claims made on or after 7 April 2008. For claims made before 7 April 2008 refusal under Paragraph 339M on the grounds of non-compliance should be considered.”

## The 2015 changes to appeals and fresh claims

The Home Office guidance on treatment of further representations as fresh claims where there was a previous right of appeal under the pre-April 2015 appeals regime needs careful attention:

### **“Section 6: When paragraph 353 does not apply**

**6.2 Cases refused asylum but granted at least 12 months’ leave before 6 April 2015** Where a claimant was refused asylum before 6 April 2015 but granted another form of leave in excess of one year, they would have had a right of appeal against the refusal of asylum under section 83 of the Nationality, Immigration and Asylum Act 2002. This was repealed on 6 April 2015 by the Immigration Act 2014. However, as they were granted leave on another basis, they will not have been able to appeal on human rights grounds under previous appeals provisions. Under section 82 of the 2002 Act (as amended by the Immigration Act 2014), the refusal of a protection or human rights claim attracts a right of appeal – irrespective of whether leave is granted for other reasons, for example, on a discretionary basis. Caseworkers must therefore not apply paragraph 353 to human rights further submissions lodged after asylum was refused where there has not been any previous opportunity to appeal to the Tribunal on human rights grounds. This section only affects cases decided before 6 April 2015.

### **6.3 Cases refused asylum but granted less than 12 months leave before 6 April 2015**

Where a claimant was refused asylum before 6 April 2015 but granted another form of leave for one year or less there was no right of appeal against the asylum refusal because section 83 of the 2002 Act only provided a right of appeal where leave of more than one year had been granted. Such individuals had no opportunity to appeal against the refusal of asylum, where they were granted less than one year’s leave, whereas in contrast the new appeals provisions under section 82 of the 2002 Act (as amended) do provide that opportunity. Therefore, caseworkers should not apply paragraph 353 to any asylum or human rights submissions lodged after the refusal of the asylum claim in cases where limited leave of one year or less was granted for other reasons before 6 April 2015.

For example, unaccompanied asylum seeking children may have been refused asylum but granted less than 12 months’ limited leave due to lack of adequate reception arrangements. Such individuals may subsequently make an application for further leave or lodge further submissions on protection grounds. Where they have not previously had any opportunity to bring an appeal against the refusal of asylum, Paragraph 353 should not be applied. This principle may also apply to those granted 6 months limited leave under the Restricted Leave or Discretionary Leave policies.

This section only affects cases decided before 6 April 2015.”

So in short

- Rule 353 should not be used against asylum seekers who previously were unable to appeal on private and family life grounds because they missed out on an old-style right of appeal because they received a grant of DLR that meant they did not face removal and so had no appealable immigration decision

- Rule 353 should not be used against asylum seekers who previously were unable to appeal on asylum grounds because they missed out on an old-style right of appeal due to their DLR grant being too short to attract an appeal

It was briefly thought that the new appeals system whereby the refusal of an asylum or human rights claim generates a right of appeal might make fresh claim refusals appealable: however this possibility was put firmly to bed by [Robinson](#) [2017] EWCA Civ 316.



## Top Tip

Re changing practices regarding child asylum seekers

### *Old system*

*Before the entry into force of the latest appeals system in April 2015, minor asylum seekers typically when through the following sequence of events:*

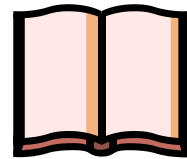
- (1) Minor claims asylum*
- (2) If accepted to be a child but asylum claim rejected, they are granted DLR (before 6 April 2015) until aged 17.5*
- (3) They apply for further leave to remain on asylum and/or human rights grounds before expiry of DLR*
- (4) If the application refused, there would be a right of appeal: because they were being refused further leave to remain, the consequence of the decision would be that they lacked leave to remain (NIA 2002 s82(d)) - For this reason there was no point in the Home Office applying the fresh claim test, because it would not bar the right of appeal as the decision would be an appealable immigration decision whatever the Secretary of State thought of the claim*

### *New system*

*However now things are rather different.*

- (1) Minor claims asylum*
- (2) If accepted to be a child but their protection claim is rejected, granted DLR until aged 17.5 (after 6 April 2015)*
- (3) They apply for further leave to remain on asylum and/or human rights grounds before expiry of DLR*

- (4) *The Home Office are entitled to apply the fresh claim test to those further representations – because it is only if there is a fresh claim that they would have to recognise a right of appeal upon refusal of a human rights claim*
- (5) *Indeed if there was no prior appeal of the last refusal or if issues are now raised that could have been raised in response to a section 96 notice, they might be entitled to certify the application*



## Example

Farhan is from Afghanistan. He was granted DLR as a minor in May 2015. He did not lodge an appeal and settled for his grant of DLR. When his DLR is set to expire, he may well wish to make an application for further leave. If he does so simply reiterating his original protection claim, and it is refused (as must be very likely given its previous failure), he will not be treated as having made a protection claim: merely further representations which “repeat” a claim as to which he was alerted to an appeal right, but failed to pursue.

Though it was originally thought that the wording of the post-April 2015 appeals provisions might permit a “fresh claim” refusal to be appealed to the First-tier Tribunal, the courts have held that the refusal of further representations does not amount to a the refusal of a human rights claim: see most recently Robinson [2017] EWCA Civ 316. Accordingly there is no right of appeal. The only remedy would be judicial review of the refusal.

In Apata [2016] EWCA Civ 802 the Court of Appeal make it clear that an urgent removal judicial review should not be pursued outside the context of further representations process. So make sure you always put a claim to the Home Office first and

- Challenge their delay in determining it pre-removal, or
- Challenge the substance of their refusal reasons when a decision comes (which may require applying to vary the original grounds for judicial review if they were solely against removal without its consideration).
- Rarely it may be necessary to lodge a judicial review application on the basis that there has not been time to make an asylum application, though one would need a very cogent explanation as to why this had not been feasible sooner.

Otherwise, never bring a judicial review claim in which a case is put against removal without it having been put to the Home Office first.

## Challenges to the Detained Fast Track process

Challenges were brought against the general lawfulness of asylum appeals in the Detained Fast Track (DFT) and its successor, the DAC (ie the administration of asylum claims by those in immigration detention under the *Home Office Detention: Interim Instruction and Process Map* ("the DII") and by the Detained Asylum Casework process). The former succeeded: in [Detention Action](#) [2014] EWHC 2245 (Admin) Ouseley J ruled that. absent *four clear days* between the allocation of a lawyer to an asylum seeker within the DFT and their date of interview

I am satisfied that the period in detention before they are allocated and the proximity of allocation to the substantive interview means that in too high a proportion of cases, and in particular for those which might be sensitive, the conscientious lawyer does not have time to do properly what may need doing.

This was a partial victory which only found one aspect of the process unlawful. However, the next year, in [Detention Action](#) [2015] EWCA Civ 840, the Court of Appeal went much further and found that

the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases. For the reasons that I have given, the safeguards on which the SSHD and the Lord Chancellor rely do not provide a sufficient answer. The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention.

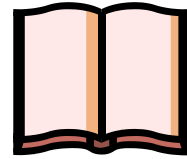
However, this second Detention Action challenge only related to decisions under The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the DFT Rules lived in the Schedule to the principal 2014 Rules): not to their predecessors, The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 which had governed appeals since 2005.

In [TN \(Vietnam\)](#) [2017] EWHC 59 (Admin), the Court found that decisions made under the older Rules were unlawful for the same reasons of unfairness as the Court of Appeal had already identified. However, most of these decisions were relatively old, and many had not been challenged by way of judicial review or appeal. Accordingly there was an issue as to whether the past proceedings should be revisited. The Court concludes

- applications should be made, direct to the FTT, for earlier appeal decisions under the 2005 Rules to be set aside
- the FTT should have regard to the need for finality in litigation, prejudice to good administration, and there being *evidenced* disadvantages leading to unfairness

The challenges to the procedure which has effectively replaced the DFT, the Detained Asylum Casework process (DAC) have so far resoundingly failed – in [TH \(Bangladesh\)](#) [2016] EWCA Civ 815 the Court of Appeal refused permission to appeal against the decision

of the Administrative Court below, noting that the safeguards including those designed to prevent inappropriate cases entering the system in the first place and that the DAC system involved lawyers at an early stage which significantly contributed towards achieving fairness.



## Example

Rashid is a citizen of Pakistan. He claimed asylum, having been apprehended as an overstayer working in a restaurant unlawfully, and went through the DFT process six years ago. His account of fearing persecution from his family due to having entered into an arranged marriage was found incredible because of implausibilities and inherent discrepancies. On his own account he was never ill-treated. He wishes to make a fresh claim for asylum having heard about the challenges to the DFT system. He has no new evidence to put forward.

It would seem quite difficult to reopen Rashid's case, even allowing for the general unfairness that has now been judicially accepted as contaminating the DFT process. Findings on discrepancies and plausibility will not necessarily be undermined by general findings of an unfair process, unless it is possible to show that he would have had answers to the matters counted against him, had he had more time and been within a fairer procedure. It will be essential to prepare a full witness statement that shows there was far more substance to his case, and that apparent discrepancies have explanations and that seemingly unlikely events are in truth plausible, to get his case off the ground.

Dahe is a citizen of China. He claimed asylum, having been present as a student for three years in the UK, after hearing about the Chinese authorities raiding his family's home because of suspicions that he was a political dissident. He had no evidence of their interest in him when he went through the DFT process four years ago: he says everything happened too fast for him really to think about his case. However he now has copies of court proceedings initiated him following the raid.

Dahe has a more promising case for inviting the FTT to reopen proceedings. It will still be necessary to determine whether he could have obtained copies of the court proceedings for the DFT process, and whether the possibility of doing so was raised at a hearing, and why it was that he claimed asylum so long after arriving here. However, there may well be answers to those concerns.

## Damages for wrongful status determination

In [AD v the Home Office](#) [2015] EWHC 663 (QB), a Mongolian citizen was returned to their country of origin where they were mistreated (after the DFT appeals system had not identified them as needing asylum, and further representations contending that an opportunity should be given for an assessment by medical experts on torture and to translate documents, had been rejected). The asylum seeker returned to this country and established

their entitlement to international protection following a successful appeal; and sued for damages because of the injury he had suffered which he argued was foreseeable.

- The Judge accepted that the Qualification Directive gave a right to refugee status and that potentially a damages claim might be available for a person who had been wrongly refused
- However in this case, the errors by Home Office officials were excusable and the defendant had not manifestly and grossly disregarded the limits on their powers.
- In any event where the Home Office had made an assessment of the claim and rejected it, there was no direct causal link between the breaches of the Procedures Directive, which were administrative, and the loss suffered.



## Top Tip

Generally speaking (unlawful detention aside), it is virtually impossible to obtain damages against government departments acting in good faith, however incompetent they may have been. However, refugee and humanitarian protection law is (for the time being) part of the international protection regime of the European Union. So in theory damages can be obtained for breaches of the relevant legal provisions. However, there is a high test for obtaining damages in European Union law. Nevertheless, where there has been a really serious failing by the Home Office (as AD shows, this needs to be with regard to information that was put before them and which they failed to address, not material provided only on appeal), it is always worth considering a damages claim.

## Third country procedures

### Introduction to Dublin 3 removals

Procedures surrounding third country removals under the Dublin 3 Regulation (ie to fellow EU Member States) are an important area of modern asylum practice.

There are numerous legal challenges possible, of which the main ones are:

- Whether the UK is the responsible country, under the original hierarchy of responsibility or because the responsibility of another country has lapsed due to delays in decision making, transfer or departure/expulsion from the European Union
- Whether there will be a fundamental rights breach caused by transfer to the responsible country, because of
  - Reception conditions in the destination country

- UK connections under the Dublin 3 humanitarian clause and/or the right to private and family life
- Whether the procedures used in order to determine the responsible country and/or the existence of relatives in the UK were unfair or inadequate
- Detention may be unlawful because not implemented pursuant to a lawful policy

Dublin 3 may also be used, not as a shield against removal, but as a means of obtaining an asylum seekers' entry to the United Kingdom. So far this has been recognised for vulnerable child asylum seekers.

### **General principles and outline of procedure**

EC Council Regulation Number No [604/2013](#) ("Dublin 3") is the instrument which now generally governs the procedures by which one European Union Member State only will be identified as responsible for a particular asylum claim (see the relevant [API](#) here). In practice this tends to be the State where they were first detected as entering the European Union territory subject to having relatives or family members present in other countries, or other special circumstances such as having been granted a visa for another country.

It applies (Article 49) where either

- The asylum claim is made after 1 January 2014 (it is not yet clear whether this means the latest, or the first, asylum claim in the European Union)
- The "take back" request is made after 1 January 2014

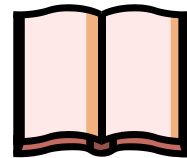
Its predecessor, Dublin 2, operates similarly to Dublin 3 in terms of the allocation of responsibility between Member States, but there are significantly greater procedural safeguards found in Dublin 3.

There is more subsidiary legislation that it is necessary to look at alongside Dublin 3, for example addressing the identification of relatives of an unaccompanied minor and their ability to care for the minor, establishing family links, dependency and care (Recital 35): see for example [the Implementing Regulation No 118/2014](#) of 30 January 2014.

Procedurally, the Dublin process is as follows:

- A Eurodac hit determines that the asylum seeker has already claimed asylum elsewhere in the EU
- The Secretary of State will then tell the asylum seeker that they are suitable for the third country process, and will write to the third country to invite them to take responsibility (on the basis of the Home Office's understanding of the hierarchy of responsibility set out below)
- The third country will then accept responsibility. If they fail to do so, this is "tantamount to accepting the request" and so they are deemed to have taken responsibility (see Articles 22(7) and 25(2) of Dublin 3) where the requested Member State does not reply in time

- The Secretary of State certifies that their case is eligible for the third country process under [Schedule 3 to the AICA 2004](#). That certificate has the consequence that the country in question is deemed to be a place where they will be safe from persecution in the Refugee Convention sense and will not be sent elsewhere incompatibly with the Refugee Convention
  
- The only remedy at this stage will be for the asylum seeker to make a human rights claim. It is likely that the Secretary of State will then certify the human rights claim as 'clearly unfounded' (under Sch 3 to the AICA 2004: such certificates operate similarly to s94 certificates discussed above), meaning that the right of appeal against that refusal is out-of-country. Usually this will be based on the poor reception conditions there perhaps combined with a low recognition of asylum claims generally or of a particular kind, or on the prospects of being sent onwards without the case being considered (which would breach the Human Rights Convention, and so is not ruled out as an argument by the deeming provision for Refugee Convention purposes)
  
- Absent an effective right of appeal, the assessment of the human rights claim as "clearly unfounded" may only be challenged by way of judicial review



## Examples

Ali is a citizen of Afghanistan. He arrives in the UK and claims asylum. He is granted temporary admission. The Home Office write to him stating they are considering his liability to return to Italy where he was fingerprinted.

Ali is very likely to face third country procedures in due course given he probably entered the EU via Italy's borders, making Italy the responsible country under Article 13. It would be a very good idea for him to identify any relatives here that might change that situation, by making the UK the responsible country under the hierarchy.

Akram is a citizen of Iraq. He arrives in the UK and claims asylum. He is detained as a search against the Eurodac system reveals that he travelled through France. He has no relatives in the UK and there is no other basis for thinking the UK is the responsible country. The Home Office certifies his claim as suitable for return to France on a third country basis without substantive consideration.

Akram contacts your office. He wants to lodge a judicial review claim against removal to France because he has heard that it does not grant asylum to people of his ethnic minority.

His claim is not yet ready for judicial review, given it seems that the UK is the responsible country, unless he is facing a very urgent prospect of removal: because he has not yet put a human rights claim against removal. The proper approach is to make the relevant arguments, if they are tenable and backed by objective country evidence from a reputable source, by way of representations, and then to bring a judicial review claim against any subsequent certification of those representations as “clearly unfounded”.

## Hierarchy of Responsibility for an Asylum Claim

Chapter 3 of Dublin 3 sets out a hierarchy under which responsibility for an asylum claim is allocated to a particular Member State. Taking aside special cases such as minors, those where family members are present, and questions of visa requirements and issue, most asylum seekers will face return to the country where they first entered the European Union. Cases are to be assessed “on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State” (Article 7(2)).

### *Identifying the responsible Member State*

The hierarchy for responsibility is essentially as follows:

- (1) Minors have their claim determined where they have a family member (spouse, unmarried partner, father, mother or guardian);
- (2) Accompanied minors have their situation treated alongside a family member provided this is in their best interests;
- (3) Unaccompanied minors should have their claim considered where they have a legally present “relative” who can care for them (Article 8(2));
- (4) Unaccompanied minors without relatives have their claim determined in the State “where the unaccompanied minor has lodged his or her application” – ie in the place they claim asylum - the CJEU in [MA & Ors](#) [2013] EUECJ C-648/11 explained that this meant the State where an asylum application was most recently lodged, ie usually their present location (Article 8(4));
- (5) For adults, in the Member State where there is a family member (spouse, unmarried partner, minor unmarried dependent children) with international protection status, regardless of whether the family was previously formed in the country of origin, or such a family member with a pending claim for asylum that has so far not been the subject of a first decision (Article 10);
- (6) In the Member State which has issued a residence document or visa (even if it was “issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents” (Article 12);
- (7) In the Member State into which “an asylum seeker has irregularly crossed the border ... by land, sea or air having come from a third country” as established on the basis of “proof or circumstantial evidence” including Eurodac hits (Article 13);
- (8) Where no other Member State is responsible, the first country where an asylum claim has been lodged (Article 3(2)).

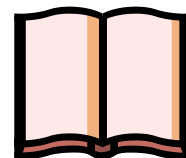
### *Lapse or assumption of responsibility*

There are various ways in which responsibility may lapse or alter, changing the responsible state from that indicated by the hierarchy above:

- If at any time a Member State issues a residence document to an asylum seeker, responsibility switches to that State (Article 19(1))
- Where it is established “*that the person concerned has left the territory of the Member States for at least three months*” unless they possess a valid residence document which it has issued (Article 19(2)) – once responsibility lapses, then a new procedure for determining the responsible state must commence (Article 19(2))
- Additionally if a person has left the European Union after their claim was refused or they withdrew it, under “*a return decision or removal order*”, then responsibility lapses and determination begins afresh (Article 19(3)).

