



Home Office

How to consider Discretion

Version 1

Guidance for decision makers on discretion

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About this guidance

This guidance is about discretion: what is it; when it applies and how to consider it, both under and outside the Immigration Rules. This guidance applies primarily to decision makers considering entry clearance, permission to enter or stay in the UK (LTE/LTR) and settlement (ILE/ILR).

Other relevant guidance: [Discretionary Leave](#), European Convention on [Human Rights \(ECHR\) Articles: Article 8 \(family and private life\)](#) or [Article 3 medical](#) grounds and [unaccompanied asylum seeking children](#); Existing concession are at [\(Annex A\)](#).

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 xxx

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 txxx](#).

Publication

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

- version 1
- published for Home Office staff on **xx xxxxxxxx 202x**

Changes from last version of this guidance

This is new guidance. It replaces the Leave Outside the Rules guidance.

Introduction

This guidance is for Migration and Borders decision makers. It is primarily for decision makers considering whether to grant entry clearance, permission to enter or permission to stay in the UK and settlement, including what evidence to consider and what conditions to apply. It is also relevant to other migration and borders decisions where there is discretion.

This guidance explains discretion, what it is, when it applies and how to consider the exercise of discretion.

The [Windrush Lessons Learned Report](#) at Recommendation 18 said ‘The decision-making framework should include at least guidelines on when the burden of proof lies on the applicant, what standard of proof applies, the parameters for using discretion and when to provide supervision or ask for a second opinion. This should produce more transparent and more consistent decision-making’. The guidance on discretion represents our commitment in response to the report.

What is discretion?

Discretion means choice. It means there is a freedom to act or not to act; the freedom to take a particular decision.

Discretion is normally indicated by the use of the word “may” rather than the word “shall” or “must”.

The need for discretion arises because the facts of each case can be different and these facts may need to be considered before powers can be exercised or a decision made, for example, on whether to allow a person to enter or stay in the UK. In some cases the power to act or not to act only arises in specific circumstances, for example, “A person whose leave to enter has been suspended...may be detained..(paragraph 16(1A) of Schedule 2 to the Immigration Act 1971 (the 1971 Act)). The power to detain under this power arises only when leave has been suspended, but it is a discretionary power, so even if leave has been suspended a decision must be made on whether or not to detain in each case. Similarly, an immigration officer “may search the premises for documents” but the power may be exercised “only if the immigration officer has reasonable grounds for believing there are [specified] documents on the premises...” (paragraph 15A (2) and (3) of Schedule 2 to the 1971 Act. The power can only be exercised by an immigration officer, there must be reasonable grounds to believe there are specified documents on the premises before the power can be exercised, and even if there are such grounds the immigration officer must decide whether or not to search the premises in

that case. Conversely, under the Borders Act 2007 a foreign national offender must be deported unless an exception applies; there is no discretion to grant entry or stay to a foreign national offender.

It is important you understand the power you are exercising, whether there are any constraints on the use of the power and what discretion may be exercised in relation to the use of the power. Decision makers should consider the relevant guidance to ensure they understand what discretion is available to them.

When making a decision on entry or stay in the UK the Immigration Rules (the Rules) set out the practice to be followed and reflect agreed policy. The Rules set out the main purposes for which a person may enter or stay in the UK and the requirements to be met for them to be granted permission to do so. They are intended to apply and be applied in most circumstances. The Rules need to be applied consistently to ensure transparency and fairness between individuals, but there will be situations where the Rules either do not cover the particular circumstances, or where there may be good reasons for allowing entry or stay even though the person does not qualify under the Rules; see section on [leave outside the Rules](#).

The power to allow entry or stay where the requirements of the Rules are not met was confirmed by the courts in cases of *Alvi [2012] UKS 33* and *Munir [2012] UKSC 32*. The latter related to discretion to allow entry or stay to specified cohorts of persons, normally referred to as concessions: see section on Concessions.

If a person applies to enter or stay in the UK for a purpose not provided for under the Rules that application should normally be refused unless there is a concession that benefits the applicant or there are particular reasons to allow entry or stay outside the rules: see section on consideration of discretion outside the Rules.

Concessions

There are several concessions, or policies, outside the Rules under which a person will be allowed entry or stay if they meet specified criteria. These concessions may be temporary, apply only to a small cohort or are outside the rules for other reasons. Concessions must be applied by decision makers in the same way as the Rules. In some cases the concession reflects our legal obligations: see for example [guidance on A3 medical cases](#), and so is not truly discretionary. Where a concession applies it may be unlawful to refuse entry or stay to a person who qualifies under the concession, because a concession is normally a statement of policy and the policy must be applied fairly and consistently.

