

An Introduction to Immigration Law –Near Neighbours Network Webinar, 8th December 2021, 4 pm

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1. This is a non-technical introduction to immigration law, aimed at helping non-lawyers to understand how the immigration system works. It is particularly focused on asylum and humanitarian protection, but also covers other aspects of the immigration system.
2. This guide is **not** legal advice. It is for general information only. If you are having immigration problems, you need to get specialist legal advice from a solicitor, barrister, or immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC). Depending on your case and your circumstances, you may be eligible for free legal aid. Most asylum-seekers are eligible for free legal aid.
3. Near Neighbours is **not** an immigration advice/services provider and cannot provide any legal advice.
4. Please note that you **must not provide immigration advice or services to clients** unless you are regulated by OISC. It is a criminal offence to do so. If a person asks you to help them with an immigration application or appeal, or to advise them on their immigration options, you need to refer them to a solicitor, barrister or regulated immigration adviser. There are many lawyers who provide pro bono assistance for people who are ineligible for legal aid.

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Basic concepts

Who is subject to immigration control?

5. The most fundamental distinction in immigration law is between people who have the “right of abode” and people who do not. The right of abode is the right to live in the UK without being subject to immigration controls. People who do not have the right of abode are subject to immigration controls, and require permission – or “leave” – to enter and remain in the UK.
6. British citizens have the right of abode. For historical reasons, there are also a few Commonwealth citizens who have the right of abode despite not being British citizens.
7. For historical reasons, there are also other types of British nationals who are not British citizens – such as British Overseas Citizens, British Nationals (Overseas) and British Protected Persons. People with these types of British nationality do not have the right of abode and are subject to immigration control.

Who is a British citizen?

8. British nationality is a complicated subject. It has changed a lot over the years. “British citizenship” as we know it today did not even exist until 1983. The detail of nationality law is outside the scope of this paper. If you are not sure whether someone is a British citizen, it is essential that they get specialist legal advice from an expert lawyer.
9. Broadly speaking, the main ways that people acquire British citizenship are:
 - a. Birth in the UK. Not everyone who is born in the UK is a British citizen – normally, a person born in the UK after 1 January 1983 is only a British citizen if one of their parents is British or has indefinite leave to remain. The meaning of “parent” in this context can be complex and can also depend on when the person was born, as the law has changed over time.
 - b. Descent from a British citizen parent. Children born abroad to a British citizen parent are normally British. However, if the British citizen parent was themselves a citizen by descent who was born outside the UK, then normally their children born abroad will not be British.

- c. Naturalisation. People who have indefinite leave to remain and who meet certain residence requirements can apply to be naturalised as British citizens.
- d. Registration. There are various routes by which a person can be registered as a British citizen. For example, children who were born in the UK and are still living here at age 10 normally have the right to be registered as British citizens.

Leave to enter and leave to remain

- 10. People who are subject to immigration control need permission – or “leave” – to enter and remain in the UK.
- 11. There are two types of leave to enter/remain in the UK. “Indefinite leave to remain” is the right to live in the UK permanently. “Limited leave to remain” is the right to live in the UK for a limited time. Limited leave to remain may also be subject to conditions – such as a condition limiting the person’s work or studies, or a condition preventing the person from claiming welfare benefits (known as a “no recourse to public funds” or “NRPF” condition). For example, someone on a student visa may not be allowed to claim Universal Credit. Indefinite leave to remain cannot be subject to conditions.

Entry clearance

- 12. Most people coming to the UK from abroad need to apply for “entry clearance” before they can come to the UK legally. Entry clearance is often referred to as a “visa”.
- 13. Nationals of some countries (mostly rich/developed countries, such as the USA and the EEA countries) are “non-visa nationals”, which means they can come to the UK for short visits without first obtaining entry clearance. Nationals of all other countries are “visa nationals”, meaning that they need to apply for entry clearance to come to the UK on any basis, even for a short visit. And even non-visa nationals need entry clearance if they want to come to the UK other than for a short visit.