There are particular forms of proof defined (see Annex II to the [Implementing Regulation](#)) distinguishing between “probative evidence” and “circumstantial evidence”, terms intended to show the cogency of the evidence:

- for example, vis-à-vis departure from the Member States (para 9 of Annex II), the relevant probative evidence is an exit stamp, tickets, a register establishing residence in the third country abroad, confirmation from the Member State from where the European Union was departed, passport stamps)
- whereas the merely “indicative evidence” (the next para 9 of Annex II) might be UNHCR confirmation, “detailed and verifiable statements by the applicant” or “reports/confirmation of the information by family members, travelling companions” and tickets, hotel bills, appointment cards for doctors, dentists, etc. in a third country, information showing that the applicant has used the services of a courier or a travel agency and “other circumstantial evidence of the same kind”.



### **Example**

Jahmir is facing return to Germany under the Dublin 3 Regulation because the Home Office have a Eurodac hit placing him there two years ago. Jahmir instructs you that whilst he was indeed in Germany, his asylum claim was rejected and he was returned to Iraq, his country of origin. There he was threatened by ISIS sympathisers and he once again fled Iraq, travelling to the UK via a route of which he is uncertain.

You will need to identify what evidence he has to prove his assertion. The best evidence would be a confirmation from the German migration authorities, or a ticket or passport stamp. Otherwise the more circumstantial evidence described as “indicative” may be available. The case is unlikely to get very far

on his bare word, because that is not a proscribed form of evidence unless it is “detailed and verifiable”. If Jahmir has a viable evidence-backed case, then he may challenge the identification of Germany as the responsible Member State, citing the authorities mentioned below such as [Ghezelbash](#) which require an effective remedy to be available against transfer. Although judicial review proceedings are not ideal for assessing evidence, they may be modified to do so, see by analogy the age assessment JR applications challenging age assessments which are heard as multi-day trials in the UT. In [Orfanopoulos \[2004\] EUECJ C-482/01](#) the CJEU considered that EU law might require post-decision evidence to be taken into account, contrary to the usual position in judicial review proceedings.

## Procedural safeguards

Amongst the most important procedural developments in Dublin 3, the latest incarnation of the relevant EU Regulation, are

- A requirement that in all cases there be an effective remedy against transfer both because of conditions in the country of return, but also based on the allocation of responsibility (Recital (17), article 27) – this has now clearly been accepted in the decisions of [Ghezelbash \[2016\] EUECJ C-63/15](#) and [Karim \[2016\] EUECJ C-155/15](#), which respectively show the CJEU accepting that under Dublin 3, Member State conclusions as to the assessment of responsibility may be challenged, both regarding the assessment of responsibility under the hierarchy, and due to the asylum seeker leaving the European Union for more than three months
- Information must be provided as to the consequences of having made an asylum application in another Member State (Article 4(1)(a)) and how responsibility is allocated under Dublin 3 (Article 4(1)(b))
- There must be a personal interview permitting information to be submitted as to “family members, relatives or any other family relations” (Article 4(1)(c)) and to access data held on them and correct inaccuracies (Article 4(1)(d)) – this must be provided “in a timely manner” (Article 5) unless they have absconded or the information is otherwise readily available, though if omitting the interview, the authorities “shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible” (Article 5(2)(b))

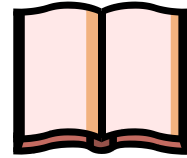
A receiving state must ensure that a returning asylum seeker is entitled to request that their case be re-opened or be able to lodge a new application, without this being treated as a “subsequent application” (Article 18(2))

- When transfer back to the responsible state is arranged, information must be given as to any remedies available against the decision (Article 26(2))
- Supervised and escorted transfers must take place humanely and reflecting the need to respect the person’s dignity; and relevant medical information must be passed between States where the returnee has suffered torture, physical, psychological or sexual violence, and the receiving state must ensure these are adequately addressed (Articles 29, 31).

- Minors receive particular guarantees, and in assessing their best interests Member States must take account of “family reunification possibilities” and “the minor’s well-being and social development” and “safety any security considerations, in particular where there is a risk of the minor being a victim of human trafficking” (Article 6(3)); actions to assess the availability of “family members, siblings or relatives” must be taken “as soon as possible” including tracing steps (Article 6(4))
- The vulnerable additionally receive procedural specific safeguards about the manner of their return abroad:
  - Recital (24): “supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child”; and Article 29 sets out that “If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity.”
  - Recital (27): data exchange “Including sensitive data on his or her health, prior to a transfer, will ensure that the competent asylum authorities are in a position to provide applicants with adequate assistance and to ensure continuity in the protection and rights afforded to them”
  - The transferring Member State shall communicate to the Member State responsible such information as is required such that the latter is “in a position to provide that person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments”: Article 31(1). Article 31(2) states that this covers “rights and immediate special needs” and includes immediate measures such as immediate health care, family member contact details, information on the education of minors, and any age assessments.
  - Additionally the transferring Member State shall communicate to the Member State responsible such information as is required in addressing the “special needs [including] information on that person’s physical and mental health, “For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence”: Article 32(1).
- There is a lower test for the purposes of public funding based on Dublin 3 at Article 27(6). This has been transposed into UK law via The Civil Legal Aid (Merits Criteria) Regulations 2013 which at para 56A state that

(1) For the purposes of a determination for any form of civil legal services in relation to a Dublin III claim, the general merits criteria do not apply and paragraph (2) applies.

(2) An individual may qualify for civil legal services only if the Director is satisfied that the individual’s case has a tangible prospect of success.



## Example

The Home Office wishes to return Khalida, an elderly woman who suffers epileptic fits to Spain, a country which granted her a visa a year ago before she came to the UK, and so which is the responsible country under Article 12. There is no challenge to this decision as to responsibility and no evidence suggesting that the asylum determination process in Spain is defective or that reception conditions are poor.

Khalida is entitled to the transfer being “carried out in a humane manner and with full respect for fundamental rights and human dignity” (Article 29(1)) and that relevant information is provided to the Spanish authorities to ensure “the provision of immediate health care required in order to protect ... her vital interests” (Article 31(1)).

### Family and humanitarian claims that the UK is the responsible country

It is always possible that there will be a viable claim to remain in the UK based on the right to private and family life. This is most likely to be viable where it arises because of relationships between the asylum seeker liable to return abroad and family members in the United Kingdom. There are at least three possibilities here:

- As set out above, it is possible that a family relationship renders the UK as the responsible Member State
- Alternatively, it is possible that Article 16, the *Dependent Persons* proviso, may require the UK to take responsibility for an asylum claim, because “normally” Member States should “keep or bring together” individuals:
  - where due to “*pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of [their pre-flight] child, sibling or parent legally resident in one of the Member States*”, or vice versa
  - and it is shown that the appropriate care can in fact be provided, and that all concerned express their desire in writing (Article 16(1))
  - the responsible Member State will then be the one where the relative in question is legally resident “unless the applicants health prevents [them] from travelling to that Member State for a significant period of time” in which case there is no responsibility to bring the potential carer onto the territory of the determining Member State (Article 16(2)) (and there are procedural obligations on States to exchange information going to proven family links, dependency, care capacity and ability to travel: see Article 11(6) of the amendment to the Implementing Regulation)
  - Note that the assessment for some kinds of responsibility due to family links under the hierarchy, and under the Article 16 must usually take place “before another Member State accepts the request to take charge or take back the

*person concerned*” and family membership does not assist where there has been a first decision on the asylum claim’s substance abroad (Article 7(3)) – if a speedy acceptance of responsibility for a claim seems to rule out a challenge under this provision, it may sometimes be necessary to argue that breaches of the procedural duties to give and receive information about family links in the UK may require the process to be reopened

- In [K v Bundesasylamt](#) [2012] EUECJ C-245/11, looking at the equivalent, differently worded though plainly analogous provision addressing what was then called *Humanitarian* cases, the CJEU explained that the Member State would be “normally” obliged to keep such persons together: only exceptionally could it derogate from that responsibility – once such a relationship of dependency is established, there was no requirement for a request to be made between Member States as that would “run counter to the obligation to act speedily, because it would unnecessarily prolong the procedure for determining the Member State responsible”.
  - Presumably the [Ghezelbash](#) line of authority cited above will entitle a challenge to be brought to a refusal to act positively under the *Dependent persons* clause
- Alternatively, where the relationship or circumstances of the family members in question do not qualify for the first two possibilities above, it is possible that there is a private and family life claim (Article 8 ECHR, though as we are in the sphere of European Union law, strictly speaking this arises under Article 7 of the Charter of Fundamental Rights)
- Relevant considerations are that applications of family members should be considered together, see eg Recital (15): as this “makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated”
  - Family life claims need to be considered via the five stage test set out in *Razgar* (you can find it below in the Family Reunion section): but the most important aspects are the establishment of private and family life with which the immigration decision represents a significant interference, and where the impact on the individuals involved is disproportionate to the public interest sought to be protected
  - It may be argued by the Home Office that family life has been established in “precarious” circumstances: it should be borne in mind that these will often not be cases based on migration choices: eg families are likely to have been forced to leave their country of origin because of political persecution or armed conflict, see eg the words of the then President of the Asylum and Immigration Tribunal, Ouseley J in [H \(Somalia\)](#) [2004] UKIAT 00027 at [14]: “*it cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up*”
  - There may well be a particularly strong argument when support is needed amongst family members where support is required because of a history of torture: eg the website of the International Rehabilitation Council for Torture Victims states that “The aim of rehabilitation is to empower the torture victim to

resume as full a life as possible. Rebuilding the life of someone whose dignity has been destroyed takes time and as a result long-term material, medical, psychological and social support is needed”

- If an expulsion would threaten the family’s ability to be together by separating them during the consideration of their asylum claims, then query whether the decision is disproportionate given the fact that the Strasbourg Court has recognised the need to grant short periods of discretionary leave to remain to avoid a temporary interference with family or private life: see the principle applied in [MS \(Ivory Coast\)](#) [2007] EWCA Civ 133; reference to a useful case can be found online [here](#): [Juzbasa-Tanackovic](#) [2006] EWHC 1071 (Admin);

In these Article 8 claims, foundational principles of human rights law addressing the right to private and family life may well be relevant:

- The ECtHR in [Ahmut v Netherlands](#) (1997) 24 EHRR 62 at [60] cites that Court’s well known proposition that the bond between natural parents and their children is a strong indicator of the existence of family life “which subsequent events cannot break save in exceptional circumstances”. The ECtHR in [Al-Nashif v. Bulgaria](#) (no. 50963/99, 20 June 2002) confirmed this applies regardless of the actual fact of marriage, naming relevant considerations as “whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.”
- Whether a relationship amounts to family life between a non-cohabiting natural child and a parent is essentially a question of fact, see the Strasbourg Court in [Schneider v Germany](#) 17080/07 [2011] ECHR 2416 at [80]-[81]: “the Court has considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant ... Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth”
- The decision of the Strasbourg Court in [Advic v UK](#) (1995) 20 EHRR CD 125 is sometimes cited for the proposition that whilst there may be family life deserving respect between adults, the normal emotional ties between a parent and an adult son or daughter will not, without more, be enough: the UK authorities such as [Ghising](#) [2012] UKUT 00160 make it very clear that whether or not there is family life between adults will be a question of fact, depending on the individual facts of the case
- Moses LJ in [Ahmadi](#) [2005] EWCA Civ 1721 noted that, vis-à-vis two Afghan brothers (aged 21 and 27), the one subject to Dublin removal wishing to care for the other (who had been granted refugee status here) because of the latter’s “florid schizophrenia”, though he had not hitherto cared for him:

*18. The pre-existing blood ties, coupled with the declared intention of the one brother to care for and support his other brother, are, in my judgment,*

*of greater significance than Sullivan J was prepared to accept. There is ample authority for the proposition that the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future. That is not to say that, where there has been no pre-existing family life and there exists only a future intention, that will be sufficient to engage Article 8. There is the world of difference between interfering with a long-established family life and merely preventing or inhibiting an opportunity in the future to develop such a family relationship.*

- In [AM \(Somalia\)](#) [2009] EWCA Civ 114 we see the Court emphasising the self-evident role of familial support in the UK when measured against the possibility of street homelessness abroad:

*25. Next, it is necessary to consider the availability of medical services in Italy in relation to the appellant's own needs. There is no evidence that he speaks a word of Italian. But, more importantly, there are strong grounds for thinking that, parted from what remains of his family, the very support which has enabled him to make a moderate degree of recovery will be absent. And, if, as is distinctly possible in the light of his brothers' successful claims, he is given asylum in Italy, all that will lie ahead there is a life of isolation and probable relapse. In other words, this is a case in which, on appeal, an immigration judge might well hold that the lawful purpose of the Dublin Regulation was not sufficient to justify the damaging effect on this appellant of disrupting what is now his private and family life by compelling him to present his asylum claim in Italy rather than here.*

- In [Dolenic v Croatia](#) 25282/06 [2009] ECHR 1946 the Strasbourg Court stated at [165]: “Private life” is a broad term not susceptible to exhaustive definition. The Court has already held that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001 I).” Thus mental health fragility may also bar a return, as see eg Lord Carswell in [Razgar](#), as where the fears of the asylum seeker “exist in an extreme form, sufficient to make him suicidal at the prospect of removal to Germany, even if unjustified or irrationally held”.
- Article 8 rights have a procedural as well as a substantive dimension, meaning that family members should be given a real and effective opportunity to establish the relationship that they claim exists between them: in [Ciubotaru v Moldova](#) (27138/04; 27 April 2010) the ECtHR stated:

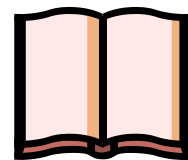
*51. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... While article 8 contains no explicit procedural requirements it is important for the effective enjoyment of rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. Such a process may require the existence of an*

*effective procedural framework whereby an applicant can assert his or her rights under Article 8 under conditions of fairness including as regards matters of proof and evidence.*

- Once one reaches the question of proportionality, different views have been expressed:
  - Sedley LJ in [AM \(Somalia\)](#) stated that the sole purpose of removal in Dublin cases was to apportion responsibility for a particular asylum claim: it did not aim to remove a person without the right to remain in the European Union to their country of origin: to that extent “The imperative of effective immigration control therefore has little bearing: that lies in the future.”
  - However, probably the more typical view is that expressed by the Court of Appeal in [ZAT](#) that "an especially compelling case" is required to justify departure from the normal assessment under the Dublin processes; or, as it was put in [CK \(Afghanistan\)](#) [2016] EWCA Civ 166 that Dublin 3

*is a legal instrument of major importance for the distribution of responsibility among the Member States for the administration of asylum claims. If it were seen as establishing little more than a presumption as to which State should deal with which claim, its purpose would be critically undermined. In my judgment an especially compelling case under Article 8 would have to be demonstrated to deny removal of the affected person following a Dublin II decision.*

- In [RSM](#) [2017] UKUT 124 (IAC) we see the UT holding that the greater the degree of engagement with the processes under Dublin 3 (eg the making of appropriate asylum claims and transfer applications alongside providing provision of sufficient bio data to satisfy the authorities), the easier it would be to demonstrate that continued exclusion from the UK would be disproportionate.



## Examples

Kasim is an adult citizen of Iran having travelled to the UK via Spain. He has claimed asylum in the UK. He has a spouse who he married in Iran who has also claimed asylum, having arrived here two months ago; she still awaits a decision on her claim.

Kasim’s claim will be the responsibility of the UK so long as he can prove his relationship with his wife, given she has a pending asylum claim: ie “whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance”: see Article 10 of Dublin 3.

The relationship will be sufficient to vest the UK with responsibility whether or not they are married and whether or not their relationship predates their flight from their country of origin, see the definition of family members: see Article 2(g).

Fadhil is a 16-year old citizen of Iraq. He enters the UK having previously claimed asylum in Italy. He has no accompanying family members or relatives known in the European Union. The Home Office consider him to be the responsibility of Italy.

Fadhil's claim may well be the responsibility of the UK, reading Article 8(4) which states that "the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection" together with the CJEU decision in MA mentioned above, which indicates that it is the location of the most recently lodged claim which is likely to be the relevant one.

Sami is a young adult citizen of Turkey who has claimed asylum having travelled to the UK via Bulgaria. The Home Office consider him to be the responsibility of Bulgaria. In the UK Sami has been granted temporary admission to the home of his older brother Hamid, who has indefinite leave to remain; a report from Medical Justice states that Sami is very dependent on Hamid, with whom he lived in Turkey years ago before Hamid departed the country, because of the PTSD he suffers following torture by the Turkish security forces.

Siblings are not "family members" for the purposes of the kinds of relationship that vest a particular country with responsibility for an asylum claim under the hierarchy. However under Article 16, PTSD must arguably amount to "serious illness" or "severe disability"; Sami is arguably "dependent on the assistance of his ... sibling ... legally resident" in circumstances where "family ties existed in the country of origin".

Now lets revisit the case of Kasim. Imagine that his wife had in fact been refused asylum before he arrived in the UK. There would now not be Article 10 responsibility under the hierarchy, as she would not be pending an initial decision.

There may be an argument that the Article 11 family procedure is in play, because "several [well, two] family members [have submitted applications for international protection in the same Member State ... or on dates close enough for the procedures for determining the Member State responsible to be conducted together". If the Home Office could be persuaded to accept that it would be appropriate for their cases to be joined, then perhaps Article 11 could be relied on.

In any event, clearly a husband and wife enjoy family life together, and their separation from one another would amount to a significant interference with that family life. Having regard to the section 117B NIAA 2002 factors, a lack of financial independence and not speaking English might count against them; the question of precariousness would have to be considered carefully, given that this is a forced migration case where they were split up by forces beyond their control.

There remain discretionary powers to take responsibility for an asylum claim for which a Member State is not otherwise responsible, now in Article 17(1). A Member State determining responsibility may, before the first decision on the claim's substance is taken,

“request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria”, providing in their request “all the material in [their] possession ... to allow the requested Member State to assess the situation”: Article 17(2).

