



Overview of UK Immigration Law

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Howard Kennedy LLP is a full service law firm based at London Bridge. Our immigration team deal with a range of matters, from human rights applications all the way through to corporate audits on businesses wishing to become sponsors.

This pack provides an overview on UK immigration law only. There are always exceptions and peculiarities so treat it as a starting point, not the last word. Immigration law changes rapidly so always check the information you have is up to date.

Sources of Immigration Law

Any one regulated to advise individuals within the field of immigration law must be aware of the various sources of information that are available and their application to real situations.

1. Primary Legislation

- Primary legislation is an Act of Parliament or Statute
- Examples of some primary legislation within immigration law would be
 - Immigration Act 1971 (framework which governs immigration control)
 - British Nationality Act 1981 (redefined nationality and citizenship)
 - Human Rights Act 1998 (incorporates the ECHR into UK law)
 - Nationality, Immigration and Asylum Act 2002 (rights of appeal, grounds of appeal, etc)

2. Secondary Legislation

- Secondary legislation is all other forms of legislation that are not Acts of Parliament such as regulations
- Examples of some secondary legislation within immigration law would be:
 - Immigration (Notices) Regulations 2003
 - Asylum and Immigration (Procedure) Rules 2005

3. Immigration Rules

- Immigration Rules have a rather unique status that is different to secondary legislation
- Regulates who may or may not be granted entry clearance, leave to remain in the United Kingdom
- The Immigration Rules are made under section 3 (5) of the Immigration Act 1971
- If the SSHD has expectations that an applicant must meet certain requirements or provide certain specified documentation then this must appear clearly within the Immigration Rules (Alvi [2012] UKSC 33)



4. Policies and Concessions

- The SSHD has policies which are provided to her caseworkers which will set out how the Immigration Rules are to be interpreted and applied.
- Some policies will also contain important concessions which will outline circumstances when the caseworker may grant leave to remain outside of the Immigration Rules.

Areas of Immigration Law

Applications or areas of immigration law can be broken down or grouped together in the following way:

- Nationality law – Who is a British citizen? Who can transmit citizenship? Who can acquire it and how do they do so?
- EU law – Typically seen as the law that governs the Free Movement of individuals
- Points Based System Migrants – this would encapsulate:
 - entrepreneurs and investors under Tier 1;
 - skilled workers, ministers of religion and sports persons under Tier 2;
 - students under Tier 4;
 - short term workers under Tier 5.
- Non-PBS Migrants – this captures most other applications:
 - Human rights applications under paragraph 276ADE
 - Spouse/Child applications under Appendix FM
 - Deportation matters
 - Asylum
 - Visit visas
 - Domestic Workers
 - Sole Representatives of Overseas Businesses
 - UK Ancestry visas

Dealing with a new immigration matter

When assessing a new immigration matter, it is important to undertake a detailed assessment of the individual's circumstances. Key questions to ask are:

1. **What is your immigration history?** Dates of entry, visas issued (and their expiry dates), refusal decisions received, encounters with the immigration authorities, any connection to immigration issues such as TOEIC/ETS etc. It is also important to scope out any ancestral information that may be relevant.



2. **What are your personal circumstances?** Are they employed? Do they have a spouse or civil partner? Are there children involved in the matter? What would be their personal circumstances in their country of origin?
3. **Manage expectations.** It is important that you do not get drawn into conversations about the success of the application and that the applicant understands the extent of your involvement both in terms of time and influence.
4. **Now look at the Immigration Rules/legislation.** Our immigration system is not the most comprehensive or flexible and so you may feel that you have to squeeze an applicant into a category. Make this assessment objectively.
5. **Identify the correct application form and the correct law and guidance.** Once you have identified what the correct visa category is you will need to make a very careful assessment as to the correct application form, supporting documents and Home Office guidance.
6. **Advise the applicant on what information and documents are required.**
7. **Complete the application form, review the supporting documents and advise on gaps where appropriate.**
8. **Document clearly what has been provided with the application.**
9. **Following submission, the applicant will receive an acknowledgment letter and an invitation to submit their biometric information.** Once that has been done, the application is assigned to a case worker and a decision is then made on the application.

Key Issues to be aware of

Making a valid application

It is a requirement of the Immigration Rules that all application submitted must meet constitute a "valid application". The legal parameters of what constitutes a 'valid application' can be found in Part 1 of the Immigration Rules. A valid application is one which:

- Is made on the correct form – the Home Office will look at whether the form suits the purpose of the application and that the correct version of the form has been used. Forms are frequently updated so make sure to check the version before you submit the application.
- All mandatory sections of the form must be completed – if you miss a box or a section then the application will be rejected as invalid.
- If a fee has to be paid then it must be paid in full (unless you make a successful application for a fee waiver);
- If the applicant is required to pay a skills charge or an immigration health surcharge then this must also be paid in full;
- The applicant must provide proof of identity (there are some exceptions to this – see paragraph 34 (5) of the Immigration Rules);
- Two passport sized photographs that meet the requirements of the form and accompanying guidance notes – be very careful to make sure that the photographs comply with those notes.



