



Home Office

# EU Settlement Scheme appeals: certification in National Security and deportation cases

Version 2.0

# Contents

|   |    |
|---|----|
| Contents.....   | 2  |
| About this guidance.....  | 4  |
| Contacts .....  | 4  |
| Publication.....  | 4  |
| Changes from last version of this guidance .....                                  | 4  |
| Introduction .....  | 5  |
| Background.....   | 5  |
| Certification to the Special Immigration Appeals Commission – regulation 15 ..... | 6  |
| The effect of certification on national security grounds .....                    | 6  |
| No human rights claim made .....  | 7  |
| Human rights claim made .....   | 7  |
| Serious and irreversible harm.....  | 9  |
| Child under the age of 18 .....   | 11 |
| Section 55 – duty regarding the welfare of children.....                          | 11 |
| Peer review process .....   | 12 |
| Reasons for decision .....  | 12 |
| Clearly unfounded claims.....   | 12 |
| Certification in deportation cases - regulation 16 .....                          | 13 |
| The effect of certification under regulation 16.....                              | 13 |
| When not to certify under regulation 16.....                                      | 14 |
| Sentences of indeterminate length .....   | 14 |
| Prisoner transfer and extradition cases.....                                      | 14 |
| Child under the age of 18.....  | 15 |
| Removal decision served to file .....   | 15 |
| Consideration of certification under regulations 16 .....                         | 15 |
| Proportionality: transition period conduct.....                                   | 15 |
| Human rights claims.....  | 16 |
| No human rights claim made .....  | 17 |
| Human rights claim made .....   | 17 |
| Serious irreversible harm and human rights.....                                   | 19 |
| Human rights procedural protection.....   | 21 |
| Discretion .....  | 22 |
| Peer review process .....   | 22 |
| Reasons for decision .....  | 22 |
| Deportation decision served to file .....   | 22 |

|  |    |
|--|----|
| Decisions not to certify.....                            | 23 |
| Section 55 – duty regarding the welfare of children..... | 23 |
| Deport decisions and human rights appeals process .....  | 23 |
| Pending appeals .....                                    | 25 |
| Re-entry to attend appeal in person.....                 | 26 |
| Serious troubles .....                                   | 26 |
| Financial assistance .....                               | 27 |
| Dual certification.....                                  | 27 |

# About this guidance

This guidance is for case workers in the EU Settlement Scheme (EUSS) Criminal Casework and Special Cases Unit and is about the certification powers under [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#). It provides guidance on when and how to apply those powers.

## Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email the Appeals policy.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

## Publication

Below is information on when this version of the guidance was published:

- version **2.0**
- published for Home Office staff on **17 August 2022**

## Changes from last version of this guidance

Updated to make it clear when an individualised proportionality assessment is required when certifying under regulation 16.

### Related content

[Contents](#)

# Introduction

This section tells you about the background and legal framework for certification under [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#) (the Citizens' Rights Appeals Regulations).

## Background

The Citizens' Rights Appeals Regulations provide appeal rights for people who apply to the EU Settlement Scheme (EUSS), and for those who apply for EUSS Family and Travel Permits. In addition, the regulations also provide a right of appeal where a person has EUSS leave or has an EUSS Family or Travel Permit and a decision is made to restrict their rights of entry or residence (for example by cancelling, revoking or curtailing leave).

There is also right of appeal for S2 Healthcare visitors and Frontier workers in similar circumstances.

A decision to deport someone who has EUSS leave or is in the United Kingdom having arrived with an EUSS Family or Travel Permit, or is an S2 Healthcare visitor or Frontier Worker will have a right of appeal under the Citizens' Rights Appeals Regulations unless there is a decision to remove which was taken under regulation 23 (6)(b) of the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations) when there will be a right of appeal under the EEA Regulations. As a person can raise any rights they have under EU Treaties in respect of entry to, or residence in, the United Kingdom they will be able to raise any rights they claim to have as a result of the EU withdrawal agreement in their appeal under the EEA Regulations as saved.

Appeals under the Citizens' Rights Appeals Regulations are suspensive of removal unless the decision has been certified either:

- on national security grounds
- where a deportation decision has been made

For further details on appeal rights under the Citizens' Rights Appeals Regulations including the grounds of appeal that can be raised see the section on Citizens' Rights appeals in the Rights of appeal guidance.

### Related content

[Contents](#)

# Certification to the Special Immigration Appeals Commission – regulation 15

This section tells you when an appealable decision under [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#) (Citizens' Rights Appeals Regulations) can be certified under schedule 1 of those regulations so that it is heard by the Special Immigration Appeals Commission (SIAC).

The grounds on which a decision can be certified to SIAC are where the Secretary of State personally certifies that the person's exclusion or removal from the UK is wholly or partly:

- in the interests of national security
- in the interests of a relationship between the United Kingdom and another country
- on the basis of information which the Secretary of State considers cannot be made public:
  - in the interests of national security
  - in the interests of a relationship between the UK and another country, or
  - otherwise in the public interest

Collectively these grounds are referred to in this guidance as national security grounds.

## The effect of certification on national security grounds

Where an appealable decision is certified under schedule 1 of the Citizens' Rights Appeals Regulations on national security grounds there is no appeal to the Tribunal (Immigration Asylum Chamber) and any appeal already lodged with the Tribunal lapses. Instead, the person can appeal to SIAC.