### Time limits for taking action

There are a set series of time limits for taking relevant actions.

- The request to take charge must be made via a standard form citing the relevant proof or circumstantial evidence (21(3): the latter need only be accepted if it coherent, verifiable and sufficiently detailed to establish responsibility, 22(5)) “as quickly as possible and in any event within three months of the date the application was lodged” (ie when a form from the applicant or report by the authorities reaches the competent authority: Article 20(2)) (Article 21(1)) or two months in a Eurodac hit case (Article 20(1), 23(3)) otherwise responsibility lies where the application was lodged (20(1)); similar times apply for “take back” cases (Article 23(2)); if urgency is requested where the asylum claim was made after a refusal of entry, arrest or a removal order, then at least one week’s notice must be given (21(2)) – in [Mengesteab](#) (Case C-670/16) the CJEU held that a take charge request cannot be made more than three months after an application for international protection is lodge
- The reply must be made by the requested Member State within two months of receipt of the request (Article 22(1)) or within one month where urgency was sought (Article 22(6)) – failure to act is “tantamount to accepting the request” (Article 22(7)) (all these times are expedited in “take back” cases so that there is a two week deadline in a Eurodac case, one month otherwise: Article 25(1) else responsibility is deemed once again (Article 25(2))
- “Take back” requests may be made even where no new international protection claim has been lodged (Article 24) though if the determining State takes more than the two/three months for Eurodac and other cases, it must give the asylum seeker an opportunity to lodge an asylum application (Article 24(3))
- Responsibility may move to the requesting Member State after six months from the request’s acceptance (or from the end of suspensive proceedings challenging the Dublin return) (but subject to a person having absconded, in which case the period permitted goes up to 18 months) (Article 29): the Implementation Regulations at 9(2) suggests that this takes place only if there is a failure to “inform the Member State responsible before the end of that time limit” – this is a live issue presently, the Court of Appeal will shortly be considering the impact of this, in [AD Somalia](#) C5/2016/3025 (presently listed for hearing on 11 October 2018).
- The importance of the decisions in Ghezelbash and Karim will now be apparent: because if responsibility lapses due to the relevant time limit passing without action being taken, then responsibility may shift to the requesting state from the state that was originally responsible.
- The ECJ decided in [Shiri](#) [2017] EUECJ C-201/16 (25 October 2017) that Article 29(2) provided for an automatic transfer of responsibility that was not conditional on any reaction by the responsible Member State. The provisions on time limits were themselves capable of contributing to the determination of the responsible Member

State, relieving the Member State responsible from its responsibility where the transfer did not take place within six months. This was consistent with Dublin 3's recital 5 objective of rapid processing of asylum claims that avoided delay. An applicant must have an effective and reliable remedy available to them to rely on the expiry of a time limit the right to plead circumstances subsequent to the adoption of a decision to remove them met that obligation

- The ECJ ruled in A.S. [2017] EUECJ C-490/16 (26 July 2017) that the requirement for an effective remedy identified in *Ghezelbash* operated with respect to all criteria for determining responsibility, including the question of responsibility following irregular crossing of the border. A third country national who had arrived in the context of the arrival of an unusually large number of third country nationals seeking international protection had "irregularly crossed" the border within the meaning of Article 13(1) of Dublin 3. This provision constitutes a condition for the application of the criterion in that provision and it had to be ensured that it was observed *before* a transfer decision was taken. The time limit in Article 29(2) of Dublin 3 on the other hand applies only to the enforcement of the transfer decision, once the principle of transfer has been established, at the earliest when the requested membership had accepted the request to take charge or take back. The last sentence of Article 13(1) of that regulation was to be interpreted as meaning that the Member State whose external border has been irregularly crossed by a third-country national can no longer be held responsible if the period of 12 months following the irregular crossing of that border has already expired by the time the applicant first lodges an international protection application. The lodging of an appeal with suspensory effect implies that the period for effecting the transfer will not expire until six months after the intervention of a final decision on that appeal.
- These principles all apply notwithstanding the possibility that the receiving Member State has actually agreed to the asylum seeker's return: see [Mengesteab](#) (Case C-670/16)
- All the time scales are expedited in detention cases, so that requests must be made within one month of the application being lodged, an urgent reply must be requested, and replies must be given within two weeks (Article 28(3)). Transfers must take place "as soon as practically possible" and within six weeks of acceptance "at the latest" subject to delays caused by suspensive appeal or review remedies (Article 28(3)).

## Detention

Detention may only take place where there is a significant risk of absconding, and not merely because a person is within the Dublin process, see Recital (20) to the Regulation:

*(20) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality.*

Article 28 sets out:

*1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.*

2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.

So we can see that

- Detention is permitted only where there is “a significant risk of absconding”
- Detention must be proportionate, as short as possible, and lesser forms of restriction on liberty have to be considered as an alternative

Furthermore, this detention proviso brings with it a series of safeguards by incorporating detention safeguards from the Reception Directive (Article 28(4)). Thus:

- Article 9(1): “Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention”
- Article 9(4) there must be “immediate” provision of written detention reasons; release must be “immediately” on a finding of unlawful detention (9(3))
- The health of the vulnerable should be a “primary concern” of the detaining authority (11(1)) and there shall be “ensure regular monitoring and adequate support taking into account their particular situation, including their health” (11(1))
- “Minors shall be detained only as a measure of last resort” (11(2)) and “they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age”

In [Al Chodor](#) [2017] EUECJ C-528/15 the CJEU finds that the exercise of detention powers must be subject to strict safeguards, requiring a strictly identified legal basis offering clarity, predictability, accessibility, and protection against arbitrariness: this could only be achieved by an act which is binding and foreseeable in its application, ie a binding provision of general application, ie a statutory provision.

Parliament has now authorised Dublin 3 detention via a statutory instrument, [The Transfer for Determination of an Application for International Protection \(Detention\) \(Significant Risk of Absconding Criteria\) Regulations 2017](#). The lawfulness of detention for third country processes under Dublin 3 prior to this statutory instrument entering effect may well be challengeable, given decision making proceeded only by reference to Home Office guidance such as the Chapter 55 detention policy.

The Court of Appeal have just heard the appeal vis-à-vis the proper interpretation of this provision in an appeal from [Khaled \(No 2\)](#) [2016] EWHC 1394 (Admin). Watch this space.

## Reception conditions and determination procedures

In the vast majority of cases, the only tenable challenge will be on the grounds that the reception conditions in the third country are inadequate such that there is a real risk of a violation of Article 3 ECHR – this may arise because of the individual circumstances of the returnee or because the system is in general inadequate.

However the evidence must reach a high threshold before it will be accepted that a fellow EU Member State has a system which is that defective. The proper approach is explained in [EM \(Eritrea\)](#) [2014] UKSC 12; you can see the kinds of evidence that are necessary for a case to succeed in [MSS v Belgium and Greece](#) 30696/09 [2011] ECHR 108 particularly at [249]-[264].

There is rather a good summary of the position in the Court of Appeal's judgment in [NA \(Sudan\)](#) [2016] EWCA Civ 1060 which sets out the some key propositions regarding the assessment of the compatibility of Dublin returns with fundamental rights:

*(1) The fundamental question is whether "substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country" ....*

*(2) Whether the threshold of "inhuman or degrading treatment" is crossed is "relative" and requires an assessment of "all the circumstances of the case, such as the duration, nature and context of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim ...". But the anticipated treatment relied on must attain "a minimum level of severity". In particular, a breach is not shown merely by showing that "the applicant's material and social living conditions would be significantly reduced if he or she were to be removed from the Contracting State" ... Nor is it sufficient to show no more than that there is a risk of a breach of the applicable EU Directives ...*

*(3) In considering that question the decision-maker should start with "a significant evidential presumption that member states will comply with [their obligations under the Convention]" ... that presumption is of course rebuttable ... and there is no requirement that in order to rebut it the applicant must show that that the risk which he alleges is the result of "systemic" defects in the arrangements made for asylum-seekers or BIPs in the receiving country ....*

When the evidence is assessed, relevant considerations are:

- Reports from UNHCR will be given special weight because of the expertise and knowledge of the organisation. Nevertheless as Lord Kerr puts it in [EM Eritrea](#):

*UNHCR material should form part of the overall examination of the particular circumstances of each of the appellant's cases, no more and no less*

- Whilst there is a very strong presumption that EU Member States will act consistently with their human rights obligations (EM Eritrea again):

*The presumption should not operate to stifle the presentation and consideration of evidence that this will be the consequence of enforced return.*

And as stated in Ibrahimi [2016] EWHC 2048 (Admin) the Secretary of State should not resort to “broad and sweeping generalisations about presumptions of compliance” of an EU Member State.

- Different Member States may treat asylum claims from particular countries of origin differently.
  - In Gashi [1999] Imm AR 415 the Court of Appeal stated that a duty of enquiry might arise where an applicant produced material that called for an explanation, eg by producing statistics which showed very stark disparities between the outcome of asylum claims between the UK and a third country.
  - The House of Lords in Adan and Aitseguer [2000] UKHL 67 considered challenges to return to a country that treated asylum claims differently to the UK’s approach. It ruled that there was a distinction between cases that involve third countries’ *interpretation* of the Refugee Convention and those involving their *application* of it: only the former could give rise to a tenable challenge preventing an asylum seeker’s return abroad
  - Based on that thinking, arguments about the different treatment of asylum claims in the UK and France did not get very far in Al [2015] EWHC 244 (Admin) where the Administrative Court concluded that permitting challenges based on differences in asylum procedures, or the third country’s assessment of the country conditions or the credibility of an asylum seeker, would undermine the Common European Asylum System which was based on a high degree of trust between Member States
- It may be possible to rely on breaches of Convention rights other than Article 3 ECHR: but where, as is likely, these are limited rights, such as the right to liberty, it will be necessary to establish a flagrant breach of the right to prevent removal, which requires a very elevated threshold: the example given Hagos (IJR) [2015] UKUT 271 (IAC) was of where the

*receiving state arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial.*

All this should be read with the minimum standards for reception in mind. These are generally provided by the recast Reception Directive (to which the UK is not party, but which

set the pan-European standard) which applies to persons within a Dublin procedure (Recital (11)):

- It requires that “material reception conditions”, defined as “housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance”
- Article 17 sets out General rules on material reception conditions and health care and at (1) requires that “Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection and (2) that “Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.”
- As to the vulnerable, “Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention”: Article 21 states a General principle that “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.”
- In [HK and Ors](#) [2017] EWCA Civ 1871 the Court of Appeal noted that the “Special Needs” provisions of the Reception Directive were capable of identifying the categories of asylum seekers with special vulnerabilities which might heighten the standards of treatment to be expected of them on return – poor health care standards in the country of return could give rise to an issue under Article 3 without the high threshold in [N v United Kingdom](#) being met (Sales LJ)

Current challenges continue in respect of a number of EU countries including Italy, Cyprus, Hungary, Bulgaria and Malta (which failed in [Hagos](#) (IJR) [2015] UKUT 271 (IAC)). The country conditions presently change so speedily that it is rather difficult to keep up. Amongst the latest developments are:

- **Hungary:** in [Ibrahimi](#) [2016] EWHC 2048 (Admin) the Administrative Court ruled in favour of applicants seeking to resist return, on the basis of UNHCR and AIDA reports regarding systemic and/or operational risks in the asylum and judicial systems, causing serious doubts that they would be able to apply for asylum in Hungary: furthermore there were significant risks of onwards return to countries that did not respect the non-refoulement principle that was central to the Refugee Convention.
- **Italy:** Families with children were for a time treated as returnable to Italy only in the light of specific assurances as to their well-being. Other vulnerable returnees, however, and asylum seekers generally, have consistently been found to be returnable without any real risk to their Article 3 rights, see eg [Weldegaber](#) [2015] UKUT 70 (IAC) [MS](#) [2015] EWHC 1095 (Admin) as well as [NS \(Sudan\)](#), essentially because the attempts to show inadequate levels of accommodation have repeatedly

failed in the light of varying levels of asylum seekers, a lack of reliable evidence that Dublin returnees would face the general risk of homelessness, and the unpredictability of the injection of extra emergency accommodation by the Italian authorities, in circumstances where the available evidence criticising Italy tends to be from the less-respected sources. Judgment is presently awaited in the latest lead case, this time from the UT.

- **Bulgaria:** In [Khaled \(No 1\)](#) [2016] EWHC 857 (Admin) the Administrative Court found that whilst it might be the case that detention conditions for asylum seekers there would contravene Article 3 ECHR, there was no real risk of a Dublin returnee facing detention as opposed to living in or outside a reception centre. The Court of Appeal in [HK and Ors](#) [2017] EWCA Civ 1871 held that the UNHCR had not stated there to be inadequate reception arrangements available for those with special needs. It would be open to the UK to notify the Bulgarian authorities of any concerns as to an individual's vulnerability.
- Although returns to Greece have been ruled out for many years, the European Commission has indicated that the all-clear is due for resuming returns there
- Challenges to returns to Cyprus and Malta have so far failed

### Running a Reception Conditions Challenge

If running a challenge based on reception conditions regarding a country where there are not yet any clear judicial decisions on the compatibility of removal with human rights obligations, it will be necessary to:

- Take a statement which clearly specifies the historic treatment of the asylum seeker in the third country (to determine whether they will be able to access support and welfare on a return), and establishes their vulnerability;
  - Whilst within the context of third country proceedings it is unrealistic (and presumably unfunded) to produce a full asylum claim statement, nevertheless the summary of the asylum claim should be consistent with the screening interview and any other documents, and should briefly set out the key incidents in the client's story, such that it is clear why they have fled their country and that they have a viable claim;
  - Their account of travel to the United Kingdom should be detailed and coherent (ie the reader needs to be able to understand when and how they entered and exited each country on the way, particularly within the European Union), with an explanation given for why they did not pursue an asylum claim in any third country;
  - Establish the stage that your client has reached in the asylum process abroad: eg a failed asylum seeker is in the most difficult position, because they may not be able to rely on the generous position struck by the Strasbourg Court vis-à-vis asylum seekers whose cases await determination and are simply in the same position as other homeless people (with respect to whom the ECtHR has not accepted there is any state responsibility to house them), and furthermore, it is

not easy to work out any basis on which they should be remaining in the European Union, given that the responsible Member State has dealt with their case and surely their determination of status is binding on the United Kingdom;

- Their experiences of the third country's asylum processes should be consistent with how it is documented as working (or malfunctioning) in practice, with spellings of locations checked against public domain information.
- Locate relevant country evidence from ECRE/ELENA, UNHCR, local NGOs etc, addressing both the adequacy of reception conditions and the availability of effective remedies in the third country both domestically and by way of application to Strasbourg (there are reports on the compliance of particular countries with Rule 39 obligations, for example, by ECRE and other NGOs) – ideally you need evidence from the EU human rights commissioner or UNHCR, with Amnesty International next;
- Argue by way of representations amounting to a human rights claim that personal facts plus country evidence equates to a viable Article 3 claim, see eg [M.S.S. v Belgium and Greece](#) [2011] ECHR reiterating the well-known case law of the ECtHR: “to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim”.

### **Dublin as a sword rather than shield: Family reunion for minors**

Although the Dublin 3 Regulation is generally a legal instrument from whose ambit asylum seekers have to defend themselves, there are occasions when it may operate as a sword to cut the knot of administrative procedures delaying a person's transfer to this country.

As we have already seen, Dublin 3 apports responsibility for an asylum claim to a particular state. Although many people face return from the UK to another Member State under its provisions, other individuals will potentially have claims to be transferred to the UK from another Member State, particularly where they have family here. For example one can readily imagine a situation where an unaccompanied minor is stranded in a refugee camp in Greece or Italy, and has a family member or sibling present in the UK whom their best interests point in favour of joining, which would make this country responsible under Article 8(1).

A series of decisions have found the courts considering the circumstances in which it might be appropriate to cut short the rather lengthy administrative processes which are followed to establish responsibility. Thus in [ZAT](#) IJR [2016] UKUT 61 (IAC) the UT found that there could be situations where a vulnerable child should be allowed to enter the UK notwithstanding that they had not made a formal application for transfer here. To resist such a human rights claim might represent a disproportionate interference with their family and private life, albeit that the Dublin Regulation would be “a consideration of undeniable potency” in the assessment process. Thus a child suffering threats to their mental health whilst they lived in the poor living conditions in Calais might benefit from a speedy transfer to the UK.

The Court of Appeal, however, took the view that cases of this nature would be very rare indeed: see [ZAT & Ors \(Syria\)](#) [2016] EWCA Civ 810. Those seeking to bypass the Dublin processes and the legal procedures of the first Member State must demonstrate objective reasons to justify that decision, which required more than “a *strong and persuasive case on*

*its merits*” - rather they had to show an “*especially compelling case under Article 8*”, as where a baby was separated from its departing mother when the lorry doors closed. Nevertheless, individual cases would be very fact sensitive. As the Court put it:

*applications such as the ones made by these respondents should only be made in very exceptional circumstances where they can show that the system of the Member State that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs. It will, in my judgment, generally be necessary for minors to institute the process in the country in which they are in order to find out and be able to show that the system there is not working in their case. This is subject to the point that, as I have stated, these cases are intensely fact-specific. There will be cases of such urgency or of such a compelling nature because of the situation of the unaccompanied minor that it can clearly be shown that the Dublin system in the other country does not work fast enough*

The high point of the UT’s thinking can be seen in [RSM](#) [2017] UKUT 124 (IAC), where we find the UT holding that the greater the degree of engagement with the processes under Dublin 3 (eg the making of appropriate asylum claims and transfer applications alongside providing provision of sufficient biodata to satisfy the authorities), the easier it would be to demonstrate that continued exclusion from the UK would be disproportionate. However, the Court of Appeal put its foot down firmly in the subsequent appeal: in [RSM](#) [2018] EWCA Civ 18 they found that there was no obligation on the UK to consider an asylum claim lodged other than on its national territory.

Meanwhile, in [Citizens UK](#) [2017] EWHC 2301 (Admin) the Administrative Court examined the expedited process agreed between British and French governments regarding children living at the Calais camp. Many of those children had refused to make asylum applications, thinking that to do so on French territory would rule out any chance of having the UK examine their asylum claims.