[Annex A](#) sets out the current concessions outside the Rules.

In some cases a concession will only be considered if the appropriate application is made. For example, those seeking to remain in the UK under the Grenfell Tower survivors concession must apply to extend their stay by completing a specified form (FLR(GT)).

In other cases, before refusing entry or stay relevant guidance may indicate a decision maker should consider and determine whether any relevant concession applies. For example, where an unaccompanied asylum seeking child does not qualify for refugee leave the guidance says the decision maker must also consider and apply the [Discretionary Leave](#) guidance which sets out a number of concessions which may apply in a range of circumstances where a protection application is refused.

Discretion under the Rules

Background

The Rules set out many circumstances where the decision maker has discretion. This is normally indicated by the term “may” rather than “must” or “shall”.

The approach to discretion under the Rules has changed over time. In the [Law Commission consultation paper on Simplification of the Immigration Rules](#) in 2019 they said that the Rules had progressively grown in length in part because there had been a deliberate shift from non-exhaustive illustrations of how the requirements of the Rules should be satisfied, which for example, allowed the decision maker to exercise discretion to decide what evidence would satisfy them that a requirement is met, to, in relation in particular to the original “Points Based System”, a more prescriptive approach where specified evidence must be provided. This was intended to provide a more efficient, transparent and objective process.

However, the prescriptive approach meant that applicants who fell within the spirit of the Rules, in that they were applying to do things that the Rules allow and broadly met the requirements, were refused on what could be perceived as technical grounds, such as the applicant providing evidence but not in the form of the specified document. There was little scope for decision makers to exercise discretion under the Rules. This was a deliberate policy choice but it led to harsh outcomes for some applicants. There was also evidence of the Rules not being applied in practice and “concessions” being developed to mitigate the harsh effect of the Rules. However, those mitigations, although well-intended, led to a lack of transparency and a risk of inconsistency and unfairness between individuals.

The Law Commission noted that there are advantages and disadvantages to a prescriptive approach and a single approach may not be the best outcome. In its

[Report on Simplification of the Immigration Rules](#) of 2020, published in response to its consultation, it recommended greater clarity on discretion.

In particular, the Law Commission recommended the Secretary of State consider the introduction of a less prescriptive approach to evidential requirements in areas of the Rules where it is considered appropriate (recommendation 3). In areas where prescription is reduced the Law Commission recommended that lists of evidential requirements should specify evidence which will be accepted, together with a category of less specifically defined evidence which the decision maker would consider with a view to deciding whether the underlying requirements of the Rules is satisfied (recommendation 4). lists of evidential requirements should specify evidence which will be accepted, together with a category of less specifically defined evidence which the decision maker would consider with a view to deciding whether the underlying requirements of the Rules is satisfied (recommendation 4).

These recommendations have both been accepted by the Home Secretary and, as the Rules are simplified, consideration is given in relation to each requirement as to whether it is appropriate to have prescriptive requirements or whether a less prescriptive, and more discretionary approach, is appropriate.

In the simplified rules an example of where a prescriptive approach has been maintained is the language requirement. This requirement applies in many routes and Appendix English language sets out how the requirement must be met. Although there is a range of specified evidence that can be provided to show the requirement is met there is no discretion to accept alternative evidence that the requirement is met.

An example of a change to a less prescriptive approach and therefore more discretion in relation to evidence requirements is the [Skilled Worker caseworker guidance](#). The guidance outlines that the Immigration Rules no longer set out specific format requirements for most documents as long as it shows the requirements are met. Also, where evidence is missing or inadequate the decision maker should consider seeking further information, alternative documents or making verification checks, giving the applicant the opportunity to submit any other relevant evidence, before deciding on the case.

Consideration of discretion under the Rules

Where a person has applied under the Rules you must consider whether the Rules allow for, or require, the exercise of discretion. For example, where the Rules say that the decision maker “must” do something, that normally means there is no discretion, whereas if the Rules say the decision maker “may” do something, this normally means there is some discretion. However, there may be Rules saying that

the decision maker “must be satisfied that” a requirement is met, which allows the decision maker discretion as to what evidence will satisfy them, on the balance of probabilities, that the requirement is met. You should refer to the relevant guidance for the route or Rules to help you understand where you have discretion and what factors to consider when exercising any such discretion: see also the section on [Consideration of discretion](#).

Examples of when discretion can be exercised under the Rules:

- When an applicant does not meet the validity requirements of the route the application may be rejected as invalid and not considered.
- When applicant is unable to provide a required piece of evidence and the decision maker is satisfied, they have good reason for not doing so but is satisfied on the available evidence that the requirement of is met.
- When an application was received out of time and the decision maker is satisfied they have good reason.