Where an appeal decision is certified under schedule 1 the appeal cannot be brought from within the UK unless the person also makes a human rights claim

Where the person has made a human right claim, the appeal to SIAC will suspend removal unless the human rights claim is certified under regulation 15(4) of the Citizens' Rights Appeals Regulations.

Regulation 15(4) allows for a human rights claim to be certified where the removal of the person to the country proposed would not be unlawful under section 6 of the [Human Rights Act 1998](#) despite the appeals process in relation to the national security grounds not having been begun or not having been exhausted.

Regulation 15(5) provides further that the grounds on which a certificate may be issued under regulation 15(4) include, in particular:

- that the person would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which it is proposed they are to be removed
- that the whole or part of any human rights claim made by the person is clearly unfounded

Where a decision is certified under regulation 15(4) the person may not be removed for the period of one month from the date they are notified of the decision to remove them except:

- in a duly substantiated case of urgency
- where they are detained pursuant to the sentence or order of any court
- where they have entered the United Kingdom and are removable as an illegal entrant under schedule 2 to the [Immigration Act 1971](#)

However, these exceptions cease to apply where a person makes an application to the SIAC to set aside the certificate and SIAC directs that the person may not be removed while the application is pending. In considering whether to set aside the certificate SIAC must apply the principles used in judicial review proceedings.

Where SIAC set the certificate aside so that the appeal can be brought within the UK then the person cannot be removed while the appeal is pending.

## No human rights claim made

Where an appeal is certified under schedule 1 and no human rights claim has been made then the appeal cannot be brought from within the UK.

## Human rights claim made

Where a human rights claim has been made you must take account of all relevant factors when considering whether to certify, in particular:

- the best interests of any children who may be, or it is claimed may be, affected by the decision to remove, in compliance with [section 55 of the Borders, Citizenship and Immigration Act 2009 \(duty regarding the welfare of children\)](#)
- whether there is a real risk of serious irreversible harm to the person being removed pending the outcome of any appeal they may bring (for example, but not limited to, the presence of any serious physical or mental health issues that would be significantly affected by interim removal)
- whether there is a real risk of serious irreversible harm to any individual (for example family members) who the person being removed claims would be affected by their removal pending the outcome of any appeal
- if there is not a real risk of serious irreversible harm to the person being removed or anyone else who they claim would be affected by their removal, then you must consider whether the person's removal pending the outcome of any appeal would breach their rights under the European Convention on Human Rights (Convention rights) for any other reason

- whether there would be a breach of the Convention rights of any individual, for example family members, who the person being removed claims would be affected by their removal pending the outcome of any appeal
- where the person being removed makes representations or provides evidence that a non-suspensive appeal would be procedurally unfair in the particular circumstances of their case
- any request the person makes for discretion to be exercised in their favour
- whether it is appropriate in all the circumstances to certify the case so that the appeal is non-suspensive of removal

Even where a decision to remove has been made a person and it has already been decided as part of that process that their removal would not breach Convention rights, this does not necessarily mean that you removing them for a limited period (pending the outcome of any appeal) would not breach their Convention rights. They are two separate considerations.

When considering whether removal pending the outcome of any appeal would breach the person's Convention rights, you must assess the question on the basis that their appeal will succeed and you must consider whether serious irreversible harm, or a breach of Convention rights, would be caused by their temporary removal from the UK.

For further human rights guidance see considering human rights claims and criminality guidance for Article 8 Convention cases. As explained above, the guidance must be applied in the context of the impact of temporary removal pending the outcome of an appeal rather than the long-term effect of removal.

In considering whether to certify a case under regulation 15, you must have regard to all known circumstances and consider all relevant information. This means any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a section 120 notice) and any evidence that is already on file or submitted in any other context. Any reference to 'available information' below refers to such evidence. For the avoidance of doubt, information that would only be available if the case owner undertakes additional research or makes additional enquiries is not 'available information' and does not necessarily need to be sought. However, if it is sought on the basis of the individual circumstances of the case, any response must form part of the consideration.

You should consider which Articles of the Convention the person raised either explicitly or implicitly, as grounds against removing them from the UK. The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceeding). Where there are family court proceedings pending you must consider whether the outcome is capable of affecting the decision to deport. Where it is possible that the outcome of the proceedings could make a difference then it will not be appropriate to certify. You need to be alert to any Convention rights which may be engaged by removal pending the outcome of an appeal.



## Serious and irreversible harm

The serious irreversible harm test is derived from the test applied by the European Court of Human Rights in immigration cases to determine whether to issue a ruling under rule 39 of the [Rules of Court](#). A rule 39 order prevents a signatory state from removing a foreign national from its territory. In the context of regulation 15 the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act 1998 and the absence of a real risk of serious irreversible harm is only one relevant factor.

The term 'real risk' is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the Convention. As explained in [considering human rights claims](#), in practice this is the same standard of proof as in asylum cases – a reasonable degree of likelihood. For further guidance on standard of proof for asylum claims submitted after the 28 June 2022 see [Assessing credibility and refugee status post 28 June 2022 for asylum claims submitted prior to 28 June](#) see the [Assessing credibility and refugee status prior to 28 June 2022](#).

The terms 'serious' and 'irreversible' must be given their ordinary meanings. 'Serious' indicates that the harm must meet a minimum level of severity, and 'irreversible' means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible.