The Court held that the making of an asylum application was absolutely central to the Dublin 3 regime. Without an application, there was simply nothing for a Member State to 'examine'. The requirements for the making of an application for international protection were relatively informal, and the authorities would have to prepare a report even where a non-written application was made without a representative.

The expedited process established in France for assessing claims did not involve the making of an application for international protection. The evidence generally did not suggest that the asylum procedure in France was less effective than when examined by the Court of Appeal in *ZAT* or that redress for its failings was illusory. The reluctance of UASCs to invoke the asylum procedure made the efficacy of procedure immaterial. Nevertheless it could be seen that— operational failings in implementing the expedited process caused confusion and distress for the children involved.

## Asylum: status determination case law

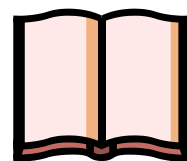
### Introduction

Cases on various aspects of status determination continue to flow from a variety of sources: the European Court of Human Rights, the Court of Justice of the European Union, and the UK courts and Upper Tribunal.

### Assessing the facts

In 2016 the Grand Chamber of the ECtHR twice looked at the way in which the facts and risks arising in Article 3 “asylum” claims are to be assessed. Although the principles it identified may not seem radical to the UK asylum practitioner, they are nevertheless something that it may well be worth emphasising to judges and Home Office decision makers:

- In [FG v Sweden](#) [2016] ECHR 299 the ECtHR stated that the special situation of asylum seekers meant that the benefit of the doubt should be given them when their credibility is assessed and any supporting documents evaluated, but where there are strong reasons to question the veracity of their claim they must provide a satisfactory explanation for any alleged discrepancies
- In [JK v Sweden](#) 59166/12 [2016] ECHR 704 the Court added that this was the case even though the claim might seem somewhat implausible as this did not necessarily detract from the claim’s general credibility and it may be difficult, if not impossible, for the person concerned *to supply evidence within a short time*, especially if such evidence must be obtained from the country from which he or she claims to have fled. At [115] the Court indicates that the burden shifts to the Government to “dispel any doubts” about risk on return in circumstances where the court found that there was a “strong indication” arising out of past persecution that the applicants would be at risk from non-state actors



### Example

Khurshad is a citizen of Pakistan. He has claimed asylum in the UK. His claim is based on having given information to the police about powerful militants who subsequently targeted him in his home city of Karachi. He went to stay with relatives in another part of Karachi but was tracked down there. The Home Office refusal letter finds that his claim to asylum is clearly unfounded because, whilst the truth of his account is accepted, he could still have sought safety in another part of the country and it would not have been unreasonable for him to do so.

Given he has already been threatened and tracked down following one attempt at relocation, it might be argued that there is a “strong indication” that he

would be at risk. Accordingly the Home Office should point to concrete evidence of his safety in another part of the country rather than speculating: for example pointing to firm evidence that the militants have no presence in other cities.

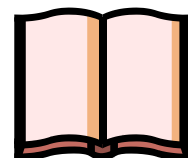
## Supporting documents

[Tanveer Ahmed \[2002\] UKIAT 00439](#) famously holds that the credibility of documents produced by a migrant is to be considered in the round: with the consequence that findings on the reliability of the person's own account usually determine the approach to be taken to supporting documents. Of course, where there is independent (eg expert) evidence supporting their genuineness, that is a different matter.

A number of Strasbourg decisions (including [Singh v Belgium \(33210/11\)](#)) have indicated there may be circumstances where a state must investigate a document before rejecting it as genuine. In [MA \(Bangladesh\) \[2016\] EWCA Civ 175](#) the Court of Appeal held that this duty may arise where a disputed document is at the centre of the request for protection: if so, the decision maker should ask themselves whether a simple process of inquiry will conclusively resolve its authenticity and reliability. In [MJ Afghanistan \[2013\] UKUT 00253](#) the UT had considered that where documents were of a nature where verification would be easy, and the documentation came from an unimpeachable source, a duty to investigate might arise.

The Court of Appeal developed this thinking in [PJ \(Sri Lanka\) \[2014\] EWCA Civ 1011](#), ruling that where attempts to verify documents were not made when the duty to do so arose, the government might be precluded from challenging their authenticity subsequently. There was no absolute rule that documents which had been provided by a person's lawyers abroad direct to their lawyers in the United Kingdom should be treated as genuine: but the judgments made it clear that there should be pause for thought before such documents are challenged as inauthentic.

The documents in the [PJ](#) appeals were a conviction for murder in Bangladesh and related documents, said to result from false charges that were politically motivated; and a FIR from Pakistan and newspaper reports relating to a march which the asylum seeker, a prominent figure within an opposition party, was accused of having organised. In the first scenario, the Court of Appeal found that no duty of enquiry arose because there were numerous features of the asylum seeker's story that rendered it beyond belief, particularly the time they had remained in Bangladesh before fleeing the country and their late asylum claim; in the latter case it was found that there was no duty to investigate because the documents were peripheral and unreliable.



## Example

Vikash is a citizen of Sri Lanka. He recently arrived in the UK and claimed asylum. His asylum claim is based on his arrest and detention for suspected separatist activities two years ago. He believes that he has outstanding court proceedings against him.

The best evidence of any legal proceedings would be for the UK lawyers to contact the court directly, or (in most cases more practicably) to contact lawyers based in Sri Lanka who should confirm their own professional standing and write on headed notepaper.

Imagine instead that Vikash was detained in the UK having been caught working illegally and having arrived here some years ago. He possesses a copy of an outstanding arrest warrant for separatist activities from Sri Lanka. It would be difficult for the Home Office to safely determine his asylum claim without investigating this document for themselves, because the Country Guidelines on Sri Lanka would suggest that a person in his position, if the document is genuine, is at risk of persecution.

Of course, when carrying out investigations in the country of origin, the UK authorities must avoid creating additional risks: Article 22 of the Procedures Directive 2005/85/EC addressing the collection of information on individual cases states that the status determining authorities must not “obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.”

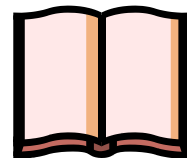
### Practical issues as to returnability

An issue has arisen repeatedly in recent years regarding the proper approach to be taken to asylum claims vis-à-vis a country where return is not possible because of technical difficulties: for example because of a lack of travel documents.

In [JI](#) [2013] EWCA Civ 279 the Court of Appeal looked at how asylum claims should be assessed where there was a question mark hanging over the means and timing of return. They reminded themselves of earlier authorities holding that where the route or method of return was uncertain, then risks arising from that aspect of the case could not be assessed until the practicalities were finalised before return was enforced. So a claim might fail for lack of certainty as to the mode and route of return, and once removal directions were set, further representations would have to be submitted, backed up by judicial review if refused without recognition as a fresh claim. They concluded (as summarised in [AA Iraq](#)):

*(a) the Tribunal is not bound to ask what would happen on return if return is simply not possible for one reason or another; but*

*(b) if return is feasible the Tribunal is bound to ask that question.*



### Example

Ahmed is a citizen of Iraq from Mosul. He arrived in the UK ten years ago and claimed asylum; his asylum claim was refused, and his appeal was dismissed because his account of involvement in a blood feud was rejected. The Tribunal

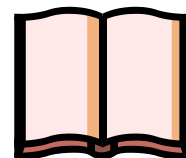
which heard his appeal declined to consider questions regarding risks on return because the Home Office Presenting Officer successfully argued that at that time, the route of return was simply unknown. Removal directions have now been set to Iraq, the point of entry being Baghdad, where he has no family and has never lived, and Ahmed has been detained.

Further representations should be submitted based on the modern Country Guidelines, arguing that he is from a contested war zone and that he would be unable to stay with relatives and presumably lacks modern documents to access social welfare support. As the question of risk on return was not previously considered, it will be more difficult for the Home Office to argue that these new submissions do not amount to a fresh claim.

In *J1* the Court was looking at a case where the Home Office relied on human rights monitoring arrangements that were anticipated as alleviating any risk on return – but which were not yet in place. The Court found that given return was presently feasible (ie there was no mystery as to how it would be arranged in the future), and faced postponement only pending those measures entering effect, it was necessary to assess risk based on the present reality: there was a real risk of harm at present as those measures which were essential to safe return were not yet in place.

The Country Guidelines decision [AA Iraq](#) [2015] UKUT 544 (IAC) found that asylum seekers were returnable to Iraq only with certain documentation. In so finding, they effectively treated the Iraqi Civil Status Identity Document (CSID) card in the same way as a document that was truly essential to return (eg a passport or laissez-passer). They found that, for a person who was not returnable, aspects of their claim depending on holding such documents (eg destitution risks due to a lack of an identity card to access social welfare assistance which would render life in the capital city unduly harsh) need not be determined.

In [AA \(Iraq\)](#) [2017] EWCA Civ 994, the Court of Appeal found that it was illogical to exclude destitution – but not other - risks from assessment on the basis that a person was not returnable. The Iraqi Civil Status Identity Document card was for practical purposes necessary for those without private resources to access food and basic services, and it was not a document that could be automatically acquired after return to Iraq. It was feasible that an individual could acquire a passport or a laissez-passer, without possessing or being able to obtain a CSID – the Country Guidelines given by the UT in [AA \(Iraq\)](#) accordingly required modification.



## Example

When preparing Ahmed's further representations, you discover that he has never held any of the documents that are now recognised as essential (ie current or expired Iraqi passport or a laissez passer) for persuading the Iraqi authorities to accept a returnee. Ahmed is aware of country evidence showing that a person returning without such documents would be ill-treated and wants to rely on that evidence in his forthcoming asylum appeal.

Ahmed cannot rely on risks from return at the port of entry risks, as on the state of the evidence currently, he cannot be removed. However he may rely on

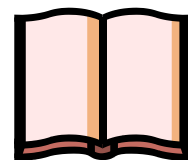
the problems he would face, the question of returnability aside, once he was inside Iraq. So he may argue that he possesses a fear of persecution in his home area, and that relocation to Baghdad would be unreasonable. It would also seem that his detention may be unlawful as in truth there is no prospect of removing him.

## Evidence of scarring

In [KV](#) [2014] UKUT 230 (IAC) the UT found that it was necessary for decision makers on asylum claims to consider whether scars relied upon as corroborative of torture consistent with an asylum seeker's account of mistreatment might also be consistent with Self Infliction by Proxy ("SIBP"). – ie having a third party perform procedures on them that leave scars reminiscent of the legacy of torture. They gave guidance to the effect that doctors providing medical-legal reports should always consider all possible causes of scarring and address the chance of SIBP whenever there was a 'presenting feature' of the case that raised a suspicion of torture; particularly where the results of a medical examination were inconsistent with the asylum seeker's account.

The case went to the Court of Appeal and in [KV \(Sri Lanka\)](#) [2017] EWCA Civ 119 the Judges found that whilst SIBP might exist, it should be considered as relevant in asylum claims only where there was "very compelling" evidence that SIBP was the only plausible cause of the scars: such a situation would be "very unusual".

The attempt by the UT to give guidance in the assessment of SIBP, whilst well-meaning, had gone off the rails with the Home Office's refusal to instruct an expert themselves. So the Guidance summarised above was effectively disapproved. [KV](#) has been granted permission to appeal to the Supreme Court, so watch this space.



## Example

Theva is a citizen of Sri Lanka. His asylum claim is based on having been detained and tortured by the authorities. He claims to have been tortured by an electric instrument which left a pattern of scars on his back. A medico-legal report states that the appearance of the scars is 'highly consistent' with his account.

When his claim is rejected, the Home Office refusal letter states that it is considered that the scars may well have been inflicted by a doctor wishing to help Theva achieve settlement in the West.

Unless there is overt evidence to back up the Home Office thesis, it is difficult to see that the allegation is relevant, given the approach of the Court of Appeal in [KV](#) – it is hard to see that conjecture can amount to 'very compelling' evidence that SIBP may be in play.

## Family tracing – the last word on the subject

There are certain obligations to trace an unaccompanied minor's parents, stemming from European Union law and found domestically in [The Asylum Seekers \(Reception Conditions\) Regulations 2005](#)

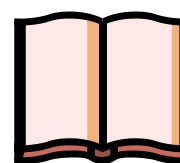
#### *Tracing family members of unaccompanied minors*

*6.—(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.*

*(2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety.*

These obligations have been found by the courts to have a limited impact on Home Office decision making. The highest authority is [MA and AA \(Afghanistan\)](#) [2015] UKSC 40, which shows that a tracing failure may be relevant to assessing an asylum seeker's claim where it has had an "effect on the nature and quality of the available evidence" and

*If the appellant has identified people who might be able to confirm his account, but the respondent has not pursued that lead, the tribunal might fairly regard the appellant's willingness to identify possible sources of corroboration as a mark of credibility, but this would be an evidential assessment for the tribunal*



## Example

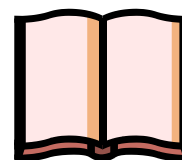
Farhan is a citizen of Afghanistan aged 16. He claimed asylum and the application was refused, though he was granted Discretionary Leave to Remain. He enjoys the right of appeal (as the decision amounts to the refusal of a protection claim). His claim was based on his fear of the Taliban who had murdered his father after his father refused to offer them financial support. He is from Helmand Province, and gave details of his family in Afghanistan at the time his claim was refused. However, the decision maker considers that his account is too vague to be considered credible. Their refusal letter states that they do not conduct family tracing in Afghanistan as they lack the capacity to do so.

When considering the relevance of the family tracing failure, you should look at the details of family members so far provided, and consider whether more

detail can be given by more focussed questioning of the client or via enquiries of people whom may know his family from the Afghan community in the UK. There are tracing services available from the [Red Cross](#) and [Children and Family Across Borders](#), which should be brought to clients' attention. If sufficient detail can be given to the Home Office and no meaningful tracing follows, a judge on appeal might take the view that a relevant lead has not been pursued by the Secretary of State, and that this counts in the client's favour.

### **Risks faced by foreign criminals due to disclosure of their record**

When a foreign national prisoner is facing removal from the UK, one should be aware that Prison Service Order 4630 requires prisons to inform certain national embassies of a removee's full name, date of birth, offence and if available, sentence length: see the discussion in [XB](#) [2015] EWHC 2557 (Admin). There the Court made it very clear that the Home Office should disclose any information they held as to whether this information had indeed been disclosed to the authorities abroad.



### **Example**

Yan is a citizen of China. He is detained in a prison under Immigration Act powers after he would otherwise have been due for release under licence. He is facing deportation having been committed of offences involving drug dealing. The country evidence indicates that the Chinese authorities sometimes prosecute their nationals where they have been convicted of serious offences abroad. His asylum claim has been rejected because the Home Office does not accept that the fact of his offending would come to the attention of the Chinese authorities.

It may be possible to rely on PSO4360, if China is one of the countries which the Order requires be informed of offending details, in order to show that the Chinese authorities would indeed discover this information. Of course, there would remain the question of what would actually then happen: it would be necessary to collect evidence as to what kinds of offences might face `double jeopardy` of this nature and what factors of a case might provoke the authorities abroad so as to make this a `real risk`), what prison conditions would be like, and whether the prosecution itself might raise human rights issues (eg Protocol 7 to the ECtHR forbids exposure to being tried twice for the same offence: though it might be argued that only a `flagrant` breach of the right would suffice to rule out removal).

When assessing prison conditions, the UT decision in [VB Ukraine](#) CG [2017] UKUT 79 (IAC) is of interest: it cites the ECtHR decision in [Mursic v Croatia](#) for the proposition that there must be a minimum of three square metres of space available to a prisoner for their detention to be compatible with Article 3 of the ECHR, unless the shortfall was for a limited period and alleviated by the possibility of exercise outside the cell and other factors.

## Persecution in military service claims

The claims of conscientious objectors were ruled untenable by the House of Lords in [Sepet and Bulbul](#) [2003] UKHL 15. This was on the basis that there was no generally recognised right to object to military service on grounds of conscience. Since then many military service asylum claims have been considered not viable. However, under the Qualification Directive at Article 9(2), transposed into domestic law by the Refugee/International Protection Regulations 2006, *acts of persecution* which are sufficiently serious to violate a basic human right may take the form of:

*(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses*

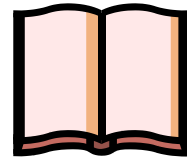
Those exclusion clauses are those set out in Article 12(2) and essentially cover war crimes, serious non-political crimes and acts contrary to UN principles.

In [Shepherd](#) [2015] EUECJ C-472/13 the CJEU examined the protection afforded persons who sought to avoid involvement in internationally condemned military service (here, an American helicopter engineer based in Germany whose case was that he did not wish to be indirectly involved in the possibility of military action leading to human rights abuses in Iraq). The Tribunal concluded that

- Any procedure for availing oneself of a conscientious objection alternative to serving would have to be exhausted before international protection sought
- An asylum seeker would need to show that they would be providing indispensable support in a context where war crimes are shown to have been committed or where there would be a real chance of their commission
- The chances of being complicit in such activities would presumably be diminished by the fact the military service in question was authorised by states that prosecuted war crimes or was pursuant to a mandate from the UN
- Whether punishment was disproportionate would depend on the overall context including the objectives of any legislation relating to the state's right to require military service and political and strategic factors: custodial sentences of five years would not necessarily be disproportionate to the legitimate state interest in maintaining its military capability
- Social ostracism and other disadvantages suffered by military service evaders would not constitute persecution

It may well be that the question of conscientious objection requires revisiting given developments in the Grand Chamber of the ECtHR. In [Bayatyan v Armenia](#) (Apn No. 23459/03; 1 June 2011) the ECtHR ruled that states have a duty to respect individuals' right to conscientious objection to military service as part of their obligation to respect the right to freedom of thought, conscience and religion set out in Article 9 of the European Convention on Human Rights. The case concerned a Jehovah's Witness who was sentenced to two and a half years in prison following his refusal of military service on the grounds of conscientious objection.

Of course, if a person would be punished by serving a period of imprisonment in prison conditions that breach international law norms, either whilst remanded in custody before trial or during the actual sentence, then they may have a viable claim for Humanitarian Protection or for leave in order to avoid violation of their Article 3 rights. An example of such a case can be seen in [VB Ukraine](#) CG [2017] UKUT 79 (IAC).