Immigration detention and immigration bail

- 14. If someone is in the UK unlawfully – for example, because they entered the UK illegally or overstayed their leave to enter/remain – then they may be detained by the Home Office. People who are being considered for deportation can also

be detained, even if they have leave to enter/remain. Most immigration detainees are held in “immigration removal centres” such as Yarl’s Wood, but some are held in prisons.

15. If someone does not have leave to enter/remain, but is not detained, the Home Office may grant them “immigration bail”. This is not the same as leave to enter/remain, but it means that their presence in the UK is temporarily tolerated. Most asylum-seekers are on immigration bail while waiting for their asylum claim to be decided. Before the Immigration Act 2016, there used to be another similar concept called “temporary admission”, but this has now been abolished and replaced with immigration bail.
16. People on immigration bail are normally subject to conditions. This normally includes a condition requiring them to report to a Home Office reporting centre regularly. Most people on immigration bail have a condition preventing them from working, although the Home Office does have discretion to lift this condition, and occasionally does so. Some people on immigration bail also have a condition preventing them from studying, although this is less common. People on immigration bail are not normally allowed to claim welfare benefits.

Deportation and removal

17. There are two main types of enforced removal from the UK: deportation and administrative removal. Both of these involve being forcibly returned to another country, and both are often referred to by non-lawyers as “deportation”, but the difference between them is important.
18. Deportation is normally used for people who have committed criminal offences. Foreign nationals who are sentenced to imprisonment for 12 months or longer are automatically considered for deportation (“automatic deportation”) and will be deported unless an exception applies. The most common exceptions are that their deportation would breach the Refugee Convention or the European Convention on Human Rights (these issues are discussed further below). The Home Office also has a discretionary power to deport foreign nationals who don’t qualify for automatic deportation, and sometimes does so (for instance, for people who are persistent low-level offenders).
19. When someone is subject to a deportation order, they cannot legally return to the UK unless and until the order is revoked.

20. People who do not have leave to enter/remain, but are not subject to deportation, may be subject to administrative removal. This would include, for example, someone who has entered illegally or overstayed their leave and has no remaining basis of stay in the UK. Depending on their situation, they may be subject to a re-entry ban for a certain period of time after being removed.

The Immigration Rules

21. The Immigration Rules are a set of rules published by the Home Office that set out the criteria for granting leave to enter/remain in the UK.
22. Even if someone does not meet the Immigration Rules, it is still possible for them to be granted entry clearance, leave to enter or leave to remain. This would be the case, for example, if refusing the application would breach their rights under the European Convention on Human Rights. The Home Office also has a general discretion to grant leave to enter/remain outside the Rules, and sometimes does so. There are some types of leave to enter/remain (such as discretionary leave for trafficking victims) that are not covered under the Immigration Rules and are instead set out in Home Office policy documents.

EU/EEA free movement rights

23. Until 31 December 2020, citizens of EEA countries¹ normally did not need leave to enter and remain in the UK. They could enter the UK for up to three months without any restrictions. After three months, they could stay in the UK if they were “exercising Treaty rights” – for instance, by working, studying or being self-sufficient. If they exercised Treaty rights for five years, they would acquire the right to permanent residence. Certain family members of EEA nationals also had the right to stay in the UK even if they were not EEA nationals themselves.
24. EEA nationals and their family members could apply for documents evidencing their status (a “registration certificate” or a “residence card”), but they did not have to. If they met the requirements of EU law, their stay would be lawful even if they had never applied to the Home Office.
25. Some non-EEA family members of British citizens also had rights under EU law. The two main examples were:

¹ The European Economic Area (EEA) includes the member states of the European Union, plus Iceland, Norway and Liechtenstein. The UK also included Swiss nationals in its definition of EEA nationals, even though Switzerland is not a member of the EEA.