If the person claims that removal, or removal pending the conclusion of any appeal, would breach Article 8 of the Convention, you must consider the effect of removal not only on the person being removed, but also on any other person whom the available evidence suggests will be affected by the person's removal (for example, immediate family members such as a partner or children).

By way of example, in the following scenarios where a person is to be removed while their appeal is pending, it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm, or that there would otherwise be a breach of the Convention during their limited period of removal (this is an indicative list and not prescriptive or exhaustive):

- a person will be separated from their partner for several months until the appeal is concluded
- there is no current subsisting family relationship with a child
- a direct and dependent family member is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person being removed to act as a carer
- a person has strong private life ties to a community that will be disrupted by temporary removal (for example a job, a mortgage, a prominent role in a community organisation)

The following are examples of when removal pending the outcome of any appeal might give rise to a real risk of serious irreversible harm or otherwise breach the Convention (this is an indicative list and not prescriptive or exhaustive):

- the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care
- the person being removed is the sole carer of a British citizen child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant disruption to their education
- the person to be deported is subject to a court order for a trial period of contact with their child, the outcome of that trial period will determine the future contact between that person and the child, and that future contact could affect the outcome of the appeal – if removal pending the outcome of the appeal would prevent that person undertaking the trial period of contact, this may amount to serious irreversible harm
- the person has a serious medical condition and medical treatment is not available, or would be difficult to access, in the country of return, such that their temporary removal gives rise to a risk of a significant deterioration in their health (however, note the conclusion of the Court of Appeal in [Secretary of State for the Home Department v Dumliauskas and others \[2015\] EWCA Civ 145](#) at paragraph 53: 'in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other member states from those available here')
- there is credible evidence that the person would, due to reasons outside their control, be prevented from exercising their right to an appeal (effectively or at all) against the decision – for example, where the person suffers from a serious mental health condition or serious physical disability that would prevent them from effectively pursuing their appeal without the support of their carers in the UK (and where they will not be able to access the requisite assistance from abroad) – for further guidance see the section on human rights protection

In considering whether there is a real risk of serious irreversible harm or whether removal pending the outcome of any appeal would otherwise breach the Convention, you need to have regard to all known circumstances and to consider all relevant information. This includes any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response a section 120 notice) and any evidence that is already on file or submitted in any other context.

You must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents. There is no prescribed evidence to be submitted, but examples of relevant evidence might include:

- where a person claims that they or a family member have a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical

professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel

- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation

In the context of an Article 8 claim, you must also consider the public interest in requiring a person to appeal from abroad. The fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest.

## Child under the age of 18

Although children are not excluded from certification on national security grounds under schedule 1 and can have any human rights grounds certified under regulation 15, it would not normally be appropriate to certify a case where the person is under the age of 18. If you are considering certifying a case of a child under 18 you must have regard to the duty regarding the welfare of children under [section 55 of the Borders, Citizenship and Immigration Act 2009](#) (see section 55 [children's duty guidance](#))

## Section 55 – duty regarding the welfare of children

When considering whether to certify a case under regulation 15 you must consider whether the available information suggests that a child under the age of 18 may be affected by the removal decision. Where a child is affected then their best interests must be a primary consideration.

You must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person being removed to be able to remain in the UK until the conclusion of any appeal. This is particularly relevant in considering whether removal pending the outcome of any appeal would cause serious irreversible harm to the child. You must also consider whether any such interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in quick and efficient removal.

You must carefully assess the quality and strength of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents. Evidence showing some specific reason why a child would suffer during the period of interim removal is more powerful than general evidence that a child would suffer from separation from the parent which risks being too general. However every case must be considered on the evidence provided.

For further guidance in relation to the [section 55](#) duty, see:

- [section 55 children's duty guidance](#)
- Introduction to children and family cases
- Criminality guidance for Article 8 European Convention on Human Rights cases

## Peer review process

All decision letters which certify a case under regulation 15 must be peer reviewed before service of the decision. The peer review can be conducted by another case owner, a senior caseworker or a chief caseworker (this can be as part of the review of the decision to deport) as deemed appropriate by the relevant casework unit (Criminal Casework or Special Cases Unit) and must be recorded in Case Information Database (CID) notes or a note uploaded to Atlas using the manage document function and on the case file.

Decisions not to certify under regulation 15 should also be peer reviewed which can be by way of conversation or consideration minute as long as the review is recorded in CID or Atlas.

## Reasons for decision

Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out on the casework system (and any case file). This is because a decision to certify (whether it is made at the same time as the decision to remove, or later on in the appeal process) can be challenged by judicial review and the Home Office may be required to provide records of each stage of the decision-making process.

## Clearly unfounded claims

Clearly unfounded means a claim is which is so clearly without substance that it is bound to fail.

It is possible for a claim to be clearly unfounded even if it takes more than a cursory look at the evidence to come to a view that there is nothing of substance in it. For further guidance on clearly unfounded claims see the section 94 guidance.

### Related content

[Contents](#)

# Certification in deportation cases - regulation 16

This section tells you when an appealable decision can be certified in deportation cases (other than those certified under [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#) (the Citizens' Rights Appeals Regulations) on national security grounds which would fall within regulation 15).