## Example

Dmitri is a citizen of Ukraine. He holds strong religious objections to military service. He has received call-up papers and wants to pursue a protection claim, having arrived in the UK, that these would contravene his fundamental religious beliefs, because he would be required to bear arms contrary to his conscience and to serve in parts of the country where serious human rights abuses were recorded as taking place.

Dmitri's case has several aspects:

- (1) As to the conscientious objection limb, in its own terms this seems to be ruled out by [Sepet](#) [2003] UKHL 15. However, the decision in [Bayatyan](#) may support an argument that international law has moved on. [Sepet](#) did not say that conscientious objectors could never win their cases: it found that the opinion of nations, and international law, had not developed sufficiently in that direction as of March 2003. Factually he must show that he has followed and exhausted any relevant procedures to escape the relevant military service.
- (2) He claims he will be required to serve in conditions that would involve internationally condemned actions by way of complicity in activities that would themselves lead to exclusion from refugee status (ie serious non-political crimes, war crimes and crimes against humanity, and acts contrary to UN purposes and principles).  
It will be necessary to determine the extent to which such crimes/acts take place and whether his foreseeable role would be "indispensable" to their commission, whether there is a real risk he would serve in the relevant part of the country, and the punishment he would face.
- (3) In fact, the Country Guidelines decision in [VB](#) held that there was no chance of involvement in internationally condemned actions but that prison conditions were themselves in breach of Article 3 standards because of the size of cells and the general prison regime in pre-trial detention. If Dmitri's conscience drives him to reject the draft in circumstances where there are no alternative arrangements for a person in his position, then he will have a viable claim that he will face inhuman and degrading treatment on a return to Ukraine.

### Assessing nationality – balance of probabilities applies

Facts in protection claims are normally proven via the "lower standard of proof", ie the "reasonable degree of likelihood" or "real chance" standard. So a decision maker doing their job properly should give the *benefit of any doubts* they may have as to a story's truthfulness to the asylum seeker: see generally [Karanakaran](#) [2000] EWCA Civ 11. This is a more generous standard than the balance of probabilities, where a decision maker would find against a person whose account they doubted.

Some protection claims involve the possibility of removal to different countries, due to the Applicant's possession of multiple countries of nationality, or because the Home Office has

evidence of their admissibility to a country other than that where they fear persecution. The decision in [MA \(Ethiopia\)](#) [2009] EWCA Civ 289 held that the standard of proof for assessing nationality was the higher one of the “balance of probabilities”.

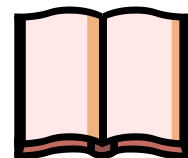
Nevertheless, a person’s nationality can potentially be relevant to their fear of persecution in some cases. In [RM \(Sierra Leone\)](#) [2015] EWCA Civ 541 the Court looked at a case where the asylum seeker asserted a fear of persecution in both Nigeria, his proposed country of removal, and in Sierra Leone. The Sierra Leonean authorities had declined to recognise his claim to be a national from their country. The Tribunals had found that *on balance of probabilities* he would not be admitted to Sierra Leone, so that Nigeria was the only country in the frame for assessing his asylum claim. He appealed to the Court of Appeal, raising issues including whether the standard of proof should have been the lower one, given that it was relevant to his asylum claim: for he might face refoulement onwards to Sierra Leone.

Underhill LJ made it clear that the standard of proof for assessing nationality will be

- The lower asylum standard where the question of nationality is relevant to the chance of persecution, but
- The balance of probabilities where it is merely relevant to returnability.

In [RM](#) the Court of Appeal found that there had been no tenable asylum claim from Sierra Leone and no evidence that the asylum seeker would be admitted there, so that the question of his returnability there was quite properly assessed on balance of probabilities.

[MA \(Ethiopia\)](#) also held that the burden of proof was on the asylum seeker to demonstrate that they had taken all reasonable steps to prove that they were a national of a particular country, before they would be entitled to argue that they were, or were not, returnable there. Documenting such efforts is an important part of preparing asylum claims where there is more than one country potentially in play.



## Example

Berhane is from the territory once within Ethiopia which became Eritrea. He claims to fear persecution in Eritrea, and that if he is returned to Ethiopia, he would face a real risk of being expelled from there to Eritrea. The Home Office say that he is not Eritrean but Ethiopian; thus he is returnable to Ethiopia and faces no risk of removal from there to Eritrea.

As Berhane’s protection claim involves an assertion that he will be returned from Ethiopia to Eritrea, and face persecution there, the likelihood of that aspect of his case must be assessed on the “real risk” standard. However, the question of whether he holds Ethiopian nationality (and would therefore be admitted to Ethiopia in the first place) would be assessed on balance of probabilities.

## Internal relocation and hiding characteristics

In [MSM \(Somalia\)](#) [2016] EWCA Civ 715 the Court of Appeal looked at an asylum appeal which potentially raised the issue of whether a person should be expected to avoid the risk of persecution by changing their employment so as to work other than as a journalist or in the media. The Home Office had argued that where an individual faced a risk of persecution because of *attributed* rather than *actual* political opinion (eg in Somalia, where aggressors imputed political opinions to those working in the media), it was open to a person to relocate in order to avoid the possible harm.

In fact the Court rather dodged the issue, on the basis that the Tribunal had in fact found that MSM himself had been accepted as pursuing a career because of his political opinion, for which reason the case fell squarely under [HJ Iran](#) principles. Nevertheless, had it been required to evaluate whether reasonable steps might be taken to avoid persecution, the Court's provisional view was that:

*the Directive leaves little room for examination of the steps the applicant might take to avoid persecution ... I would have regarded the absence of any provision in the Convention or the Directive dealing with the possibility of avoiding action, together with the express exemption in Article 8(1) from the basic approach in cases where there is no real risk of persecution in part of the applicant's country of origin, as pointing against the [submission made by the Home Office]*

In [AS \(Iran\)](#) [2017] EWCA Civ 1539 the Court of Appeal held that Christian conversion, in and of itself, in absence of proselytising or past persecution, and where the applicant would be moving away from their home area for other reasons, was held to be insufficient for risk of persecution.

For those representing LGBTIQ asylum cases, UKLGIG's June 2018 [briefing paper](#) "Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation" is essential reading. Its overview and introduction outline the paper's approach as follows:

1. HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31 is the lead case in the UK about claims for asylum based on sexual orientation. In this case, the Supreme Court gave detailed guidance on questions which had posed real problems to decision-makers and courts. While HJ and HT are gay men, the guidance given is directly relevant to all claims based on sexual orientation. Eight years on, it is still important to go back to the Supreme Court's judgment to ensure that the correct approach is taken to claims based on sexual orientation. We will refer to the Supreme Court's judgment as 'HJ (Iran)' throughout this paper.
2. The key conclusion reached by the Supreme Court is that no one can be expected, still less required, to conceal who they are in order to avoid persecution.
3. The judgment also gives important broader guidance on how to decide asylum claims based on sexual orientation, and sets out a framework (at paragraph 82 of the Judgment) for decision-making.
6. A decision-maker deciding whether a person ['X'] is entitled to asylum on the basis of sexual orientation should ask four questions. These are:

(i) Is it reasonably likely that X is gay [or LGBTQ] or will be perceived to be gay [or LGBTQ]?

(ii) Is there a real risk that gay men [or LGBTQ people] would face persecution if they lived openly in X's country of origin?

(iii) Would X in fact live 'openly' (or would X conceal X's sexual orientation) if returned to the country of origin?

(iv) If the answer to question (iii) is that X would conceal X's sexual orientation, why would X do so?

7. We will deal with these questions in turn. It is important to approach them in the correct order. It is likely to lead to real confusion if questions (iii) and (iv) are taken out of order. The Home Office should update its policy documents, including the Asylum Policy Instruction on Sexual Orientation and Country Policy Information Notes, to give separate summary guidance for each of the four questions in HJ (Iran) in the order in which they arise.

### **Exclusion from- and cessation of- international protection**

A person may be excluded from refugee status for committing various acts and crimes: particularly for serious non-political crimes, war crimes and crimes against humanity, and acts contrary to the purposes and principles of the United Nations. Often the allegation leading to exclusion will relate to activities said to be terrorist in nature, via association rather than actual participation in the offence in question.

Some points on exclusion from international protection:

- Common [Position 2001/931](#) is a European Union measure by which a number of organisations are proscribed with a view to combatting terrorism, because it is considered that they are involved with terrorist acts. In [T](#) [2015] EUECJ C-373/13 the CJEU found that an individual assessment of the *actual* activities of an asylum seeker was necessary notwithstanding support having been provided to one of the relevant organisations.
- [T](#) also holds that a refugee whose residence permit is revoked (but is not returnable to their country of origin because of Article 3 risks or some practical issue) must continue to enjoy access to employment, vocational training and other social rights, as provided for by the Qualification Directive, until their removal – because those rights flow from the grant of refugee status, not simply from the issue of a residence permit.
- In [AH \(Algeria\)](#) [2015] EWCA Civ 1003 an Algerian national was convicted in France of being a member of an association or grouping formed with a view to preparing acts of terrorism. Reminding themselves of the position of the Supreme Court that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied", the Court of Appeal stated that there are in particular two areas in the administration of Article 1F(b) where this caveat is relevant:

*"The first is the application of the term 'serious non-political crime'.*

*The second is the sense to be given to "serious reasons for considering that... he or she has committed [a crime]". The latter expression imposes a demanding hurdle for the application of Article 1F(b)."*

- [The ECJ held in \*Lounani\*](#) [2017] EUECJ C-573/14 (31 January 2017) that it can be inferred from Security Council Resolution 1624 (2005) that acts contrary to the purposes and principles of the United Nations are not confined to the 'acts, methods and practices of terrorism'. The Security Council therein calls upon all States to deny safe haven to and bring to justice 'any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts, or provides safe haven' and to deny a safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of incitement to commit a terrorist act or acts. Conviction of a terrorism offence is not necessary for there to be serious reasons to consider such acts to have taken place. Exclusion of refugee status as laid down in Article 12(2)(c) of Directive 2004/83 cannot be confined to the actual perpetrators of terrorist acts, but can also extend to those who engage in activities consisting in the recruitment, organisation, transportation or equipment of individuals who travel to a State other than their States of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts. The fact that that person was convicted, by the courts of a Member State, on a charge of participation in the activities of a terrorist group is of particular importance, as is a finding that that person was a member of the leadership of that group, and there is no need to establish that that person himself or herself instigated a terrorist act or otherwise participated in it
- In [Youssef](#) [2018] EWCA Civ 933 appellant was disqualified from refugee status because he had incited terrorist acts in general. There was no requirement for there to be a link between his incitement and a specific terrorist act.
- In [RY \(Sri Lanka\)](#) [2016] EWCA Civ 81 the Court of Appeal looked at a case where the Secretary of State had instituted deportation proceedings against a Sri Lankan refugee recognised as such in 2000 and granted indefinite leave to remain. They did not seek to revoke his refugee status but relied upon Article 33(2) of the Refugee Convention which suspends the protection against refoulement notwithstanding that a person holds refugee status, because they are a danger to the community. The Court of Appeal rejected the argument that the mere fact of holding refugee status meant a person had to be accepted as at risk of serious harm: the passage of time may have undermined that assumption.



## Casework Tip

Most exclusion cases turn on a scenario where an asylum seeker admits a certain level of involvement with, or sympathy for, an organisation, but denies involvement in the kind of activities that might lead to exclusion. Lord Brown came up with a useful shopping list of factors that are relevant to exclusion in

these circumstances in [JS \(Sri Lanka\)](#) [2010] UKSC 15: an advisor can take instructions against this list.

- (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned,
- (ii) whether and, if so, by whom the organisation was proscribed,
- (iii) how the asylum-seeker came to be recruited,
- (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it,
- (v) his position, rank, standing and influence in the organisation,
- (vi) his knowledge of the organisation's war crimes activities, and
- (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

#### Cessation

In the February 2016 version of the guidance on [Settlement protection](#), the HO removed their long-standing policy that they would not routinely consider a person's protection needs at this stage unless a Minister had issued a ministerial declaration that a particular country was now considered to be generally safe. Some applicants for ILR, who have close family members in their countries of origin, have been asked by the HO to provide further information to support their settlement claims. Instances have been reported (on the RLG) that this has started to happen to nationals of countries where the HO believes, with some support from the Tribunal, that peace has broken out (ie Somalia and Zimbabwe). There are other indicators of this change of approach.

Under its policy on [revocation of refugee status](#), the HO recognises it can only do so under Article 1C(v) if the changes in the country situation are **significant** and **non-temporary** such that a fear of persecution can no longer be regarded as well-founded:

The overthrow of one political party in favour of another might only be transitory or the change in regime may not mean that an individual is no longer at risk of persecution. Equally, as was confirmed in [MS \(Art 1C\(5\) – Mogadishu\)](#) [2018] UKUT 196, the Secretary of State is not entitled to cease a person's refugee status pursuant to Article 1C(5) of the Refugee Convention solely on the basis of a change in circumstances in one part of the country of proposed return. The changes must be such that the reasons for becoming a refugee have ceased to exist and there are no other reasons for an individual to fear return there.

There is also consideration of revocation where the HO believes that internal relocation is available, or due to a change in the refugee's personal circumstances.

In all of these circumstances, the burden will rest with the Home Office to establish that the individual is no longer a refugee. There is a right of appeal against revocation, once revocation has taken place.

The Court of Appeal in [MA \(Somalia\)](#) [2018] EWCA Civ 994 clarifies the interpretation of the Qualification Directive, the UNHCR Handbook and the judgment in [Salahadin Abdulla](#) C-175/08, in relation to cessation decisions, as follows:

A cessation decision is the mirror image of a decision determining refugee status, [i.e.] the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred. [...]

The question whether Article 3 would be violated by the refugee's return to his country of origin is not part of the cessation decision but separate from it, and there is no violation by reason only of the absence of humanitarian living standards on return.

Article 3 is not normally violated by sending a refugee back to his country of origin where there is a risk that his living conditions will fall below humanitarian standards.

However, in the specific case of a prospective risk of being intentionally deprived, by the authorities of state of origin, of appropriate care for the physical and mental after-effects resulting from past official torture - where this would lead to a real and demonstrable risk of significant and permanent deterioration in the state of health - this may constitute inhuman and degrading treatment, and may in itself form the basis for a claim for subsidiary protection, even if in the absence risk of further torture (see below, section Health – Paposhvili and MP)

#### Cessation and family members

As to the situation of family members present in the UK under family reunion provisions, in the case of a cessation decision in respect to their relative previously granted protection, in [Mosira](#) [2017] EWCA Civ 407 (08 June 2017) it was held that it was open to doubt whether it was an appropriate procedural step for the Secretary of State use Rule 339A of the Immigration Rules against a person who had not been recognised as a refugee under Rule 334. A person granted refugee status under the old family reunion policy and then subjected to cessation of refugee status proceedings might argue he had a legitimate expectation in domestic law to equivalent protection by reason of the grant of refugee status, though the Home Office could argue that he could still be lawfully deprived of such status under Article 32 of the Refugee Convention on “public order” grounds.

It was reasonable for the Tribunal to find that a person granted leave as a child family member of a person with refugee status could not be subject to cessation on grounds of a change in circumstances in Zimbabwe, as the country conditions were not being the basis of their original grant of status; at the same time, arguably, a person should not benefit from the protection of the cessation provisions where they had never been granted refugee status under the terms of the refugee status (Sales LJ)

## Risk assessment in Country Guidelines decisions

Often the thinking in a decision addressing an asylum claim in one country may be relevant to status determination in other countries, and so it is always a good idea to keep abreast of the Tribunal's thinking in cases analogous to yours, even though it is expressed in relation to another country of origin to your client's. However, as confirmed in [YC \(China\)](#) [2018] CSOH 40 a judge will not be entitled to disregard country guidance in favour of evidence reported to have been given by an expert witness in another case. Instead, the test to persuade a judge to depart from CG findings is to show that "cogent evidence" has been provided justifying departure from the relevant guidance, see [SG Iraq](#) [2012] EWCA Civ 940.

In [OO \(Gay Men\)](#) (CG) [2016] UKUT 65 (IAC) the UT looked at the situation of gay asylum seekers from Algeria, and found that

- there was no indication that sharia law, or indeed the criminal law, was used against gay men, and there was no sign of persecution in society outside the family unit
- Although it was possible that family members might persecute somebody for their gender preference, where a person had revealed this to them and they had tolerated that, any decision to thereafter live discreetly and conceal homosexuality outside the family home was due to a fear of shame and disrespect rather than because of a risk of persecution.
- Accordingly it would be necessary to establish some special characteristic that might bring disapproval at the highest level to make good a claim based on a national risk of persecution, or that relocation away from a persecutory family would be unduly harsh.



### Top Tip

When representing LGBTi asylum seekers, look carefully at

- the legal framework in force in the country in question and whether same-sex preferences and/or activity are criminalised
- the extent to which those laws are enforced directly, and whether they are not, if they provide an atmosphere of intimidation within which non-state actors may be free to cause harm with impunity
- attitudes to sexuality, family and community expectations of behaviour based on hetero-normative standards (ie expecting marriage)
- their appearance, speech, behaviour, dress and mannerisms
- the behaviour of the asylum seeker in the UK (which *may* be relevant to whether they would feel inhibited by expectations in their country of origin)

And be creative and diligent in pursuing objective evidence of this material via a combination of public domain country evidence (regarding conditions abroad) and witness statements and social media (as to the individual's sexuality and behaviour). UKLGIG's June 2018 [briefing paper](#) "Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation" (see

further above under ‘Internal relocation and hiding characteristics’) is essential reading.