- e. Where a non-EEA national was the primary carer of a British citizen child, and the British child would have to leave the EU if their primary carer were removed from the UK, the primary carer could derive a right of residence from EU law. People in this situation were called “Zambrano carers”.
 - f. When a British citizen exercised free movement rights in another EU/EEA country, and their non-EEA family members lived in that country with them, their non-EEA family members could acquire a right of residence under EU law when the family returned to the UK together. People in this situation were called “Surinder Singh family members”.
26. From 31 December 2020, this has now changed. Free movement rights have ended, and EEA nationals require leave to enter/remain like all other foreign nationals. EEA nationals are “non-visa nationals” (see under “Entry clearance” above) and so do not need to apply for a visa in advance if coming to the UK for short visits, but will need to apply for a visa if coming to the UK for work or study.
27. However, the Government has set up the “EU Settlement Scheme” (EUSS). EU/EEA nationals and their family members who were already living in the UK before 31 December 2020 can obtain indefinite leave to remain (“settled status”) or limited leave to remain (“pre-settled status”) under the EUSS. In some circumstances they can also be joined by their family members from abroad. The deadline for applying to the EUSS was 1 July 2021, but the Home Office has discretion to accept late applications.

The Home Office

28. The Home Office is headed by the Secretary of State for the Home Department (the Home Secretary). This is the government department that administers immigration control. The former UK Border Agency (UKBA) has been abolished and its functions transferred to the Home Office. UK Visas and Immigration (UKVI) and UK Border Force are part of the Home Office.

Asylum, humanitarian protection etc

Asylum

29. Asylum and refugee status are concepts that come from the Convention on the Status of Refugees (“the Refugee Convention”). Broadly speaking, a person is a refugee if they have a well-founded fear of persecution in their home country for reasons of their race, religion, nationality, membership in a particular social group, or political opinion. “Membership in a particular social group” can include things like gender, sexual orientation, disability, or membership of a family or clan.
30. Parties to the Refugee Convention normally have a duty not to return a refugee to a country where they will be persecuted. Lawyers refer to this as “non-refoulement”.
31. The Refugee Convention is supplemented by the EU Qualification Directive, which still forms the basis of much of UK asylum law (despite Brexit).
32. A person who is claiming to be a refugee normally needs to satisfy the Home Office of the following things:
 - a. That their account of what has happened/will happen to them is true (lawyers refer to this as “credibility”);
 - b. That they are at risk of persecution on return;
 - c. That, if the risk of persecution is from non-state actors, they could not be adequately protected by the authorities in their home country (lawyers refer to this as “sufficiency of protection”); and
 - d. That they could not avoid the risk of persecution by moving to another part of their home country, or that it would be unreasonable to do so (lawyers refer to this as “internal relocation”).
33. Some people who meet the definition of a refugee are excluded from refugee status – for example, because they committed a serious non-political crime outside the UK, or because they have been involved in crimes against humanity

or war crimes. These people will normally benefit from Article 3 of the European Convention on Human Rights (which is discussed below).

34. Some people, although technically refugees, are not protected against return ("refoulement") by the Refugee Convention. This applies when the person has committed a particularly serious crime in the UK and is a danger to the community, or where there are reasonable grounds for regarding them as a danger to the UK's security.
35. A person who is recognised as a refugee by the UK and granted asylum is normally granted five years' leave to remain, with the right to apply for indefinite leave to remain after five years. They may also be able to bring their spouse and minor children to join them in the UK. Their refugee status is likely to be reviewed if they commit a serious crime and are considered for deportation. They may also lose their refugee status if they re-avail themselves of the protection of their home country (for instance, by visiting their home country or obtaining a national passport).

Humanitarian protection

36. Humanitarian protection (also known as "subsidiary protection") is a concept created by EU law. It applies where a person is at risk of serious harm (such as the death penalty or torture) in their home country, but it is not for one of the five reasons set out in the Refugee Convention (race, religion, nationality, membership of a particular social group or political opinion). It can also apply when a person is at risk of indiscriminate violence due to a state of war in their home country.
37. When a person claims asylum, they are automatically considered for humanitarian protection as well. As with asylum, some people are excluded from humanitarian protection for reasons such as criminality.
38. As with asylum, a person who is granted humanitarian protection is normally granted five years' leave to remain, with the right to apply for indefinite leave to remain after five years. Again, they may also be able to bring their spouse and minor children to join them in the UK.