A decision can be certified under regulation 16 where both the following requirements are met:

- a decision has been made to make a deportation order under section 5(1) of the Immigration Act 1971 (which includes deportation decisions under s3(5) and 3(6) (including automatic deportation) of the Immigration Act 1971) and deportation under the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations) as saved
- the appealable decision can be certified where the person's removal would not be unlawful under the [Human Rights Act 1998](#) despite the appeals process in relation the appealable decision not having begun or not having been exhausted

It does not matter whether or not the deportation decision is the relevant appealable decision – any appealable decision under the Citizens' Rights Appeals Regulations can be certified if, separately, a deportation decision has been made or the person is subject to an extant deportation order.

Where the deportation decision is not the relevant appealable decision it does not matter whether the deportation decision is made before or after the appealable decision.

Regulation 16(4) provides that the grounds upon which the Secretary of State may certify include (in particular) that the person would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which it is proposed they are to be removed.

## The effect of certification under regulation 16

Where an appeal is certified under regulation 16(3) the appeal does not suspend removal. However, a person whose appeal is certified must be given one month from when they are notified of the decision before they are removed except:

- in a duly substantiated case of urgency
- where they are detained pursuant to the sentence or order of any court
- where they have entered the United Kingdom and are removable as an illegal entrant under schedule 2 to the [Immigration Act 1971](#)

Where an appellant applies to the appropriate court or tribunal for an interim order to suspend removal the exceptions above cease to apply, and the person may not be removed until a decision has been taken on their application unless:

- the decision to remove them is based on a previous judicial decision
- they have had previous access to judicial review
- the decision to remove them is based on imperative grounds of public security

Where a court or tribunal makes an injunction suspending removal, removal will not be possible. In these circumstances, you should contact Litigation Operations to decide whether to make an application to have the effect of the interim order lifted or to seek an expedited judicial review or appeal.

## When not to certify under regulation 16.

There are circumstances where it would not be appropriate to certify under regulation 16.

### Sentences of indeterminate length

It would not usually be appropriate to certify under regulation 16 where a person is serving an indeterminate-length sentence and their release is at the discretion of the Parole Board. This includes but is not limited to those persons who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1971
- given an Extended Sentence for Public Protection (EPP)
- given an Extended Determinate Sentence (EDS)

In these cases, certifying under regulation 16 could be counterproductive. This is because the Parole Board will have made a decision about release based on the intention to deport the appellant rather than the possibility that they may return to the UK for an appeal hearing, or in the event that any appeal is successful.

Consequently, there may be no provision to recall them to prison in the event of an interim return for the hearing or if the appeal is allowed even if the Parole Board would otherwise have deemed a recall to be appropriate or would have imposed licence conditions.

### Prisoner transfer and extradition cases

Prisoner transfer cases and cases where extradition is in prospect are not normally suitable for certification because the appellant will be unable to return to the UK for their hearing and may be unable to conduct their appeal from abroad while in custody.



## Child under the age of 18

Although children are not excluded from certification under regulation 16, it would not normally be appropriate to certify cases where the person is under the age of 18. If you are considering certifying a case where the child under 18 you must have regard to the duty regarding the welfare of children under [section 55 of the Borders, Citizenship and Immigration Act 2009](#) (see [section 55 children's duty guidance](#)).

## Removal decision served to file

Where a removal decision is served to file because the person's whereabouts are not known, the case is unlikely to be suitable for certification under regulation 16.

Even where one of the above situations is relevant, you must consider every case on an individual basis to decide whether or not it is appropriate to certify under regulation 16.

## Consideration of certification under regulations 16

You must consider whether certification under regulation 16 is appropriate in all cases where deportation is being pursued and there is an appealable decision under the Citizens' Rights Appeals Regulations having due regard to the guidance on when not to certify under regulation 16.

## Proportionality: transition period conduct

The case of [R \(Hafeez\) v SSHD \[2020\] EWHC 437 \(Admin\)](#) ("[Hafeez](#)") was a challenge to the Secretary of State's application of the certification power in regulation 33 of the [Immigration \(European Economic Area\) Regulations 2016 \(EEA Regulations 2016\)](#). The court held that when assessing whether to certify removal under regulation 33, in addition to considering whether or not removal would breach section 6 of the Human Rights Act 1998, an individualised proportionality assessment, derived from EU law and in particular the Free Movement Directive, must be made justifying why interim removal is proportionate. That test was set out in regulation 27 of the EEA Regulations 2016. This consideration must be distinct from, and additional to, consideration of whether interim removal will be unlawful under the Human Rights Act (see [Human rights claims](#) for more details) including whether any interference with any qualified Convention rights is necessary and proportionate.

The effect of the UK leaving the European Union is that is that where a person is being deported due to conduct committed after 11pm 31 December 2020 (the end of the transition period) an individualised EU law-derived assessment is not required. You must still consider whether the decision to remove would not be unlawful under section 6 of the Human Rights Act 1998. See the section on human rights claims and the sections that follow for further guidance on the consideration required.

Where the conduct which led to deportation was committed on or before 11pm 31 December 2020 (the end of the transition period) then the withdrawal agreement

extends the same protection to EEA nationals and their family members who have applied for or been granted leave under the EU Settlement Scheme (EUSS) as applies under the Free Movement Directive. This means that when considering whether to certify a decision under regulation 16 for conduct committed on or before 11pm 31 December 2020 you must carry out an individualised assessment taking account of the test contained in regulation 27 of the EEA Regulations 2016.