[AS \(Safety of Kabul\) Afghanistan CG](#) [2018] UKUT 118 deals with the safety of Kabul for those men with low profile in relation to the Taliban, and with the issue of how to weigh up the existence or absence of a support network. The key passages set out the approach as follows:

230. Our findings above show that it is not generally unsafe or unreasonable for a single healthy man to internally relocate to Kabul. However, we emphasise that a case-by-case consideration of whether internal relocation is reasonable for a particular person is required by Article 8 of the Qualification Directive and domestic authorities including Januzi and AH (Sudan). When doing so, we consider that there are a number of specific factors which may be relevant to bear in mind. These include, individually as well as cumulatively (including consideration that the strength of one factor may counteract and balance the weakness of another factor):

- (i) Age, including the age at which a person left Afghanistan.
- (ii) Nature and quality of connections to Kabul and/or Afghanistan.
- (iii) Physical and mental health.
- (iv) Language, education and vocational and skills.

231. We consider age as a relevant factor given that we have not seen any reason or evidential basis to depart from the specific guidance given in AA (unattended children) Afghanistan CG [2012] UKUT 00016, which was supported in evidence before us as to greater risk to or vulnerability of minors. There is no bright line rule at the age of 18 when a person in the United Kingdom is considered to be an adult (there are different views as to becoming an adult and in particular as to achieving manhood in Afghan society which is not specifically linked to age but more to marital status) where such issues fall away overnight but are more likely to gradually diminish.

232. We also consider the age at which a person left Afghanistan to be relevant as to whether this included their formative years. It is reasonable to infer that the older a person is when they leave, the more likely they are to be familiar with, for example, employment opportunities and living independently.

In [SM \(lone women - ostracism\) \(CG\)](#) [2016] UKUT 67 (IAC) the UT looked at the situation facing women in Pakistan who had defied social expectations via single motherhood and so might face domestic violence from their family. The UT found:

- Internal relocation may be available depending on family, social and educational situation, and relocation would normally be reasonable where support from family members or a male guardian could be accessed in the site of relocation
- Educated, better paid older women could reasonably seek relocation where they had qualifications that would give access to well-paid employment
- Where social support was not available because of the person’s situation, the reasonableness of internal relocation was a question of fact in each case: private shelters offering long-term residence had limited places and state shelters were

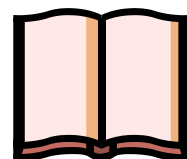
in short supply, and offered short-term accommodation focussed on reconciliation with the family

- Some shelters would not accommodate older children and the impact of any temporary separation would have to be assessed in individual cases
- A woman returning with a new partner/husband would have access to male protection and would be unlikely to risk ostracism or serious harm outside her home area: divorce from a former spouse through legal channels was possible

In [TD and AD \(Trafficked women\) \(CG\)](#) [2016] UKUT 92 (IAC) the Tribunal looked at the circumstances for trafficked women in Albania, stating:

- Risk of persecution/serious harm would depend on depending on social status and economic standing of the family, the level of education of the victim and her family, her state of health particularly her mental health, the presence of an illegitimate child, place of origin, age and potential support network
- The strict code of honour meant that trafficked women would face very considerable difficulty in reintegrating at home or relocating internally, particularly those with children outside marriage whose families might refuse to accept the child so forcing its abandonment
- Women leaving the country lured by false promises of relationships or work might have done so of their own free will but had nevertheless been controlled for the purpose of exploitation because of the threat of violence and lack of freedom
- Measures by the authorities provided sufficient protection in general but the arrangements might not be effective, depending on the individual's circumstances
- The shelters provided by the reception and reintegration programme would offer support and protection, for up to 2 years, and would be a reasonable option depending on particular vulnerabilities
- A woman leaving such a shelter could live alone, though potentially facing stigma, isolation, financial hardship and uncertainty, physical insecurity and the subjective fear of being found by her traffickers/families, which could not reasonably be endured by some individuals eg those with mental illness or psychological scarring
- Re-trafficking was a risk, in the individual case turning on personal circumstances including background, age and willingness and ability to seek help from the authorities, and the factors leading originally to trafficking
- Trafficking victims might well be members of a particular social group

## Example



Amina is from Algeria. She has been present in the UK as the spouse of a qualified person exercising Treaty rights; she had come here as a student, and has not told her family of her marriage. She recently learned that the man she thought of as her husband was in fact previously married and had not been lawfully entitled to marry her. A friend of hers told her family about her difficulties, and her sister rang her from Algeria to say there had been a conference at the local mosque about her: her father and brother had disowned her and other relatives had issued death threats against her because she was perceived as having brought disgrace on the family. She became fearful for her safety on a return abroad. She claims asylum.

The Home Office refuse her asylum claim, saying that they do not accept she would not have told her family about her problems therefore her story is not believed, and that honour crimes are rare in Algeria, a country which has a functioning police force, and anyway she could relocate to an urban centre where she could live and work without the need for family support.

She will need to take on the Home Office case on four issues: her credibility, the risks she actually faces, and whether there is state protection or internal relocation against them. Relevant considerations will be

#### Credibility

Whenever a person claims asylum after being lawfully or otherwise resident here there will be major questions asked by the Home Office. Consider

- Does she have friends or relatives here who will support her claim and recount on what they were told by her of her problems abroad and stating how she has acted during their friendship if that shows she has been suffering stress due to events abroad, or an employer, tutor/lecturer or counsellor or similar person in a position of responsibility who can vouchsafe for her reaction to events abroad?
- Did they meet her former partner in the United Kingdom? Is there any relative abroad who will support her case by a letter?
- Can, at the very least, she give an account that is sufficiently vivid and detailed to have the “ring of truth”?

#### Objective risks:

- Is there country evidence to show that an educated woman will face a risk of domestic violence/honour crimes (there would be little difficulty in showing that physical threats of this kind was “serious harm”), and that there are entrenched patriarchal attitudes in society;

#### Convention reason:

- Do her problems have a religious dimension? If not, or alternatively, is she a member of a particular social group: look for evidence of (1) a common background that cannot be changed (ie her past as a woman who has defied family expectations and (2) societal recognition of a socially outcast woman as being different to other members of the community

#### State protection

- Are the police likely to leave these matters to families to sort out as they do not see it as falling within their crime prevention duties
- Are women discriminated against in the access they have to the courts and in how their evidence would be received judicially?

### Internal relocation:

- Would life alone for such a person without family to support them be unduly harsh?

### **Home Office to disclose Operational Guidance position**

In [UB \(Sri Lanka\)](#) [2017] EWCA Civ 85 the Court of Appeal looked at an appeal before the Tribunals where the Home Office Operational Guidance was overlooked. It was accepted that the asylum seeker's representative might have found this material on the Home Office website and put it before the Tribunal: but the issue was whether the Secretary of State's representative was under a free-standing duty to do so.

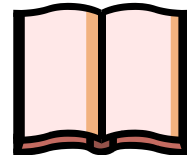
The Court of Appeal found there was such a duty. In [UB](#) the Home Office had rejected the possibility that the asylum seeker was a member of a particular group. The OGN annexed letters from the Foreign and Commonwealth Office showing that the group in question had been proscribed by the Sri Lankan authorities as terrorist in nature, and that individuals belonging to these it would face arrest under anti-terrorism laws. The Court held that

*there was the clearest obligation on the Secretary of State to serve relevant material and ensure it was before the Tribunals at both levels*

Given the failure, the question then became

*whether, viewed in retrospect, the guidance might realistically have affected the outcome*

In this particular case, the implications of membership would have plainly been relevant had that fact been accepted on appeal: the FTT had made no findings as to whether or not the individual was a member of the particular group, and so the failure was a material one.



### **Example**

Jahan is a citizen of Bangladesh. You take on his case after his appeal to the FTT had been dismissed. He claimed asylum based on his membership of a student political group. The Home Office OGN at the relevant time stated that members of that group might face arrest and detention by the security forces if their membership came to light on a return to Bangladesh. Although his membership was accepted by the FTT dismissing his appeal, the Judge found that he was not at risk of serious harm based on the country evidence before him: which did not include the relevant OGN.

It is possible to appeal to the UT on the basis that this OGN should have been disclosed by the Home Office. You should file and serve a Rule 15A notice (under the [UT Procedure Rules 2008](#)) explaining that the OGN should be admitted into evidence at the “error of law” stage of proceedings, for its relevance to be determined.

Even if Jahan was “appeal rights exhausted”, there would be a powerful argument that a “fresh claim” should be recognised if further representations

are made raising the Home Office failure and demonstrating its materiality. Even though Jahan may not be able to point to further information regarding his individual case, under Rule 353 this new material would amount to “further submissions [that] are significantly different from the material that has previously been considered [as] the content ... had not already been considered”.

## Health – Paposhvili and MP

For some years, human rights claims based on the consequences of return abroad due to ill-health have failed to gain traction because of the ultra-high threshold established by the lead case of *N v United Kingdom* 2008 47 EHRR 885, which essentially held that a claim could not succeed absent evidence that return abroad would lead to imminent death without family support, or similarly dramatically acute humanitarian plight. Having considered revisiting the issue for some years, the Strasbourg Court made a landmark restatement of the appropriate test for ECHR Article 3 violations in [Paposhvili v. Belgium](#) (Application no. 41738/10; 13 December 2016).

The Court noted that given that it seemed that no “very exceptional” cases had been identified in its subsequent case law, applying the threshold in *N v United Kingdom* 2008 47 EHRR 885, it was necessary to clarify the appropriate approach. ,

*183. The Court considers that the “other very exceptional cases” within the meaning of the judgment in N. v. the United Kingdom (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.*

The Court stated that

- a degree of speculation would be appropriate and an applicant did not have to demonstrate “*clear proof*” of their claim to face proscribed treatment [186]
- the enquiry would involve a comparison between the applicant’s state of health prior to removal and how it would subsequently evolve [188]
- it would be necessary to verify whether the treatment available in the receiving state is “*sufficient and appropriate in practice*” to prevent an Article 3 violation [189] and whether the individual “*will actually have access to this care and these facilities in the receiving State*” bearing in mind the “*cost of medication and treatment, the existence of a social and family network, and the distance to be travelled ...*” [190]
- where serious doubts remained as to whether an Article 3 violation might ensue, obtain individual and sufficient assurances from the receiving state [191]

- it remained the case that the exercise did not involve comparing care regimes in the ECHR signatory state and overseas [192]

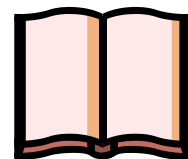
This decision was of course inconsistent with the binding precedent in the UK, the House of Lords decision in N [2005] UKHL 31, where Baroness Hale stated it as being

*whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity*

In AM (Zimbabwe) [2018] EWCA Civ 64 the Court looked at Paposhvili in the light of N concluding

- Judges below the Supreme Court were bound by N
- It was only appropriate to grant a stay against removal in a case which could satisfy the test set out in Paposhvili – that test showed that the boundary of Article 3 protection being shifted from imminence of death in the removing state (even with treatment available there) to being defined by the imminence (ie likely “rapid” experience) of intense suffering or death, driven by the non-availability of previously available treatment
- This represented a clarification rather than a major change according to the European Court of Human Rights
- They hoped the Supreme Court would consider this question at an early stage

In MM (Zimbabwe) [2017] EWCA Civ 797 the Court of Appeal considered it arguable that to return someone to a country where they are likely to suffer a profound mental collapse, possibly amounting in effect to a destruction of their personality, might infringe the right under Article 3 to protection against torture and inhuman treatment



## Example

Vladimir is a citizen of Russia. He arrives in the UK and claims asylum. The claim fails. During his time here, it becomes apparent that he suffers from very serious mental health problems, as well as a very serious form of diabetes, which mean that he would be unable to access medical treatment without family support; and there is clear evidence that he has no family in his country of origin.

Conceivably Vladimir can make a case relying on Paposhvili. Whilst he is clearly not a “deathbed” case in the sense set out in N he might well be able to show that removal would lead to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. Vladimir’s legal team would need to cite Paposhvili, pointing

out that whilst N in the House of Lords may well be binding on the domestic courts, nevertheless it made it clear that the approach of the Strasbourg Court was to be highly relevant to the response of the domestic courts, and therefore any court minded to find that Vladimir meets the Paposhvili threshold but not the high standard in N should recognise the argument and indicate that permission to appeal should be granted from any negative decision that they issue.

In April 2018, in the case of [MP Protection subsidiaire d'une victime de tortures passees](#) [2018] EUECJ C-353/16 it was held that Article 4 of the Charter of Fundamental Rights must be interpreted such that the removal of a third country national with a particularly serious mental or physical illness constitutes inhuman and degrading treatment, within the meaning of that article, where such removal would result in a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned.

Given the fundamental importance of the prohibition laid down in Article 4 of the Charter, particular attention must be paid to the specific vulnerabilities of persons where their psychological suffering is likely to be exacerbated by removal and is due to torture or inhuman or degrading treatment in their country of origin.

An asylum seeker who was tortured by the authorities of his country of origin and who, according to duly substantiated medical evidence, continues to suffer from post-traumatic after-effects due to those acts that are likely to be significantly and permanently exacerbated so as to endanger his life, if he is returned to that country, may have a viable claim for subsidiary protection. In such cases, both the cause of the current state of health of a third country national due to acts of torture inflicted by his country of origin's authorities in the past, and the fact that any such mental health disorders would be substantially aggravated on account of the psychological trauma still suffered due to torture, are relevant factors to be taken into account when interpreting Article 15(b) of the Qualification Directive.

The criteria for granting subsidiary protection must be drawn from international human rights instruments including obligations such as Article 14 of the Convention against Torture. The question is whether a person is likely to face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from past official torture. One example is where the applicant is at risk of committing suicide due to trauma from past torture by the national authorities, where those authorities make no provision for their rehabilitation; another example is where it is apparent that the national authorities there have adopted a discriminatory policy as regards access to health care preventing some individuals from obtaining access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities

## Asylum claims made from abroad

Advocate General Mengozzi gave a dramatic Opinion in [Case C-638/16 PPU X and X v État Belge](#). It relates to the EU Visa Code (Regulation No 810/2009) establishing a Community Code on visas. He found that decisions under the Visa Code implement EU law and thus must respect the Charter of Fundamental Rights irrespective of territorial criterion, and that a visa on humanitarian grounds must be issued where there is a serious risk of a breach of the right to be from inhuman and degrading treatment.

This radical piece of thinking was reversed by the Court of Justice in [X and X \(Judgment\)](#) [2017] EUECJ C-638/16. It pointed out that the Procedures Directive applied only to “applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States”. The Dublin 3 Regulation

*only imposes an obligation on Member States to examine any application for international protection made on the territory of a Member State, including at the border or in the transit zones, and that the procedures laid down in that regulation apply exclusively to such applications for international protection.*

## The right to asylum

The UT President looked at the nature of the right to asylum as protected in European Union law by Article 19 of the Charter of Fundamental Rights, in [Hassan](#) IJR [2016] UKUT 452 (IAC). Noting that the right “belongs to an elevated plane”, the Tribunal opined that any threat to the right might suffice to bring EU law protections into play: as the “flagrant breach” test would weaken and erode the right to asylum, given its underlying rationale and ethos.

## Family reunion

### Introduction

The Rules for family reunion for persons granted refugee status and Humanitarian Protection are generous towards the admission of individuals who are spouses and civil partners; similarly, unmarried partners and children are catered for. The rules are at their most expansive when addressing the circumstances of “pre-flight” family, who do not have to provide any evidence as to maintenance and accommodation (for refugees 352A; for persons with Humanitarian Protection, 352FA). Sponsors of post-flight family members must provide evidence of an ability to maintain and accommodate, but not to the rigorous standards set out in Appendix FM (see Part 8 of the Rules, eg Rule 319L for spouses).

However, the availability of family reunion significantly diminishes for other family members: thus siblings and parents are not provided for by the Rules.

### Relationships dealt with under the Rules

The Rules addressing family reunion for spouses/partners have changed, via the addition of what is now 352A(iii):

- the requirement for pre-flight relationship requires, for those in a formal relationship,  
“the marriage or civil partnership did not take place after the person granted refugee status left the country of his former habitual residence in order to seek asylum”

and now additionally requires that

- “the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum.”
- Note there is no requirement for the relationship to have existed *in the country of origin*: it may have formed post-flight, in some *country of interim residence*, so long as the quality of stay is sufficiently durable to be argued as a place of habitual residence
- The asylum family reunion Rules have been adjusted such that two-year cohabiting partners can qualify, not just spouses/civil partners

### Relationships dealt with outside the Rules

At various times in the past the Home Office has published policy referring to the admission of family members outside the Immigration Rules. The formulation that existed for many years can be found in the UT decision of [SS Somalia](#) [2005] UKAIT 00167:

*The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion. Such applications are considered under the criteria above, ie there must be compelling, compassionate circumstances in order for the family to be granted entry to the UK.*

It seems that there is now no equivalent to this concession towards family members beyond partners and children. The Home Office [Family reunion: for refugees and those with humanitarian protection](#) cross-references to the general guidance on exceptional circumstances issued in relation to the ten-year route to settlement under Appendix FM and acknowledges that there is always scope for an application to be made under the Human Rights Convention:

*The decision must provide reasons why the application does not warrant a grant of leave on the basis of the applicant's ECHR Article 8 family life under the exceptional circumstances policy, or on the basis of compassionate or compelling factors.*

So these cases would need to be pursued via applications outside the Rules, applying on the traditional approach to Article 8, ie the five-stage test identified in [Razgar](#) [2004] UKHL 27:

- (1) Will the proposed [refusal of admission] be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
- (3) If so, is such interference in accordance with the law?*
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*

You can see an example of a case that failed in [IAA v UK](#) [2016] ECHR 986, because the ECtHR took the view that although there was a partial asylum dimension to the case, the Sponsor (the mother of several older children who were living in a refugee camp) had originally been granted admission to the UK as the spouse of a refugee, from whom she subsequently divorced. Referring to the fact that for the last nine years the five children abroad had lived together as a family unit in Ethiopia with the older children caring for their younger siblings, the ECtHR ruled:

*43. It is clear from the Court's case-law that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin (or*

*elsewhere) permanently and to have thereby abandoned any idea of a future family reunion (Şen v. the Netherlands, cited above, § 40). Rather, the Court will look carefully at the facts of the case in order to determine whether the parents always intended for the child to join them. In the present case, there is no evidence to suggest that the applicants' mother had any such intention. Contrary to what the applicants argue before this Court, there is nothing to suggest that she fled a situation of armed conflict. Rather, she appears to have made a conscious decision to leave her children in Somalia in order to join her new husband in the United Kingdom, knowing that he would not agree to the children joining them. Therefore, as long as she remained in a relationship with her second husband, she cannot have had any expectation that the applicants would join her new family unit. Furthermore, following her separation from her second husband, the applicants' mother appears to have waited for two years before attempting to bring the applicants to the United Kingdom.*

[AT \(Eritrea\)](#) [2016] UKUT 227 (IAC) is a case on family reunion, where the 16-year old sponsor made an application outside the Immigration Rules for his brother and mother to join him. The President notes that no provision has ever been made for family reunification such that a child refugee in the United Kingdom could apply for parents and siblings to join them, and nor was there any policy dealing with such cases. He notes that there is effectively a blanket exclusion in these cases, and accordingly it was only right to give less weight to the Secretary of State's assessment of proportionality in the individual case.