Article 3 of the European Convention on Human Rights

39. The European Convention on Human Rights is part of UK law by virtue of the Human Rights Act 1998. People often rely on their rights under the European Convention on Human Rights to argue that they should be allowed to remain

in the UK. The Articles of the Convention most commonly encountered in immigration law are Article 3 (the prohibition of torture and inhuman or degrading treatment or punishment) and Article 8 (the right to private and family life). We will return to Article 8 below.

40. In some cases, a person cannot be removed from the UK because it would breach their rights under Article 3 of the European Convention on Human Rights (the prohibition of torture and inhuman or degrading treatment or punishment). This is most often relevant in the following situations:

- e. If the person is at risk of persecution/serious harm on return (such as the death penalty or torture), but is excluded from asylum and humanitarian protection, for example because they have committed a serious crime. Unlike asylum and humanitarian protection, Article 3 provides absolute protection – it does not matter if the person has committed crimes or is a danger to the public.
- f. If the person is seriously ill, and would be likely to die soon or experience very severe suffering on return to their home country due to lack of access to medical treatment.
- g. If the person would be living in extremely poor humanitarian conditions on return to their home country (for example, they would be street-homeless and starving).

41. People who are excluded from asylum and humanitarian protection, but cannot be removed because of Article 3, are normally given “Restricted Leave” by the Home Office for six months at a time, with significant restrictions on what they can do. If the situation in their home country changes, the Home Office may try to remove them at a later stage.

42. People who succeed on Article 3 grounds because of their medical condition or humanitarian conditions would normally be given 30 months’ leave to remain, with the right to apply for indefinite leave after 10 years.

Asylum procedure

43. A person normally needs to be in the UK to claim asylum – you cannot apply from abroad. Most asylum-seekers either enter illegally (for example, by lorry or boat), or enter the UK with leave on another basis and later claim asylum.

Sometimes the reason a person claims asylum does not arise until they are already in the UK – this is known as a “sur place” asylum claim.

44. When a person claims asylum, they will normally have a short interview with the Home Office called a “screening interview”. At a later time, they will have a longer interview about their case called a “substantive interview”. After this, the Home Office will make a decision on their case. There can be a very long delay between these stages, depending on the case. Sometimes asylum decisions are delayed because the person has been referred into the National Referral Mechanism for victims of trafficking (discussed below).
45. When the Home Office decides a person’s asylum claim, the outcome is usually one of the following:
- h. The person is granted asylum or humanitarian protection. They will be granted leave to remain for five years.
 - i. The person is refused asylum or humanitarian protection, with a right of appeal to the First-tier Tribunal. Appeals to the First-tier Tribunal are discussed below.
 - j. The person is refused asylum or humanitarian protection and their claim is certified as “clearly unfounded”, which means they cannot appeal until they have left the UK. They can challenge the certification decision by judicial review. Judicial review is discussed below. If their judicial review succeeds, their claim is likely to be re-refused with a right of appeal.
46. If a person is refused asylum and humanitarian protection but granted another form of leave (for example, because they are an unaccompanied asylum-seeking child) they are still able to appeal the refusal of asylum and humanitarian protection, unless it is certified.
47. If a person has lost their appeal and has no remaining rights to appeal further (i.e. they are “appeal rights exhausted”), or if their claim was certified and they did not challenge it at the time, they can later make a new claim for asylum. This process is called “further submissions”. They normally need to go in person to a Home Office building in Liverpool, to lodge their further

submissions. Further submissions do not have to be a completely new claim – they can be new evidence in support of an existing claim.

48. When the Home Office decides a person's further submissions, the outcome is usually one of the following:

- k. The person is granted asylum or humanitarian protection. They will be granted leave to remain for five years.
- l. The person is refused asylum or humanitarian protection, but their claim is accepted as amounting to a "fresh claim". This will be the case if the Home Office accepts that their claim is significantly different from their previous claim and has a realistic prospect of success.
- m. The person is refused asylum or humanitarian protection and their claim is not accepted as amounting to a "fresh claim". In this case they cannot appeal but can challenge the decision by judicial review. If their judicial review succeeds, their claim is likely to be re-refused with a right of appeal.