Therefore, when considering certification under regulation 16 where the person's conduct that resulted in the deportation decision occurred on or before 11pm 31 December 2020, you must be satisfied that all the following apply to the decision:

- it must comply with the principle of proportionality
- it must be based exclusively on the personal conduct of the person concerned
- the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent
- matters isolated from the particulars of the case or which relate to considerations of general prevention will not justify the decision
- the person's previous criminal convictions will not in themselves justify the decision
- the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person

Also, before taking a relevant decision on the grounds of public policy and public security in relation to a person who is resident in the United Kingdom, you must take account of considerations such as their age, state of health, family and economic situation, length of residence in the United Kingdom, social and cultural integration into the United Kingdom and the extent of their links with their country of origin.

An example of when interim removal may be proportionate is where the person is at high risk of offending and is therefore a threat to the public but there is no power, or it is not possible for practical reasons, to detain them and there is no reason as regards health or length of residence in the UK why they would not be able to reside in their country of origin while their appeal is pending.

A person whose appeal is certified under regulation 16 will be able to apply to return to the UK to attend their appeal, but you must consider whether an interim removal would have any effect on their ability to prepare and present their appeal effectively as this is relevant to whether a decision to certify under regulation 16 is proportionate.

## Humans rights claims

You can only certify under regulation 16 if you are satisfied that removal pending the outcome of any appeal would not be unlawful under [section 6 of the Human Rights Act 1998](#).

An application to the EUSS, for a frontier worker permit or under Appendix S2 Healthcare Visitor does not of itself engage human rights, nor does it engage



protection claims (asylum and humanitarian protection) where a deportation order has been made. However, a person may make a separate human rights or protection claim (for guidance on human rights claims see the section what is a human rights claim? in the Rights of appeal guidance).

Where a section 120 notice has been given (when the deportation decision is made or when the EUSS, or other appealable decision is made) the person may make a human rights claim in response. Where a section 120 notice is given and the person makes a human rights claim which is considered and refused, then under regulation 9 of [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#) (the Citizens' Rights Appeals Regulations) the human rights claim can be raised as a ground of appeal in any appeal under those regulations. For more information see the section on deport decisions and human rights appeals process.

An appeal against the refusal of a human rights claim may only be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

For further guidance on this ground of appeal see the Rights of appeal guidance.

## No human rights claim made

It is for the person being deported to raise any human rights grounds as to why they should not be deported. Where a decision has been made to deport and no human rights claim has been made, consideration should nonetheless be given to any available information in deciding whether the appealable decision can be certified. Where there is no reason why the decision cannot be certified under regulation 16 then it should be.

## Human rights claim made

Where a human rights claim has been made you must take account of all relevant factors when considering whether to certify, in particular:

- the best interests of any children who may be, or it is claimed may be, affected by the decision to remove, in compliance with the duty regarding the welfare of children under section 55
- whether there is a real risk of serious irreversible harm to the person being removed pending the outcome of any appeal they may bring (for example, but not limited to, the presence of any serious physical or mental health issues that would be significantly affected by interim removal)
- whether there is a real risk of serious irreversible harm to any individual, for example family members, who the person being removed claims would be affected by their removal pending the outcome of any appeal
- if there is not a real risk of serious irreversible harm to the person being removed or anyone else they claim would be affected by their removal, then you should consider whether the person's removal pending the outcome of any appeal would breach their rights under the Convention for any other reason

- whether there would be a breach of the Convention rights of any individual, for example family members, that the person to be removed claims would be affected by their removal pending the outcome of any appeal
- where the person being removed makes representations or provides evidence that a non-suspensive appeal would be procedurally unfair in the particular circumstances of their case
- any request the person makes for discretion to be exercised in their favour
- whether it is appropriate in all the circumstances to certify the case so that the appeal is non-suspensive of removal

Even where a decision to deport has been made and it has already been decided as part of that process that removal of the person would not breach Convention rights, this does not necessarily mean that removing them for a limited period (pending the outcome of any appeal) would not result in a breach of human rights. They are two separate considerations.

When considering whether removal pending the outcome of any appeal would breach Convention rights, you must assess the question on the basis that their appeal will succeed and you must consider whether serious irreversible harm or a breach of Convention rights would be caused by their temporary removal from the UK.

For further human rights guidance see considering human rights claims and criminality guidance for Article 8 European Convention on Human Rights cases. As explained above, the guidance must be applied in the context of the impact of temporary removal pending the outcome of an appeal rather than the long-term effect of deportation.

In considering whether to certify a case under regulation 16, you must have regard to all known circumstances and consider all relevant information. This means any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context. Any reference to 'available information' below refers to such evidence. For the avoidance of doubt, information that would only be available if the case owner undertakes additional research or makes additional enquiries is not 'available information' and does not necessarily need to be sought. However, if it is sought on the basis of the individual circumstances of the case, any response must form part of the consideration.

You should consider which Articles of the Convention the person raised either explicitly or implicitly, as grounds against removing him or her from the UK. The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceedings). Where there are family court proceedings pending you must consider whether the outcome is capable of affecting the decision to deport. Where it is possible that the outcome of the proceedings could make a difference then it will not be appropriate to certify their removal. You need to be alert to any Convention rights which may be engaged by removal pending the outcome of an appeal.

## Serious irreversible harm and human rights

The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in immigration cases to determine whether to issue a ruling under rule 39 of the [Rules of Court](#). A rule 39 order prevents a signatory state from removing a foreign national from its territory. In the context of regulation 16 the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act 1998 and the absence of a real risk of serious irreversible harm is only one relevant factor.