Where the Rules provide discretion and you are granting based on the exercise of that discretion you must grant under the relevant route under the Rules, for the specified period and subject to any conditions provided for under that route.

Discretion outside the Rules (LOTR)

Where a person is seeking to enter or stay in the UK for a purpose not provided for under the Rules, or where the requirements of the Rules are not met, there is still the power to apply discretion and to grant entry or stay outside the Rules, known as a Leave Outside the Rules (LOTR).

The lack of clear over-arching guidance about the use of this discretion has led to the perception of a lack of common sense and compassion in decision-making and a failure to consider “the face behind the case”. However, there is a risk of a lack of transparency, inconsistency and unfairness if the decision to allow entry or stay outside the Rules in an individual case is made without clear principles being applied.

Some of the concerns have been addressed by the work on simplifying the Rules and the more flexible approach to evidential requirements, and in identifying more clearly where there is already discretion under the Rules. This approach is intended to lead to fewer cases being refused on perceived technical grounds and more cases being granted under the Rules. This approach is preferable because the Rules are a published statement of policy and practice and it is more transparent if they are applied consistently. Where the Rules remain prescriptive this reflects the policy intention and any exercise of discretion must be outside the Rules.

When to consider discretion outside the Rules:

Where a person requests the exercise of discretion outside the Rules, either through a specific application for a grant outside the Rules, for example on form FLR (HRO), Further leave (Immigration Rules) or by requesting such consideration you must consider first whether there is a process that must first be followed, for example, a specific application form or fee and then whether and how to exercise discretion: see section on [consideration of discretion](#).

In some cases the need to consider whether to exercise discretion arises because a particular case has been raised in the media or in Parliament or by the courts, often because it appears to have compassionate or compelling circumstances. If you are asked to consider, or review, the case you must consider whether to exercise discretion in such cases in the same way as any other case, to ensure fairness and consistency i.e. you must treat like cases alike: see section on [consideration of discretion](#).

Where there is no request to consider the exercise of discretion there is no obligation to do so. However, you may think there are reasons for exercising discretion, for example because of “decision discomfort”: see Ethical Decision-Making Model Guidance, or for another reason. In such cases if you cannot resolve your concerns using existing guidance you should discuss the case with a Senior Caseworker.

Applying discretion outside the Rules in cases in the UK

Generally individuals who are in the UK must apply for permission to enter or stay on the specified application form for the route whose purposes most closely matches their circumstances and give biometrics and pay the relevant fees etc. See also guidance on waiver of fees.

However, if there is no relevant route and the individual wishes their case to be considered solely outside the Rules, they can apply on the [further leave \(human rights other\)](#) (FLR (HRO)) application form, or if seeking settlement on [form SET\(O\)](#). The applicant will be asked to provide details, including any relevant evidence, of why they are seeking to stay in the UK. Where the application is not subject to a fee exemption or fee waiver, they must pay the relevant fees.

In some cases the consideration of discretion outside the Rules will not be in response to an application but arises where the case is being considered or reviewed in response to representations for example from an MP, a complaint, press interest or when removal action is being taken. If an application has already been made and decided it will not normally be necessary to require a further formal

application before reviewing the case and considering discretion. Even if discretion has been considered previously there may be additional facts or evidence which may lead to a different decision.

Applying discretion outside the Rules in overseas cases

Generally individuals who are outside the UK must apply for entry clearance on the specified application form for the route whose purposes most closely matches their circumstances and provide biometrics and pay any relevant fees etc.

Where an Entry Clearance Officer (ECO) thinks an application for entry clearance justifies the exercise of discretion outside the Rules they must refer the application to the Referred Casework Unit (RCU) for consideration. This is because although ECOs can apply discretion to decide applications under the Rules they do not have a delegated power to grant entry clearance outside the Rules.

In making a referral to RCU, the ECO must include all the relevant information and evidence available to them and their recommendation and reasons.

Applying discretion outside the Rules at the UK border

Border Force officers have the power to grant leave to enter under the [Immigration Act 1971](#). However, they must apply the Rules and should only grant leave to enter outside the Rules if approved by a Senior Officer.

Further details of consideration of leave outside the Rules at the border can be found on [Leave Outside the Immigration Rules \(LOTR\) and compelling compassionate circumstances: Border Force](#) guidance.

Discretion in relation to cancellation of entry clearance or permission to enter or stay in the UK

The power to cancel (including curtail, vary, etc) entry clearance or permission to enter or stay in the UK is generally discretionary. The power to cancel is set out in different pieces of legislation which, along with the policy on cancellation is reflected in Part 9: grounds for refusal on suitability in the Rules. This policy applies whether the entry clearance, permission to enter or stay was granted under the rules or outside them.