Trafficking and the National Referral Mechanism

49. Some asylum-seekers are also victims of trafficking. In this case, they will normally be referred into the National Referral Mechanism (NRM) for victims of trafficking. This is separate from the asylum process, but is also administered by the Home Office.

50. At the first stage, the NRM will make a decision on whether there are "reasonable grounds" to believe that the person is a victim of trafficking. If the reasonable grounds decision is positive, the next stage is a decision on whether it is more likely than not that the person is a victim of trafficking – this is called a "conclusive grounds" decision. There are often very long delays in making conclusive grounds decisions. The outcome of an asylum claim is normally delayed to await a conclusive grounds decision.

51. If the conclusive grounds decision is negative, there is no right of appeal and it can only be challenged by judicial review. However, it is not binding on the judge in a subsequent asylum appeal, who will make up their own mind as to whether the person is a victim of trafficking.

52. If the conclusive grounds decision is positive, then the person may be granted discretionary leave to remain as a victim of trafficking. The law in this area is in a state of flux. A very recent High Court judgment has said that people who have a positive conclusive grounds decision and are waiting for an asylum decision should always be given discretionary leave to remain – but the Home Office disagrees with this judgment and is appealing it to the Court of Appeal.

Asylum support

53. Most asylum-seekers are not allowed to work. Asylum-seekers are not allowed to claim mainstream welfare benefits such as Universal Credit or to use local authority housing assistance.

54. Asylum-seekers who would otherwise be destitute are provided with support by the Home Office, known as “section 95” support. This normally consists of accommodation (which is often poor-quality) and a small cash allowance, currently £37.75 per week.

55. When an asylum-seeker has been granted leave, their section 95 support will stop and they will have to move on from their accommodation within 28 days. This can create problems, since people are often unable to obtain Universal Credit and council housing within this time.

56. When an asylum-seeker’s claim has been refused and they no longer have any remaining appeal rights (i.e. they are “appeal rights exhausted”), their section 95 support will stop.

57. Refused asylum-seekers who cannot leave the UK can apply for another form of support called “section 4 support”. This consists of accommodation and food vouchers. People on section 4 support do not have access to cash. A refused asylum-seeker who has made further submissions, but whose further submissions have not yet been accepted as amounting to a fresh claim, can claim section 4 support. If their further submissions are accepted as amounting to a fresh claim and they are able to appeal, they will be able to get section 95 support again.

58. For both section 95 and section 4 support, asylum-seekers have to show that they would otherwise be destitute. So if the Home Office thinks they have another source of income available, they may lose their support.

Unaccompanied asylum-seeking children (UASCs)

59. Asylum-seekers who are unaccompanied asylum-seeking children (UASCs) are normally cared for by local authority social services, and do not normally receive section 95 or section 4 support while they are still children.
60. UASCs who are refused asylum while they are still children are normally given leave to remain until age 17.5. This leave does not give them the right to stay in the UK permanently – the Home Office may try to remove them after they turn 18, unless they obtain asylum or humanitarian protection in the meantime.

Other types of leave to enter/remain

61. Other than asylum and humanitarian protection, there are several other reasons why a person might be granted leave to enter/remain. These include the following, which is not exhaustive.

Family members of British citizens etc.

62. Some family members of British citizens, and family members of people who have indefinite leave to remain, can apply for entry clearance or leave to remain under the Immigration Rules. This includes spouses and partners, minor children, adopted children and adult dependent relatives. The Rules are complicated and sometimes impose requirements that are difficult to meet – for example, a foreign spouse or partner applying for entry clearance normally has to show that their British/settled spouse or partner is earning at least £18,600 per year, although there are some exceptions to this rule.
63. In some cases, family members who cannot meet the Rules can rely on Article 8 of the European Convention on Human Rights (discussed below).