The term 'real risk' is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the Convention. As explained in [considering human rights claims](#), in practice this is the same standard of proof as in asylum cases – a reasonable degree of likelihood. For further guidance on standard of proof for asylum claims submitted after the 28 June 2022 see [Assessing credibility and refugee status post 28 June 2022 for asylum claims submitted prior to 28 June](#) see the [Assessing credibility and refugee status prior to 28 June 2022](#)

The terms 'serious' and 'irreversible' must be given their ordinary meanings. 'Serious' indicates that the harm must meet a minimum level of severity, and 'irreversible' means that the harm would have a permanent or very long-lasting effect.

It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible.

If the person claims that removal, or removal pending the outcome of any appeal, would breach Article 8 of the Convention, you must consider the effect of removal not only on the person being removed, but also on any other person whom the available evidence suggests will be affected by their removal (for example, immediate family members such as a partner and/or children).

By way of example, in the following scenarios where a person is to be removed before their appeal is determined, it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm, or that there would otherwise be a breach of the Convention, while a non-suspensive appeal is in progress (this is an indicative list and not prescriptive or exhaustive):

- a person will be separated from their partner for several months while the appeal takes place
- there is no current subsisting family relationship with a child
- a direct and dependent family member is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person liable to removal to act as a carer
- a person has strong private life ties to a community that will be disrupted by temporary removal (for example a job, a mortgage, a prominent role in a community organisation)

The following are examples of when removal pending the outcome of any appeal might give rise to a real risk of serious irreversible harm or otherwise breach the Convention (this is an indicative list and not prescriptive or exhaustive):

- the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care
- the person being removed is the sole carer of a British citizen child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant disruption to their education
- the person being deported is subject to a court order for a trial period of contact with their child, the outcome of that trial period will determine the future contact between that person and the child, and that future contact could affect the outcome of the appeal – if removal pending the outcome of the appeal would prevent that person undertaking the trial period of contact, this may amount to serious irreversible harm
- the person has a serious medical condition and medical treatment is not available, or would be difficult to access, in the country of return, such that removal pending appeal gives rise to a risk of a significant deterioration in the person's health (however, note the conclusion of the Court of Appeal in [Secretary of State for the Home Department v Dumliauskas and others \[2015\] EWCA Civ 145](#) at paragraph 53: 'in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other member states from those available here')
- there is credible evidence that the person would, due to reasons outside their control, be prevented from exercising their right to an appeal (effectively or at all) against the decision – for example, where the person suffers from a serious mental health condition or serious physical disability that would prevent them from effectively pursuing their appeal without the support of their carers in the UK (and where they will not be able to access the requisite assistance from abroad) – for further guidance see the section on human rights protection

In considering whether there is a real risk of serious irreversible harm or whether removal pending the outcome of any appeal would otherwise breach the Convention, you need to have regard to all known circumstances and to consider all relevant information. This includes any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context.

You must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents. There is no prescribed evidence to be submitted, but examples of relevant evidence might include:

- where a person claims that they or a family member have a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel
- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation

In the context of an Article 8 claim, you must also consider the public interest in requiring a person to appeal from abroad. The fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest.

## Human rights procedural protection

Convention rights, such as Article 8, have a procedural aspect which means that a breach of that right can arise where there is no effective procedural protection. Procedural protection means access to an effective remedy by way of a mechanism to challenge the state's decision (for example, a deportation decision or refusal of a human rights claim).

Whether a person has an effective remedy is relevant to whether it is lawful to certify a case under regulation 16. If a non-suspensive appeal means that the person cannot access a fair and effective appeal process, removal pending the final determination of the appeal will be a breach of section 6 of the Human Rights Act 1998 and the case cannot be certified under regulation 16.

A non-suspensive appeal may be less advantageous to the person. However, that does not mean that it would be a breach of their Convention rights. An effective remedy does not require the person to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. The question to be answered is whether the non-suspensive appeal can be determined effectively and without obvious unfairness.

When considering this point, it is important to reflect on the Supreme Court's reasoning in [Kiarie and Byndloss](#), and, in particular, paragraphs 60 to 78. In paragraph 76, Lord Wilson concluded that for a human rights appeal to be effective the individual 'would need at least to be afforded the opportunity to give live evidence'. A person certified under regulation 16 will, other than in exceptional cases (see re-entry to attend appeal in person), be able to request a return to the UK for their hearing. This means that Lord Wilson's primary concern should not arise. However, there may be other procedural issues in an individual case that mean interim removal would render the procedure ineffective or unfair.

## Discretion

If you are satisfied that there is no real risk of serious irreversible harm and that removal pending the outcome of any appeal would not otherwise breach the Convention, you must consider whether there is any other compelling reason not to certify. Regulation 16 is a discretionary power, meaning that it does not have to be applied in all cases where removal pending the outcome of any appeal would not breach the Convention.

In each individual case, you must be satisfied that it is appropriate in all the circumstances to certify. An example of when discretion should be applied (and a decision not certified) is when removal could not take place before an appeal would be heard.

You must consider any request to exercise discretion not to certify, even in the event that removal pending the outcome of any appeal would not breach the Convention. But in the absence of specific representations, and where there are no particular factors known to the Secretary of State that would justify the exercise of discretion, it is not necessary to give reasons in the decision letter for not exercising discretion in favour of a person liable to removal pursuant to regulation 16.