Consideration of discretion outside the Rules

The Rules set out the practice to be followed in deciding on entry or stay in the UK and to ensure transparency, consistency and fairness it is important that they are applied. However, the Rules cannot cater for every possible scenario, and there remains discretion, including discretion to allow entry or stay, on a case by case basis where a person does not meet the requirements of the Rules. To ensure such decisions are made lawfully and fairly it is important to identify why discretion is being considered and whether it is appropriate to exercise discretion on the particular facts of the case, taking into account all of the relevant factors]. There must be sufficient evidence to demonstrate that the individual circumstances of the case are not just unusual but can be distinguished from most other cases where discretion has not been exercised. This is to ensure the use of discretion does not undermine the objectives of the Rules or create a parallel regime for those who do not meet them.

Where an application has been made for entry or stay on a particular route but, even when applying the available discretion under the Rules the applicant does not meet the requirements for a grant there may be reasons why the application should not be refused.

In some cases the request for an exercise of discretion will relate not to the grant of entry or stay but the conditions attached to that grant. For example, a partner on a 5 years route to settlement on the basis of a British Citizen partner fails to meet the financial requirements for settlement after 5 years but their application is not refused as they are granted further 30 months leave on the 10 year settlement route.

If the applicant requests different conditions to those which would normally be applied on that route or for that application, for example they request that the “no recourse to public funds condition” is not applied and you are applying discretion to grant permission to stay, the grant should normally reflect the route applied for, but imposing different conditions is a separate exercise of discretion, which may need you to take into account relevant factors which may differ from the factors taken into account in deciding to grant permission.

Individual compelling or compassionate circumstance

There are cases where the exercise of discretion to grant entry or stay is justified based on the individual compelling or compassionate circumstance. This does not mean the case must be unique, but it does mean the circumstances that justify the grant must not apply generally to applicants or a significant cohort of applicants. If exercising discretion to grant entry or stay is justified in a number of cases based on the same circumstances there may need to be a concession or a policy change and

you should refer to the Ethical Decision-Making Model Guidance for escalation options.

Where the particular circumstances of the case are considered sufficiently compelling or compassionate to justify a grant it is important to ensure fairness and that the approach is applied consistently to other cases in the same circumstances. However, as such decisions are based on a rounded view of the circumstances of the particular case you do not need to strive to distinguish the case from all other cases. You need to be clear why you think a grant is justified on the facts of the case and which particular facts, or combination of facts, are relevant to that decision. You must seek approval from a Senior Caseworker who will advise on whether the exercise of discretion is justified and ensure that it is applied consistently.

Examples of circumstances of a person in the UK which may be sufficiently compelling or compassionate to justify the exercise of discretion include:

- where a person in the UK has experienced a life changing event or personal tragedy which would make refusal unduly harsh
- where the removal of a person from the UK is unlikely to be possible due to physical or mental incapacity which is unlikely to improve

When considering whether to grant entry or stay you should consider whether the consequences of refusal are unjustifiably harsh based on the particular facts of the case and balancing that against the need to maintain effective immigration control in the public interest. The normal outcome of an application where a person does not meet the requirement of the Rules is refusal and a requirement to leave the UK, so to be unjustifiably harsh there must be something additional beyond the normal consequences of a refusal in terms of impact of the decision on a person (not always the applicant) in order to justify the exercise of discretion.

What length of stay and conditions to grant when discretion is exercised to grant outside the Rules

You should first consider the reasons the person is seeking to enter or stay in the UK. If it is for a primary purpose covered by the Rules, for example to work or study, and you are granting entry or stay for that purpose, you should normally grant the same period and conditions as if they had met the requirements of the route.

The factors taken into account in the exercise of discretion may mean however that a different period of permission and/or different conditions should instead apply, in which case, your decision should be based on all relevant factors.

There may be factors raised which will be sufficiently short lived that it is appropriate to refuse the application and to give an undertaking not to remove the individual or expect them to leave the UK until the circumstances have changed, for example to take exams or to attend a particular event within a few weeks. Any such undertaking should be clear as to why it is being given, for how long it lasts and the position of the applicant during that period (for example if they have no permission to stay they will be unable to work or rent or access public funds and it should be made clear whether or not they are on immigration bail (which can itself be subject to conditions)).