Article 8 of the European Convention on Human Rights

64. Article 8 of the European Convention on Human Rights protects the right to private and family life. Many people rely on Article 8 in immigration cases, especially if they have lived in the UK for a long time and/or have family members in the UK. Even if a person cannot meet the Immigration Rules, they may still be allowed to remain in the UK on Article 8 grounds, depending on the facts of their case.

65. Unlike Article 3, Article 8 is not an absolute right. It is a qualified right. Where a person's Article 8 rights are engaged, the Home Office and/or the court/tribunal will decide whether the interference with their rights is "proportionate" to the legitimate aims pursued by the Home Office. The courts accept that some interference with Article 8 rights is proportionate in the interests of immigration control.
66. There is a big difference between deportation cases and non-deportation cases when it comes to how Article 8 claims are decided. As we saw above, deportation cases are normally those in which a person has serious criminal convictions. In a deportation case, it is generally difficult to resist deportation on Article 8 grounds, even if the person has lived in the UK most of their life and/or has British citizen children. This is particularly the case since the Immigration Act 2014 came into force, which imposed restrictive requirements as to how courts and tribunals are supposed to decide Article 8 claims. However, it is not impossible, and depends on the facts of the individual case – anyone who is in this situation needs expert, specialist legal advice. In a removal case, by contrast, it is generally easier to win an Article 8 case. However, again, everything depends on the facts of the individual case.

The Points Based System

67. Most people coming to the UK to work or study now have to apply for entry clearance or leave to remain under the Points Based System (PBS). The PBS is very complicated and was significantly reformed in December 2020. It includes routes for skilled workers, temporary/seasonal workers, religious workers, students and entrepreneurs, among others.
68. The requirements of the PBS are very prescriptive and people have to submit specific documents/evidence in order to succeed – mistakes can be fatal to the application. It is important to get expert, specialist legal advice. In general, it is not possible to apply to the PBS from within the UK if you currently do not have any leave to enter/remain, or if you have leave to enter/remain as a visitor.

Courts, tribunals, appeals and judicial review

Courts and tribunals

69. Tribunals are specialist judicial bodies which deal with a particular area of law. There are two levels of immigration tribunal:

- a. The First-tier Tribunal (Immigration and Asylum Chamber) is a specialist tribunal that deals with appeals against certain types of immigration decisions. Appeals are explained below. There are also other Chambers of the First-tier Tribunal which deal with appeals against other types of decisions.
- b. The Upper Tribunal (Immigration and Asylum Chamber) is a specialist tribunal which deals with appeals from the First-tier Tribunal. It also deals with claims for judicial review of certain types of immigration decisions by the Home Office. Judicial review is explained below.

70. There are also two other courts that are commonly encountered in immigration cases:

- a. The Administrative Court, which is part of the High Court, deals with judicial review cases (other than those which are dealt with by the Upper Tribunal).
- b. The Court of Appeal deals with appeals from the High Court (including the Administrative Court) and the Upper Tribunal.

Appeals

71. Some immigration decisions can be appealed to the First-tier Tribunal. The main types of decisions that can be appealed are:

- n. A decision to refuse an asylum/humanitarian protection claim (where it is not certified);
- o. A decision to refuse a human rights claim (where it is not certified);
- p. A decision to revoke asylum or humanitarian protection;
- q. A decision to refuse leave under the EU Settlement Scheme.

72. An appeal to the First-tier Tribunal is a merits appeal. This means that the judge does not just review whether the Home Office decision was lawful – they consider all the evidence and make up their own mind. This can include evidence that post-dates the Home Office decision.

73. First-tier Tribunal decisions can be appealed to the Upper Tribunal, and Upper Tribunal decisions can be appealed to the Court of Appeal.

Judicial review

74. Many types of immigration decisions do not carry a right of appeal. These decisions can only be challenged by judicial review. A claim for judicial review is brought either in the Upper Tribunal or in the High Court, depending on the type of decision.

75. Unlike an appeal, in a judicial review the judge normally only reviews whether the Home Office decision was lawful – they do not re-make the decision for themselves. However, there are some exceptions to this, depending on the type of case. If the judicial review succeeds, the result is normally that the Home Office has to make a fresh decision.