## Peer review process

All decision letters which certify a case under regulation 16 must be subject to peer review before service of the decision. The peer review can be conducted by another case owner, a senior caseworker or a chief caseworker (this can be as part of the review of the decision to deport) as deemed appropriate by the relevant casework unit (Criminal Casework or Special Cases Unit) and must be recorded in CID notes or a note uploaded to Atlas using the manage document function and on the case file.

Decisions not to certify under regulation 16 should also be subject to peer review which can be by way of conversation or consideration minute as long as the review is recorded in CID notes/Atlas and on the case file.

## Reasons for decision

Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out on the casework system (and any case file). This is because a decision to certify (whether it is made at the same time as the decision to remove, or later on in the appeal process) can be challenged by judicial review and the Home Office may be required to provide records of each stage of the decision-making process.

## Deportation decision served to file

Where a deportation decision has to be served to file because the person's whereabouts are not known, you must not certify under regulation 16. Should the



person later come to light, the question of whether to certify can then be considered in line with this guidance.

## Decisions not to certify

A decision not to certify a case under regulation 16 is not a concession that the removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm or otherwise be unlawful under [section 6 of the Human Rights Act 1998](#).

## Section 55 – duty regarding the welfare of children

When considering whether to certify a case under regulation 16 you must consider whether the available information suggests that a child under the age of 18 may be affected by the removal decision. Where a child is affected then their best interests must be a primary consideration.

You must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person liable to deportation to be able to remain in the UK until the conclusion of any appeal. This is particularly relevant in considering whether removal pending the outcome of any appeal would cause serious irreversible harm to the child. You must also consider whether any such interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in effecting removal quickly and efficiently.

You must carefully assess the quality and strength of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents. Evidence showing some specific reason why a child would suffer during the period of interim removal is more powerful than general evidence that a child would suffer from separation from the parent which risks being too general. However, every case must be considered on the evidence provided.

For further guidance in relation to the [section 55](#) duty, see:

- [section 55 children's duty guidance](#)
- Introduction to children and family cases
- Criminality guidance for Article 8 European Convention on Human Rights cases

## Deport decisions and human rights appeals process

When a notice of liability to deportation is served, the person is invited to make representations as to why they should not be removed pending the outcome of their appeal. If no representations are made you do not need to investigate the circumstances of the person to establish whether they can have a fair and effective non-suspensive appeal. It is for the person liable to removal to raise any concerns on those points.

If representations are made about why a person's appeal should be suspensive of removal, they must be carefully considered. If, notwithstanding such representations, the claim is certified under regulation 16, that consideration must be set out in the decision letter. Where representations about a non-suspensive appeal are made, the principles under which they must be considered are that:

- the person is entitled to lodge an appeal, with or without legal representation, before they leave the UK
- schedule 2 to the Citizens' Rights Appeals Regulations provides that a person who is liable to removal pursuant to regulation 16 is allowed one month to leave the UK voluntarily beginning on the date of the decision to remove them before removal is enforced, unless an exception applies
  - for example, where the person is detained pursuant to the sentence or order of any court - a person can use this one month period to make arrangements for the continuation of their appeal from overseas, even though they will leave the UK before it is determined - these arrangements include, but are not limited to, giving instruction to a legal representative or seeking assistance from family members in the UK (see the effect of certification under regulation 16 for further guidance)
- Schedule 2 of the Citizens' Rights Appeals Regulations provides that a person whose case is certified under regulation 16 may apply for temporary admission to the UK in order to attend the appeal hearing in person see re-entry to present appeal in person for more information

The person may make representations to the effect that their personal circumstances mean that they would not be able to access a fair and effective remedy. You should consider these representations in light of the above. For example:

- a desire to participate in the proceedings, including to give oral evidence or to attend the appeal, will likely be satisfied by the ability of the individual to apply to attend their hearing
- removal to an EEA country is unlikely to raise significant barriers to communications and so, in the absence of specific evidence, individuals removed to such a country should be able to effectively communicate with family members or legal representatives to prepare the appeal

The following are examples of representations that may amount to personal circumstances which mean that interim removal would prevent a fair and effective appeal:

- the person is disabled or otherwise personally incapable of giving instructions from abroad to legal representatives or communicating with family members or others who will give evidence in the appeal
- the person needs expert evidence to support any human rights claim in their appeal and is unable to obtain these prior to being removed, and the reports cannot be produced while the person is outside the UK



You must discuss with your senior caseworker if you are considering not certifying a case under [regulation 16](#) because the person has made representations about procedural fairness.

Where we have considered the human rights claim then the person can raise human rights alongside the EUSS appeal against their deportation decision. This is because where a person has made a human rights claim which has been refused, regulation 9 of the Citizens' Rights Appeals Regulations allows them to raise the ground that the decision is unlawful under section 6 of the Human Rights Act 1998 where a human rights claim has been made and has been refused.

Where a section 120 notice has been given and a human rights claim has been made late or is raised in the grounds of appeal and has not been decided, it is possible for the Tribunal to consider the claim for itself as a 'new matter' where the consent is given by the Secretary of State for Home Department. See the Rights of appeal guidance for guidance on new matters.