- If the main applicant is under the age of 18, the parent or legal guardian must provide written consent to the application
- Biometric information must be provided upon request.

If you do not make a valid application then it will be rejected and this can have consequences for the individual.

If the applicant already has leave to remain in the United Kingdom then a valid application must be made before the expiry of their leave so that it is considered to be in-time. If an in-time application is made then the individual's leave to remain is virtually extended until a decision is made on the application. This prevents an individual from becoming an illegal migrant whilst their application is pending with the Home Office. Section 3C of the Immigration Act 1971 was enacted to make sure that leave to remain was automatically extended when an in-time application is made.

Note: the Home Office do make mistakes on whether or not an application should be rejected – if you receive a Notice of Invalidity then you should take careful steps to consider whether or not the Home Office are correct in their assessment.

Supporting Documentation

When you conduct your analysis of an applicant's immigration matter, the key to conveying this analysis to the Home Office will be in the supporting documentation. As a general rule, the Home Office will only accept original documents and those documents must be in English (or accompanied by a certified translation).

The Home Office will have a list of suggested supporting documents for each application type. This list is largely generic and will mostly likely not be suitable to the needs of the applicant. You will therefore need to look at the matter creatively to see what further documents you should obtain. As a general rule, you should try to furnish independent documents for every aspect of the applicant's factual matrix.

"Hostile Environment"

You may have heard of the hostile environment in immigration – this is a package of measures which have been designed by the SSHD so as to make life difficult for migrants in the UK who do not have the right to remain in the UK. The theory is that, if life is made as difficult as possible for such individuals, they will voluntarily leave the UK.

In May 2012, Theresa May said, in an interview to The Telegraph about the hostile environment,

The aim is to create here in Britain a really hostile environment for illegal migration ... What we don't want is a situation where people think that they can come here and overstay because they're able to access everything they need.

These measures include limited access to work, housing, health care, bank accounts and restricted appeal rights. The majority of the measures came into effect in the Immigration Act 2014 and were then expanded upon in the Immigration Act 2016.

There are additional measures that could be considered part of the hostile environment package, namely the increasingly complicated way in which applications are to be submitted and processed and the steep increase in immigration application fees.



A central theme to the hostile environment measures is the move away from central government led enforcement action and the move towards the private sector becoming a tool of immigration enforcement.

It is important to note that very minor errors or omissions in an application can quickly cause a legal migrant to become an illegal migrant (and therefore subject to these measures).

Common Application Types

In a Pro Bono environment, there will be some applications that you will see more often than others. These could be:

1. Article 8 – Private life applications under paragraph 276ADE of the Immigration Rules;
2. Article 8 – Family life applications under Appendix FM of the Immigration Rules;
3. Asylum

A short summary on the above three applications has been set out below:

Article 8 – Private Life

From 9 July 2012, a human rights application on the basis of "private life" would be considered by the SSHD under paragraph 276ADE.

Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and*
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or*
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or*
- (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*

276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

The difficulty in these applications is that most individuals fall within the scenario set out in (vi) which means the applicant must demonstrate 'very significant obstacles' to integration in their country of origin. AS v SSHD [2017] EWCA Civ 1284 contains a helpful discussion on what is meant by 'very significant obstacles'.



Article 8 – Family Life

Consideration of the right to family life has also been incorporated into the Immigration Rules, specifically under Appendix FM of the Immigration Rules. In order to be successful, an applicant would need to demonstrate that they are suitable (this entails an assessment of convictions etc) and that they are also eligible. Eligibility is considered under four headings:

- 1) Relationship requirements
- 2) Financial requirements
- 3) English language
- 4) Immigration status

If an applicant is relying on an exemption (i.e. they are married to a British citizen or have a qualifying child) then they do not need to meet the financial, English language or immigration status requirements. However this only applies if an applicant can demonstrate that the exemption applies:

EX.1. This paragraph applies if

(a)(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.