*Lesser weight is to be accorded to the Secretary of State's assessment to the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the [rule in question] embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case by case basis.*

The President then cites [SS \(Congo\)](#) [2015] EWCA Civ 387 where the Court of Appeal paid specific attention to the factor of children in the context of applications for leave to enter and leave to remain in the United Kingdom. Having noted that the "Article 8 code", contained in Appendix FM to the Immigration Rules, constituted an "attempt" by the Secretary of State to reflect " *more precisely than before*" the relevant balance to be struck between the public interest and the interests of the individual in Article 8 cases, the Court formulated some general principles in [39]. These include the principle, expressed in [39](iii) that:

*(iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. ... the fact that the interests of a child are in issue does not simply provide a trump card ... the interests of the child are a primary consideration - i.e. an important matter - not the primary consideration ... relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to*

*do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.*

The President then notes that the Statutory Guidance [Every Child Matters: Change For Children](#) makes it clear that the UK will adhere to international instruments which stress the importance of making administrative decisions compatibly with the rights and best interests of the child: for example the International Covenant of Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, and the Child Convention itself, in dealing with the cases of children.

The President then notes the factors that are relevant to the interests relied upon by the Appellants in the balancing exercise:

*35. On one side of the scales there is a strong family unit whose members are clearly united and fortified by strong bonds of love, affection and interdependency. They long to be reunited and have gone to substantial lengths and have made considerable sacrifices to achieve this goal. For as long as separation continues, this will be a disfunctioning, debilitated and under achieving family. The main feature of this under achievement will be the family's inability to attain its potential as one of the key elements of modern societies throughout the world. The under performance of family members and family units, in this respect, does not further any identifiable public interest. On the contrary it is antithetical to strong and stable societies. These features of the family unit under scrutiny in these appeals are exposed in a context where M, being the older of the two male sons, is, culturally, considered to be the head of the family. This family, bereft of its natural head by circumstances and not by choice, is now deprived of his successor and has been thus bereft for almost four years.*

*36. The evidence establishes clearly that the sponsor is under achieving as a person. This means that his contribution, actual and potential, to United Kingdom society is diminished. This arises in circumstances where he has demonstrated his willingness to adapt to United Kingdom culture and to study earnestly in this alien country. The prediction that society will secure some benefit if the sponsor achieves family reunification in this country is readily made. Thus reunification will promote, rather than undermine, the public interest in this respect. It will be manifestly better for society than maintenance of the status quo.*

And he looks at the matters cited as public interest considerations counting against the family's rights:

*(a) the safeguarding of children, specifically those in the position of the sponsor, who would be at risk of trafficking and exploitation in their quest to reach the United Kingdom; and*

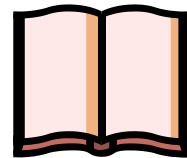
*(b) additional pressure on publicly funded childrens' services.*

He notes that there is no statutory basis for those asserted public interests and as they were unevicenced, they did not tip the scales in the Respondent's favour.

Notably, the Home Office [Family reunion: for refugees and those with humanitarian protection](#) says

*Where it is relevant to a decision, caseworkers dealing with overseas applications must make it clear in their decision letter that the child's welfare has been considered in the spirit of section 55 without stating that it is a duty to do so.*

In a non-refugee entry clearance appeal, [I](#) [2011] UKUT 483 (IAC), the UT President made it clear that, whilst section 55 does not apply to entry clearance applications (as they do not involve children in the UK), nevertheless considerations identified in the Child Convention were likely to be important to assessing the child's private and family life.



## Examples

Albert is a citizen of the Congo granted refugee status in the UK two years ago. He wishes to sponsor his wife Jane to join him here. Before coming to the UK he lived in a refugee camp in Botswana for three years. He and Jane were childhood sweethearts in the Congo and married in the refugee camp in Botswana where they lived for several years before they became separated and Albert made his journey to the UK.

Jane has a viable application under the most generous route to join Albert ie under Part 11 of the Rules relying on Rule 352A, given she is a pre-flight family member: the relationship existed before they left Congo and their marriage was in a country of habitual residence.

If Albert and Jane had only married after Albert had obtained refugee status in the UK, having met when he visited Botswana a year ago, then the application would have to be made under Part 8 of the Rules at Rule 319L, requiring adequate accommodation and maintenance without recourse to public funds and satisfaction of the English language testing regime.

Albert's mother Camilla also lives in Congo, alone since her husband's death. Albert has regularly sent her money.

Notwithstanding that the parent/child relationship is always "pre-flight" in character, Camilla does not qualify under the generous Part 11 regime, as adult dependent relatives are not catered for, not being a child or partner. However Part of the Rules at Rule 319V caters for the situation of parents, if they satisfy the requirements for adult dependent relatives: if Camilla is aged over 65, then she can qualify if maintenance and accommodation are adequate, she is dependent on Albert, and there are "no other close relatives in [her] own country to whom [she] could turn for financial support".

Lusine is a refugee from Cameroon aged 15. Her elder sister Josephine, aged 19, her only living family member, remains in Cameroon, where they previously lived together before Lusine was helped to leave the country by a friendly cousin. They have remained regularly in touch via social media since Lusine was forced to leave the home they shared there because of threats made to her because of her perceived sexual preferences.

Josephine does not qualify under the Rules as she is not a child or partner of Lusine; it is difficult to see she could qualify as an adult dependent relative as she does not require Lusine's "care". However she may well have a viable case:

- it would seem there is enduring family life between them
- the refusal of entry clearance will amount to an interference with that family life
- that leaves the question of whether the decision strikes a "fair balance" between private right and public interest, bearing in mind that the Rules do not cater for this situation, that this is family life that predates Lusine's forced migration to the UK, particularly if the evidence of emotional dependency between the pair is sufficiently strong to show that Lusine's development would be seriously compromised by not admitting her sister.

## Detention in the asylum and deportation context

### Detention and the Detained Asylum Casework (DAC) process

As mentioned above, whilst the DFT system was struck down as inherently unfair, its heir, the Detained Asylum Casework (DAC), has robustly staved off challenges.

Nevertheless individual claims for release from the DAC may nevertheless have mileage in so far as the detainee is either an adult at risk whose case is not receiving appropriately speedy progression, or whose case is sufficiently complex

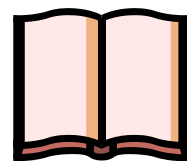
There may also be claims dating from the previous detention regime, before the era of *Adults at risk*, which may well turn on whether there was independent evidence of a detainee being a torture victim.

Under both regimes, there may be challenges as to whether arrangements for identifying the vulnerable in detention are lawful, in particular as to whether Rule 35 reports have been pursued and actioned with sufficient vigour.

Furthermore, asylum claims that are complex will not be suitable for the DAC process.

In [Cham](#) [2016] EWHC 1345 (Admin) it had been argued that no gender preference claim could be safely determined in accelerated processes.

- Blake J disagreed, opining that any judge will be familiar with opportunistic sexual orientations claims made very late and one could not say that such a claim was *always* unsuitable for the fast track.
- However, he made it clear that there would be cases where it was understandable that, due to suffering sexual identity-based humiliation, vulnerable individuals had found it too difficult to raise their claim sooner. Their claims would be unsuitable for such processing where their claim was backed by medical evidence, as it would take careful and painstaking relationship building with competent trusted advisers before all relevant matters came to light.



### Examples

Anyiam is from Nigeria. He has claimed asylum based on fearing persecution because of his same-sex gender preference. He has been routed into the DAC because the Home Office considers that his protection claim is abusive, having been made after coming to light after working unlawfully in the UK for several years, and additionally is considered straightforward. After you have interviewed him in detention, he admits that he was sexually abused by people in his local community in Nigeria.

It seems that Anyiam is vulnerable. You would need to investigate whether the abuse he has suffered constitutes torture or sexual violence: both are

identified in the *Adults at risk* Guidance as tending against suitability for detention.

Additionally his claim may well be complex, if his ability to give instructions is affected by any trauma occasioned by his experiences (and this may explain his late protection claim), and/or if he can obtain witnesses as to his sexuality and problems abroad. It may additionally be necessary to commission expert evidence regarding state protection and the possibility of internal relocation: if this impacts on the instructions you will be taking from him, there is again a good argument for release from detention.

## **Detention and the *Adults at risk* regime**

On 12 July 2016, sections 59 and 60 of the Immigration Act 2016 were brought into force; requiring the Secretary of State to issue statutory guidance on those who would be particularly vulnerable to harm in detention, and limiting the detention of pregnant women to those who will shortly be removed, or where there are exceptional circumstances which justify detention. Where the exceptions apply, detention is limited to 72 hours, or seven days where personally authorised by a Minister of the Crown.

The relevant guidance is in UKVI operational guidance, in 'Enforcement', both under ['offender management'](#) :

[Adults at risk in immigration detention](#) (formerly ch 55b EIG)

[Detention of pregnant women](#)(formerly ch 55a EIG)

The "adults at risk" guidance on vulnerable detainees identifies torture victims as one of the categories who should not normally be detained. They may only be detained if immigration control factors outweigh the need to release them. In *Medical Justice* [2017] EWHC 2461 (Admin) it was decided that the definition of torture should include that inflicted by non-state actors: the political question of whether or not the harm was inflicted by a state or non-state actor was not relevant to the question of vulnerability to harm via detention.

On 2 July 2018 [The Detention Centre \(Amendment\) Rules 2018](#) came into force and amended the definition of torture in the 2001 Detention Centre Rules by adding the following new subsection to the Rule 35 definition of torture:

- (6) For the purposes of paragraph (3), "torture" means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation in which—
- (a) the perpetrator has control (whether mental or physical) over the victim, and
  - (b) as a result of that control, the victim is powerless to resist.

Changes to statutory guidance are made in the Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 ([SI 2018 No. 410](#)). The new policy is to be published on 2 July 2018 (unavailable as at the time of writing – one published this will be [here](#)), presumably to clarify the definition of torture.

The above two guidance documents largely replace the provisions in the former Chapter 55 EIG, regarding those who are ordinarily regarded as unsuitable for detention, though Chapter 55 retains two important general principles:

that unaccompanied children must not be detained other than in very exceptional circumstances (55.9.4)

Families should only rarely be detained outside of the [Family returns process](#) (in the 'Returns preparation' section of 'Enforcement' operational guidance). See also the archived policies [EIG ch's 45 a\) b\) and c\)](#).

The intention of the August 2016 [Guidance on adults at risk in immigration detention](#) was that 'fewer people with a confirmed vulnerability will be detained in fewer instances and that, where detention becomes necessary, it will be for the shortest period necessary. Para 3 of the superseded August 2016 Policy states)':

*The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However, it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them. This builds on the existing guidance and sits alongside the general presumption of liberty.*

The now superseded August 2016 guidance further stated as follows:

### **Who is an adult at risk?**

*7. For the purposes of this guidance, an individual will be regarded as being an adult at risk if: they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention. Those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves.*

Point 8. provided that the presumption is not to detain a person considered to be 'at risk', while point 9. sets out that, in assessing likely risk of harm to that individual if nevertheless detained for the period identified as necessary for their removal, evidence is to be classified as follows:

*a self-declaration of being an adult at risk – should be afforded limited weight, even if the issues raised cannot be readily confirmed. Individuals in these circumstances will be regarded as being at **evidence level 1***

*professional evidence (e.g. from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is an adult at risk – should be afforded greater weight. Individuals in these circumstances will be regarded as being at **evidence level 2***

*professional evidence (e.g. from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk – should be afforded significant weight. Individuals in these circumstances will be regarded as being at **evidence level 3**.*

At point 11, an explicitly non-exhaustive list of risk factors is set out which will “inform” detention decisions: suffering from a mental health condition or impairment (this may include learning difficulties, psychiatric illness, clinical depression or post-traumatic stress disorder, depending on the nature and seriousness of the condition)

- *having been a victim of torture (individuals with a completed Medico Legal Report from reputable providers will be regarded as meeting level 3 evidence, provided the report meets the required standards)*
- *having been a victim of sexual or gender based violence, including female genital mutilation*
- *having been a victim of human trafficking or modern slavery*
- *suffering from post-traumatic stress disorder (which may or may not be related to one of the above experiences)*
- *being pregnant (pregnant women will automatically be regarded as being level 3 risks)*
- *suffering from a serious physical disability*
- *suffering from other serious physical health conditions or illnesses*
- *being aged 70 or over*
- *being a transsexual or intersex person*

The policy acknowledges that there may be other conditions that render a person particularly vulnerable to harm and that the nature and severity of a condition and the availability of evidence may change over time. These risk factors are to be weighed and balanced against immigration factors, including the length of time in detention, public protection issues and the person’s record of previous compliance.

The policy also states that court or tribunal judgments about the credibility of a person’s account or about professional evidence may be taken into account.

Notably, the policy nowhere states that vulnerably people should only be detained in exceptional circumstances, which was the old policy, raising concerns that the new policy may be less protective than its predecessor.

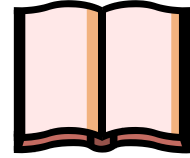
In other words, the guidance essentially provides that

- The clear presumption is that detention will not be appropriate if a person is considered to be “at risk” subject to the possibility that immigration control considerations outweigh this presumption
- An adult at risk is someone who

- declares that they are suffering from a condition, or have experienced a traumatic event (eg trafficking, torture or sexual violence) that would be likely to render them particularly vulnerable to harm in detention OR
  - Detention decision makers are aware of that condition/experience due to medical/ professional/observational evidence
- Relevant conditions/experiences (the nature and severity of which can change over time) suggesting vulnerability in detention are
- Mental health condition/impairment depending on its nature and seriousness
  - Being a torture victim (evidence from a reputable medico-legal reporters will be awarded particular weight)
  - Being a victim of sexual/gender-based violence including female genital mutilation
  - Being a victim of trafficking or modern slavery
  - Suffering PTSD (whether or not related to one of the above experiences)
  - Being pregnant (automatically accepted as at level 3 cogency)
  - Suffering from a serious physical disability
  - Suffering from other serious physical health conditions/illnesses
  - Being aged 70 or over
  - Being a transsexual or intersex person
  - Other unforeseen conditions cannot be ruled out
- Following “at risk” identification, the evidence on which that assessment is based must be considered and weight attributed to it, at a level depending on the reliability of the supporting evidence:
- A self-declaration receives *limited weight* (level 1)
  - Professional evidence from a social worker, medical practitioner, or NGO, or official documentary evidence, indicating that the individual is an adult at risk should receive *greater weight* (level 2)
  - Professional evidence identifying both risk and that a period of detention would be likely to cause harm, eg by worsening the symptoms/condition should receive *significant weight* (level 3)
- The weight awarded such evidence may be reconsidered in the light of decisions from courts or tribunals about the person’s claims or about any professional evidence: however short of that, medical evidence should be disagreed with only where there are *very strong reasons* to do so
- Evidence that immigration detention for an undefined period would cause harm does not demonstrate that immigration detention for a very short period will cause harm absent cogent medical evidence to such effect
- A Rule 35 report attesting to the possibility of mental health deteriorating will normally amount to level 3 evidence, and one indicating concerns that its subject may be a torture victim will be at least level 2 evidence
- Where a Rule 35 report is received, it should be reviewed and if found wanting, “*it should be returned to the medical practitioner with a request for the necessary information*”

- The basic principle is: the higher the level of evidenced risk to the individual, the shorter the length of detention that should be maintained, and this should be carefully assessed, considering the likely length of detention against the likely impact on the health of the individual, primarily focussing on the length of expected detention against the likely impact of such detention on an individual at risk
- The risk factors must be balanced against immigration control factors to see whether the latter outweigh the former, in a highly case-specific consideration
  - Length of time in detention and realistic prospect of removal making every effort to ensure detention is as short as possible: new arrivals with no right of entry are likely to be detainable notwithstanding other aspects of this guidance, bearing in mind their “normally inherently short turnaround time”
  - Public protection issues – criminal history, security risk, public good deportation proceedings
  - Compliance issues – absconding risks, taking account of voluntary return options and any effort to frustrate removal or history of living and working illegally in UK
- The public interest in the deportation of foreign national offenders (FNOs) will generally outweigh a risk of harm to the detainee
- Where the detainee is a foreign national offender, it is necessary to assess the seriousness of any offending, having regard to any available police or National Offender Management Service (NOMS) evidence on the level of public protection concern, and whether deportation proceedings have begun
- Where level 1 evidence of being at risk is available, further detention is appropriate where one of these applies:
  - where the removal date can be forecast within a reasonable window,
  - where public protection issues are identified, or
  - where there are indicators of non-compliance with immigration control
- Where level 2 evidence of being at risk is available, further detention is appropriate only where one of these apply:
  - the date of removal is fixed or can be fixed quickly, within a reasonable timescale, and the individual has failed to comply with reasonable voluntary return possibilities, or has been refused at the border
  - they present public protection issues sufficient to justify detention, eg meeting the criminality thresholds in the Immigration Act 2014
  - negative indicators of non-compliance suggest that the individual is highly likely not be removable unless detained
- Where level 3 evidence of being at risk is available, further detention is appropriate only where removal has been set for a date in the immediate future or where “the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection concern. It is very unlikely that compliance issues, on their own, would warrant detention of individuals

falling into this category – though non-compliance should be taken into account if there are also public protection issues or if the individual can be removed quickly”



## Examples

Jerome is from Ghana. He is detained. He has made an asylum claim which is pending consideration; there is very little supporting evidence. He tells the detaining officers that he was beaten up because of his political beliefs whilst detained in Ghana. He has previously failed to report having been given reporting conditions after being encountered as an overstayer.