## Pending appeals

Where a person has lodged an appeal with the Tribunal which is not under the Citizens' Rights Appeals Regulations (for example an appeal against the refusal of a protection or human rights claim or an appeal under the EEA Regulations) and an appealable decision is then made under [the Citizens Rights Appeal Regulations](#) you should only consider certifying under regulation 16 where the other decision has been certified either under section 94 or section 94B of the [Nationality, Immigration and Asylum Act 2002](#) or regulation 33 of the [Immigration \(European Economic Area\) Regulations 2016 as saved](#). Where the existing decision under appeal has not been certified then you should not certify under regulation 16 because it will not be possible to deport the person where they have an existing in-country appeal. In these circumstances you should write to the hearing centre who are dealing with the existing appeal and request that the appeal under the Citizens' Rights Appeals Regulations and the existing appeal are linked together. It will be for the Tribunal to decide whether to use its case management powers to link the appeals.

### Related content

[Contents](#)

# Re-entry to attend appeal in person

This section tells you about when a person can re-enter the UK to attend their appeal hearing in person.

Schedule 3 of [the Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#) (the Citizens' Rights Appeals Regulations) allows for a person to make an application to return to the UK to make submissions in person at their appeal hearing.

Where you are certifying a decision under regulation 16 you must use template ICD 5252 or 5252A where the public policy grounds have not been considered in making the deportation decision, which sets out when a person should apply to re-enter the United Kingdom and has the contact details for Immigration Enforcement.

## Serious troubles

Under schedule 2 of the Citizens' Rights Appeals Regulations permission to re-enter must be granted except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security.

Where the person can be detained upon their return to the United Kingdom this may be taken into account when considering whether their return will cause any serious troubles to public policy or public security. The fact a person can be detained does not automatically mean that their return may not cause serious troubles on public policy or public security grounds. However, where it is decided that re-entry may cause such serious troubles, it can be considered when assessing whether it is proportionate to refuse re-entry. Serious troubles to public policy or public security is a high threshold. The following are examples which could satisfy the test; it is not an exhaustive, list:

- violent and disruptive offenders who cannot be safely managed in immigration detention
- where an individual's return to the UK is likely to cause public disorder
- national security cases

When considering serious troubles, a person's conduct prior to their removal should be taken into account. For example, a person who was violent while in immigration detention and who sought to disrupt removal attempts is unlikely to be granted permission to re-enter the UK for the purpose of attending an appeal hearing.

However, permission should only be refused if satisfied that the person will still be able to have an effective appeal from outside the UK (see human rights procedural protection).

## Financial assistance

Where permission has been granted for a person to return to the UK to attend their appeal hearing in person, you must consider any application they make for financial assistance. Financial assistance may be given if there is evidence that:

- the person is unable to fund their return (including the cost of leaving the UK again after the appeal hearing)
- there are no family members, friends or others who are able to assist
- the absence of funds creates a real and genuine barrier to return which would otherwise take place

Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or documents that cannot be verified.

Where the person is granted permission to re-enter the UK pursuant to schedule 2, they will be permitted to make submissions in person at their EU Settlement Scheme (EUSS) appeal.

## Dual certification

Where a section 120 notice has been served and the person makes a human rights claim which engages Articles 2 and 3 Convention rights or where they make a protection claim then the decision cannot be certified under regulation 16 unless the human rights or protection claim can be certified under section 94 of the [Nationality Immigration and Asylum Act 2002](#). This is because it would be unlawful to remove someone from the UK if there is a real risk that their treatment in their country of return would breach Articles 2 or 3 Convention rights or if they were at risk of persecution. Where the human rights or protection claim can be certified as clearly unfounded using section 94 then the appealable decision under the Citizens' Rights Appeals Regulations can also be certified under regulation 16. The reason this is lawful is because section 94 certification means the claim is clearly unfounded which means the applicant will not be at real risk of persecution or a breach of Article 2 and 3. For guidance see section 94 guidance.

If the Article 2, Article 3 Convention or protection claim cannot be certified under section 94 there will be an in-country right of appeal against the refusal of that human rights or protection claim. Therefore, the appeal under the Citizens Rights Appeals Regulations should not be certificated under regulation 16 and a request should be made for the appeals to be linked. From 28 June 2022 any claim certified under section 94 will not have a right of appeal, any claim certified prior to 28 June 2022 under section 94 will have an out of country right of appeal.

Where a human rights claim or a protection claim has been made and is certified under section 96 of the Nationality Immigration and Asylum Act 2002 there will be no right of appeal, so you can certify a decision under regulation 16 of the Citizens' Rights Appeals Regulations. For guidance on section 96 see Late claims: certification under section 96 of the Nationality, Immigration and Asylum Act 2002.

However, where a protection or human rights claim has been certified under section 96 you must still be satisfied that interim removal pending appeal under the Citizens' Rights Appeals Regulations will not be a breach of section 6 of the [Human Rights Act 1998](#).

Where a decision has been made to remove a person under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations), as saved you should only certify a decision under regulation 16 where the EEA decision to remove has been certified under regulation 33 of the EEA Regulations.

Where a decision has previously been certified under section 94, 96 or regulation 33 and you cannot certify the appealable citizens' rights decision under regulation 16 you should withdraw the previous certifications. This is because the appeal under the Citizens' Rights Appeals Regulations will be suspensive of removal and it will be better for any other appeals or issues raised to be heard alongside the EUSS appeal.

#### **Related content**

[Contents](#)