Asylum

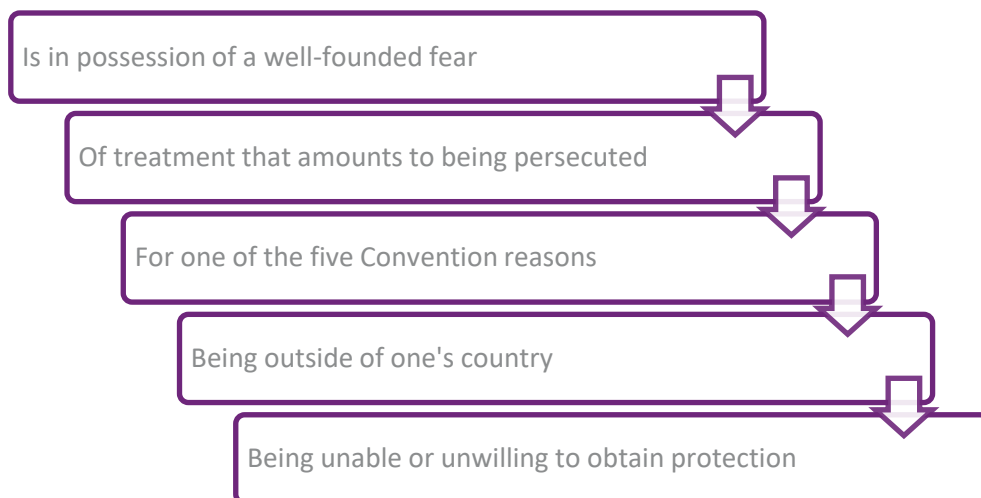
An asylum claim is a claim made by a person, to the SSHD, at a place that is designated by the SSHD and should the SSHD attempt to remove that person from the UK such removal would constitute a breach of the UK's obligations under the Refugee Convention.

The process for claiming asylum is largely as follows:

- 1) Make an asylum claim at the designated place;
- 2) Attend screening interview;
- 3) Substantive asylum interview;
- 4) Decision;
- 5) Appeal (if refused).

In order to demonstrate that an applicant is a refugee, it has to be shown that the individual meets the definition of a refugee as it appears under Article 1(A)(2) of the Refugee Convention.

The definition states that a refugee is someone who:



Asylum law is quite voluminous but a couple of points to note are:

- When it comes to assessing whether an applicant is in possession of a well-founded fear, the SSHD and the Tribunal will be looking at the credibility of the applicant as well as any future risk to the applicant.
- Standard of proof in assessing the well-founded fear of an applicant is lower than the civil standard ('balance of probabilities') – *Ravichandran [1996] Imm AR 97*.



- Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 will identify certain behaviours which would be considered as damaging to an individual's credibility.
- Failure to claim asylum in a safe third country is not a requirement of international law (see *R v Uxbridge Magistrates Court ex parte Adimi & Ors [1999] Imm AR 560*) however an explanation should be obtained as to why asylum was not claimed in a safe country if there was a lengthy stay in that country.
- The method by which an asylum seeker enters the country ought not to carry decisive weight when it comes to analysing the individual's claim for refugee status.
- Inconsistencies in an applicant's evidence should not be a decisive issue – perfect recall, particularly of a traumatising event, is a rare thing.

Rights of Appeal/Administrative Review

As already mentioned, as part of the hostile measures package, the foreign nationals have now seen their appeal rights severely curtailed. Historically, an individual would be given a right of appeal if they made a valid, in-time application, and that application was refused. Such an individual could appeal the matter to the First-tier Tribunal and that appeal could be brought on various different grounds (such as the decision not being in accordance with the law etc).

The Immigration Act 2014 changed the appeal landscape however so that only those who make a human rights application (or are EEA nationals) can appeal. This is regardless of the individual's legal status in the UK. A number of immigration applications are presumed to be a human rights application (for example, Appendix FM applications and some settlement applications).

For those who do not have a right of appeal, they may challenge the decision by way of an application for Administrative Review. This option is not available to all who do not have a right of appeal. For example, those who have their leave curtailed cannot appeal and do not have the right to Administrative Review.

Applicants who advance a human rights claim will not necessarily have the right to remain in the UK whilst their appeal is pending. This is due to the fact that not all appeals are "suspensive". If the SSHD certifies the claim as 'clearly unfounded' then the applicant will be given an 'out-of-country' right of appeal (or non-suspensive right of appeal). This means they cannot lodge their appeal until they have left the UK. If the application is refused but not certified then the applicant has to lodge their appeal within 14 days of being sent the notice and can remain in the UK whilst the appeal is being processed.



Useful Links/Information

For further reading on immigration law, I would highly recommend the following resources:

1. Immigration Manual from HJT (Edition 17) – see here: <https://hjt-training.co.uk/17th-edition-immigration-manual/>
2. Home Office operational guidance pages: <https://www.gov.uk/topic/immigration-operational-guidance>
3. Immigration Rules: <https://www.gov.uk/guidance/immigration-rules>
4. Upper Tribunal case law: <http://www.bailii.org/uk/cases/UKUT/IAC/>
5. Country policy and information notes which caseworkers will review when making decisions on asylum and human rights applications: <https://www.gov.uk/government/collections/country-policy-and-information-notes>
6. Country reports which can be useful for applicants:
<http://www.refworld.org/publisher,UKHO,COUNTRYREP,,,,0.html>