Jerome may well have suffered mistreatment sufficient to count as torture, but as he has self-reported it, this only constitutes level 1 evidence. His immigration history is sufficient to warrant a conclusion that he will not be removable unless detained, so applying the policy, he will not necessarily be released.

Ashfar is from Pakistan. He is detained having been encountered working in breach of his student conditions; he has admitted having done so. He has always lived with his uncle’s family in the UK. His leave has been curtailed and removal directions are pending according to a letter from the immigration service. He has received a Rule 35 report in which a Doctor indicates that he is transsexual and that he seems to be upset about being detained.

The Rule 35 report appears to be level 2 evidence: it represents a professional identification of him as an adult at risk, but does not necessarily indicate that he will face real harm if detention continues. Arguably the Home Office should seek further information given that his “upset” may in fact be the manifestation of real mental distress. Applying the guidance, although presently there seems no obstacle to Ashfar’s removal directions being set quickly (as no case against removal seems to be available), arguably there are only limited negative indicators of non-compliance, given he has family ties here and seems to have readily admitted his wrongdoing: this does not necessarily justify an inference that he “is highly likely” not to be removable absent detention.

Arif is a citizen of Bangladesh. He has been detained after exhausting the appeal process against deportation on private and family life grounds, having committed numerous motoring offences for which he was convicted of sentences ranging from fines to six months’ imprisonment. He has recently received a Rule 35 report, having claimed asylum, stating that his presentation is consistent with having been sexually mistreated in detention and stating that his mental health is tangibly deteriorating because of his detention. He has claimed asylum and is awaiting a decision on that claim.

Arif may not be suitable for detention. Where there is level 3 evidence, only a fixed removal date (inconceivable where an asylum claim awaits decision) or

significant public protection concerns could justify his detention: yet it is hard to see that his level of offending is sufficiently serious to be classified as falling into that class of case.

### **Failure to provide accommodation**

Much of Sch 10 Immigration Act 2016 was commenced on [15 January 2018](#) by the Immigration Act 2016 (Commencement No. 7 & Transitional Provisions) Regulations 2017, whose [Explanatory note](#) sets out transitional arrangements in brief. Essentially:

s61(1)-(2), s66 and most of Sch 10 Immigration Act 2016 are commenced

Sch 10 replaces the previous framework of 6 types of status with a single power of immigration bail

Some of Sch 11 IA 2016 is commenced, which repeals s4(1) IAAA 1999 ('s4 support'). This is, on the same date, replaced by the power in Sch 10 para 9

Accommodation or facilities at a bail address (9(2)), or travel expenses (9(4)), may be provided by the SSHD where a residential condition was imposed (9(1)(a)) and the person would be unable to support themselves at that address, were the power not to be exercised (9(1)(b)).

Both powers (in 9(2) and 9(4)) apply only where the HO thinks there are exceptional circumstances justify their exercise.

This para is intended to operate instead of s4(1) of the 1999 Act which is repealed.

The UKVI [Immigration bail guidance](#) from p 52 sets out the exceptional circumstances. There is a short, 8 page [API on handling s4\(1\) transitional cases](#). (v1.0).

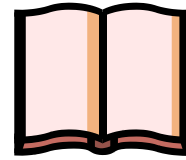
[New judicial guidance](#) was issued by Judge Clements, President of the First-tier Tribunal (IAC), on 2 May 2018, to replace the [2012 guidance](#) and Part 5 (Bail) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 was amended on 15 January 2018 by the Tribunal Procedure (Amendment No. 2) Rules 2017/1168, whose [explanatory memorandum](#) outlines the changes.

As part of the new additions to the tribunal guidance, para 57 provides that the HO have advised they will not seek residence conditions in most cases so long as a stable bail address (defined in para 38) is available, and that '[t]his fits with the general principle that bail conditions should be the minimum necessary. The meaning of providing a stable bail address is that the applicant is not required to necessarily live at that address as a condition in itself (para 56). The landlord's consent is assumed under para 61, in absence to evidence to the contrary.

All this appears an attempt to resolve the problems, as set out by BID in their influential report in September 2014, [No place to go: delays in provision of s4\(1\)\(c\) bail accommodation](#)', which showed systemic problems and delays in the provision of bail accommodation to high risk immigration detainees.

In July 2016, in [Sathanantham](#)[2016] EWHC 1781 (Admin), the Administrative Court found that the system itself was being operated in a manner that was unlawful, and that in each case the time taken to resolve the application amounted to a breach of the SSHD's duty to

deal with applications fairly and rationally. The judge commented that, *'when arrangements come to be made under the Immigration Act 2016 the failures of the existing system must be addressed'*.



## Example

Chan is a citizen of China who is in detention following exhausting rights of appeal against deportation for armed robbery. He has a good case for being released given that the Home Office have not managed to arrange his removal following a year in detention. However he has no family members or community links in the UK, and no resources or immediate job prospects, such as to make it feasible for him to find accommodation himself. Accordingly his representatives have requested the Home Office bail team to secure section 4 addresses. The probation service have so far rejected two bail addresses which have been identified by the Home Office. Meanwhile Chan languishes in detention.

The Home Office must be pressed to give written reasons for why the accommodation is not suitable. If they maintain their refusal, then an application for bail should be made, with the “least worst” accommodation being identified and put forward for judicial assessment of its suitability.

## The Restricted Leave Policy

### Introduction

For some years, the Home Office policy was to grant short-term periods of discretionary leave to remain (DLR) to people whose conduct was considered such that they should be excluded from the usual benefits of such leave: normally DLR is granted for 2½ to 3 years at a time, outside the Immigration Rules but under the general residual power to grant leave found in the Immigration Act 1971.

However, increasingly stringent grants of leave have replaced the relatively benign regime once in place.

### The December 2016 Policy

From 7 December 2016 a new [Restricted Leave](#) policy (recently updated to incorporate DPA references only), entered force replacing that previously in effect – it seems to have been promoted largely by the decision in [MS IJR \[2015\] UKUT 539 \(IAC\)](#). This policy aims to uphold certain policy objectives which have previously been recognised as valid by the courts:

- Public interest in removing those not entitled to remain here at the earliest opportunity and signalling that they should not become established here

- Public protection in monitoring their living and working arrangements
- Upholding the rule of law internationally by preventing them establishing a new life in the UK

It may be linked to the Immigration Rules which, via the general refusal reasons, provide for refusal of an application, for indefinite leave to remain or otherwise, because of criminal convictions, and which now expressly at [para 322\(1E\) in Part 9](#) provides for refusal of an application for anyone fitting into the Restricted Leave policy, and will be granted to those who

- Are excluded from international protection (or would be if they made such a claim) (ie essentially, have committed war crimes, serious non-political crimes and acts contrary to UN principles)
- Are recognised refugees who have lost the benefit of the non-refoulement provision because Article 33(2) has been invoked against them because they are seen as a
  - *danger to the UK's national security* or
  - *having been convicted of a particularly serious crimes they pose a danger to the UK community*

It is sometimes argued that people suffer unduly because of delays in considering applications which means that, rather than only suffering the inherent disadvantage of having been granted only six months leave, they in fact have to endure the greater problem of virtually never having the appropriate documentation showing a present entitlement to residence, because no sooner are they granted leave than they have to re-apply. Collins J in [N \[2009\] EWHC 1581 \(Admin\)](#) acknowledged this difficulty and indicated that he expected speedy reconsideration of the case before him in the light of the past delays.

In [MS](#) at headnote (v) the UT finds:

*Whilst the imposition of time limited leave may have an impact on the quality of family life, in that, it may be stressful for all members of the individual's family to live under the continual "threat" every six months of the individual concerned being removed, it does not interfere with the continuance of family life.*

### **Restricted Leave – its general features**

These are general features of the leave and its renewal process:

- Normally granted for 6 months, subject to removal being “reasonably likely” sooner or where the particular circumstances justify a longer grant – relevant considerations are the individual’s circumstances, the seriousness of their (suspected/actual) offending and previous compliances with immigration control
- There is no application form or fee for a further application

- Any further application will be considered against “Active review” criteria: ie proactive consideration of country evidence and information may be sought from the applicant if necessary in assessing whether there is any change of circumstances
- Those previously granted leave under the older policy (in force from 2 September 2011) will remain subject to its terms for so long as the last grant of leave is extant. However, once their circumstances are actively reviewed following a further application, any further leave will be renewed under the new policy – one of the rulings in *MS* was that there was nothing so unfair as to be unlawful in delays in considering past applications for extensions under the latest policy, notwithstanding that they were made when the old policy prevailed
- In theory, there are certain “upgrading” routes out of the policy (ie ways of getting a better form of leave), but most would fall for automatic refusal, eg under the Rules because of the general refusal reasons, and under the residual Discretionary leave provision because it excludes those subject to Restricted leave: however the latter may represent an exit route in which case a senior Home Office person may authorise relaxation of the leave to Discretionary leave with no conditions and no 6-month limitation on the grant

### **Restricted Leave – onerous conditions on work, study, residence and reporting**

The most distinctive feature of this kind of leave is the distinct power to make quite onerous conditions which restrict the way in which the person spends their life in the UK:

- Appropriate conditions (which can be the subject of representations as to their variation) are likely to be
  - A restriction on employment/occupation (normally to be restricted proportionately rather than denied outright, ranging from a requirement to notify the Home Office of working arrangements for appropriate safeguarding via report to other agencies, to restrictions from working in certain occupations because of features of the individual case eg working with migrant or vulnerable communities having regard to past conduct in positions of authority and/or trust, or a total ban where there is a “particularly high public protection risk”);
  - A restriction on studies, normally barring all studies in person or remotely, reinforcing the temporary nature of any such leave
  - A requirement of maintenance and accommodation without recourse to public funds (subject to providing evidence of destitution bearing in mind past support arrangements, savings/disposable assets, work permission, potential family assistance here and abroad)
  - Reporting conditions (frequency and location depending on imminence of removal, absconding risks, the impact of the condition on domestic including child responsibilities, health and mobility and employment)
  - Residence conditions (eg in a specific area to reduce housing costs if publicly funded; bearing in mind known risk factors; probably not to spend more than 3

consecutive nights away from the address without prior written consent, no more than 10 nights away from that address in any rolling 6 month period) (impact on children to be considered, as where the condition might disrupt education at a crucial stage or where it would remove them from extended family)

- Compliance with conditions will be vigorously reviewed and referral for investigation for prosecution may follow breaches – breaching conditions “is very serious”

### **Restricted Leave – indefinite leave to remain applications**

There is only limited access to settlement, the new guidance aiming to take account of the various legal challenges including the authority of *MS* cited above.

- An application for indefinite leave to remain can be made only outside the Rules
- Such applications will normally fall for refusal as it will usually be too uncertain to predict that a person will never be removable: however consideration must be given to whether this is a case where the only reasonable course is to grant indefinite leave to remain
- The earlier decision in *N* [2000] EWHC 1581 found that normally after ten years settlement would be appropriate, because of the earlier terms of that policy:

*the policy has, as it were, a cap. It is recognised that there will come a time when - provided the individual has behaved himself in this country - it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking - and of course each case has to be considered on its own merits - such an individual will have leave to remain indefinitely and thus will be entitled to settle here.*

That approach is now expressly disavowed: henceforth settlement will be granted only in “rare” and “exceptional” circumstances

- *MS* identifies a non-exhaustive set of relevant considerations:

#### **“ILR: Consideration of whether the end point has been reached:**

- (i) The consideration of whether or not the point has been reached where the only reasonable course is to grant ILR will depend upon a variety of factors, including:
  - (a) the reasons why the individual was excluded from the Refugee Convention;

(b) whether the applicant has remained blamelessly in the United Kingdom for a lengthy period of time;

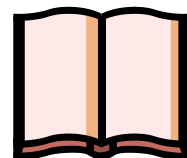
(c) the prospect of removal of the applicant to his or her home country, involving an appraisal of the political circumstances of the home country bearing in mind that the international reputation of the United Kingdom which can be in point in these cases and

(d) the particular circumstances of the applicant and his life in the United Kingdom.

(ii) This is not an exhaustive list. Failure to consider this aspect of the policy and provide reasons may amount to an error of law. However, there will be cases when the suggestion that the end point has been reached is so hopeless that reasons are not required in relation to this aspect of the policy”

- The new guidance states that expiation/remorse/good behaviour will not normally be sufficient given the public policy to show that such persons are not welcome here, and that subsequent good behaviour is the least that can be expected
- Such is the rich tapestry of immigration policy and case law, soon after the latest *Restricted leave* policy was published, another Administrative Court decision, also called *MS* but the reference being [2016] EWHC 3162 (Admin), was published. This time Collins J found that a decision was unlawful where
  - it omitted any consideration of the past judicial assessment by SIAC that the applicant posed no risk to national security
  - it overlooked the very remote possibility of return abroad within the foreseeable future: he also pointed out that whilst it was reasonable for the policy to state that an individual should not be putting down private life ties, it was unrealistic to prevent them establishing family life in this country

He added that strict residence conditions imposed on a person on restricted leave could be sufficiently serious to amount to false imprisonment – so if it transpires that the conditions are unlawful, because relevant considerations have been overlooked, then it may be that the limitations on a person’s liberty over the period in question are also unlawful, creating the possibility of a damages claim.



## Example

Chohan is a citizen of India. He has been in the UK for 20 years and all his close family members live here with him, including two daughters who have been born and completed school here. Having lived here lawfully for some three years as a student, he claimed asylum based on his associations with a Sikh group that pursued its political aims by violent means. He himself had never carried out or financed terrorist activities. Though the credibility of his claim was accepted as were the ensuing risks he would face from the Indian

security forces, he was excluded from refugee status due to being a member of a group which committed serious non-political crimes. Accordingly he was repeatedly granted short periods of leave, and in recent years has received six month periods of leave under various versions of the Restricted Leave policy. He has had no further involvement with the group in this country.

Chohan seems to have a reasonable claim for indefinite leave to remain. He has lived here blamelessly for a lengthy period, he has strong family ties here, his original involvement with the group was at the less direct end of the scale. One might argue that after so many years, given that the violence in question has now probably diminished, there would be no real blow to the UK's reputation were he allowed to settle here.

### **Domestic workers who are victims of slavery or human trafficking**

The Immigration Rules provide for domestic workers with an established relationship with an employer to join or travel with them – for those who entered the UK under the Rules in place after 6 April 2012, for a period not exceeding six months. For those entering before that date, there was no such limitation on length of residence and indeed the route could lead to settlement. Appendix 7 of the Rules contains a form that workers and their employers must sign agreeing the terms and conditions of employment, including payment of the national minimum wage.

The Rules originally required a person to remain with the same employer, but given the obvious opportunities for exploitation from abusive employers that might result, in April 2016 permission was given to change employer, though still only within the currency of a six month stay.

The upper age limit was removed in November 2016 for people applying for an extension of leave, so they may now apply even though they are over 65 years old.

A new immigration route has been opened from 24 November 2016 for people whose last grant of leave was as a domestic worker, private servant in a diplomatic household (Tier 5) or a discretionary grant of leave following a conclusive decision under the National Referral Mechanism, have been recognised as victims of slavery or human trafficking.

Note that:

- applicants must be able to maintain and accommodate themselves (ie no recourse to public funds)
- applications must be made within 28 days of receiving notice of the NRM decision or within 28 days of receiving the result of another application that was afoot at the time of the NRM decision
- leave may be granted for up to two years (in total, including any prior grant of DLR granted in recognition of personal needs as a trafficking victim)

If you have one of these cases, it may well be useful to refer to the James Ewins [\*Independent review of the overseas domestic workers visa.\*](#)

In the meantime, a series of test cases including [Benkharbouche](#) [2015] EWCA Civ 33 has seen employees of diplomatic missions seeking to bring employment proceedings against their abusive employers. Those claims were long seen as outside the jurisdiction of the courts because embassies and consulates enjoy state immunity – however in that case the Court of Appeal found that parts of the State Immunity Act that seemed to bar such claims were contrary to Article 6 ECHR, in that restrictions on claims brought by low level employees were not generally ruled out by international law. This included claims brought by non-UK nationals, or those without habitual residence in the UK when their contract was made, even though there was no rule of international law requiring such a provision and no other compelling justification for this differential treatment.

Two decisions handed down 18 October 2017 [Reyes v Al-Malki](#) [2017] UKSC 61 and [Benkharbouche and Janah](#) [2017] UKSC 62 constitute a breakthrough in this area. In the first, the court held that the employment of the domestic servant was not in the course of official functions and thus immunity was limited; whereas in the latter it was held that sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978, which confer immunity in English law, are incompatible with article 6 of the European Convention on Human Rights and Article 47 of the EU Charter, because the Act discriminates unjustifiably on the grounds of nationality.

While a wider exploration of trafficking in general is outside the scope of this course, some recent developments are worthy of note:

- In [TDT, R \(app of\)](#) [2018] EWCA Civ 1395 Court of Appeal examined the Secretary of State's positive duty under Article 4 of the ECHR to protect victims of trafficking.
- In [MS \(Pakistan\)](#) [2018] EWCA Civ 594 the Court of Appeal clarified the effect of [AS \(Afghanistan\) v SSHD](#) [2013] EWCA Civ 1469, [2014] Imm. A.R. 513, and held that, in a statutory appeal against removal, a negative NRM decision can only be re-examined where it can be shown that the decision was perverse, irrational or one which was not open to the decision-maker.
- As to the availability of legal aid in trafficking cases, following a successful challenge by ATLEU (briefing paper here), the LAA published an [announcement](#) on 9 May 2018 confirming that funding is available irrespective of whether: a formal application is made for leave to remain, or whether this is automatically considered under the modern slavery victims' discretionary leave policy
- The Bar Standards Board in April 2018 issued [guidance](#) on dealing with vulnerable clients, including guidance on identification of trafficking victims, and ATLEU now provides an extremely useful set of free, online resources (ATHUB, [here](#)) for practitioners dealing with trafficking victims.