For example, if there are compelling or compassionate reasons to allow a person to stay in the UK to retake exams in 3 months' time you would probably grant 3 months LOTR with conditions prohibiting work and access to public funds. Whereas if a person is seeking entry to attend a funeral and there are compelling or compassionate circumstances justifying a grant it may be appropriate to grant 6 months entry as a visitor, subject to the normal conditions for visitors.

In some cases the compelling or compassionate circumstances may be of short duration but may justify a further grant on the current route even if the principle purpose of the grant is not for the purpose of that route. For example, a temporary worker whose permission to stay is about to expire and whose partner or child has been in a serious accident which prevents them leaving the UK for 6 months could be granted a further 6 months on the same conditions as a temporary worker.

However, if the purpose for which you are granting entry or stay is not a purpose covered by the Rules, or it would not be appropriate to grant on a route under the Rules, you should grant "leave outside the Rules" (LOTR) for a period sufficient to meet the purpose of the grant, or for a maximum of 30 months.

Where it is very unlikely that the circumstances of the person granted LOTR will change over time you should consider whether it is appropriate to grant settlement.

Leave outside the rules (LOTR) and future applications

Where a person is not being granted on a particular route and is granted LOTR for a specific purpose which is time limited it should be made clear in the decision notice that the person will be expected to leave the UK once that period of grant has expired unless the purpose has not been met, in which case they may be able to apply for further permission to stay.

Where the grant of LOTR is for a limited period but the compelling or compassionate circumstances are likely to continue and the person is likely to, or may, be able to extend their LOTR it should be made clear in the decision notice that the person

must make a further application to stay in the UK before their current permission ends.

If LOTR has been granted based on compelling or compassionate circumstances, which continue to exist, a further grant of LOTR would normally be appropriate.

Discretion: relevant factors

Where you are considering the exercise of discretion there are some general factors you must take into account.

Suitability

You must consider whether there are any suitability grounds that apply to the person such that it would not be in the public interest to allow entry or stay in the UK. You should have regard to [part 9 grounds for refusal within the Immigration Rules](#) and the relevant guidance, including whether it is appropriate to exercise discretion, even where you are considering the exercise of discretion outside the Rules.

You must also have regard to sections 32 to 39 of the Borders Act 2007 which imposes a duty on the Secretary of State to deport a foreign national offender unless certain exceptions or exemptions apply, and therefore removes any wider discretion to allow entry or stay in such cases.

Equalities

The public sector equality duty requires that decision makers must not unlawfully discriminate against people who share any of the following protected characteristics; age, disability, gender reassignment, pregnancy and maternity, race (this includes ethnic and national origins, colour and nationality), religion and belief (this includes lack of belief), sex or sexual orientation.

As a starting point you should ensure that you have read the [discrimination guidance](#) as it explains some concepts that you need to understand, including direct and indirect discrimination.

For further information on the Public Sector Equality Duty (PSED) please contact the PSED Team at PSED@homeoffice.gov.uk.

Children duty

[Section 55 of the Borders, Citizenship and Immigration Act 2009](#) places a duty of those exercising immigration and nationality functions to have regard to the need to safeguard and promote the welfare of children (under the age of 18) in the UK. This

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is known as the children duty: see guidance [‘Every Child Matters – Change for Children’](#) which set out the key principles to take into account in all cases involving a child in the UK.

When considering the exercise of discretion to grant entry or stay, it is important to consider as a primary consideration the best interests of any child who may be affected by the decision.

For example, a child may seek entry on arrival to join a parent in the UK. The child may not meet the entry requirements of the Rules but there may be compelling or compassionate reason to allow entry, for example the UK parent is a British Citizen and the other parent has recently died: relevant factors will be the age of the child, whether there are other family members for the child to be returned to outside the UK and whether that would be in their best interests, whether there is a genuine and subsisting relationship between the child and the British Citizen parent, the proposed care arrangements for the child in the UK, etc.

Where a child is in the UK unlawfully but would otherwise meet the requirements of the Rules for a particular route you should have regard to the fact that the child will not have been responsible for regularising their immigration status and so has not themselves acted unlawfully.

Where the child is part of a family with no right to stay in the UK the best interests of the child will normally be met if the family are being treated as a family unit and are all being required to leave or removed together. If there are compelling or compassionate circumstances which mean removal of the child would be unjustifiably harsh it may be appropriate to allow all of the family to stay.

There may be cases where the discretion requested relates only to the period of leave or conditions. A longer period of leave may be considered appropriate, either because it is in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other compelling or compassionate reasons to grant leave for a longer period.

Children separated from their parent(s)/guardian(s) and unaccompanied children

A child may arrive in the UK unaccompanied or become unaccompanied at a later stage, for example, where a child arrives alone in the UK, or a child arrives with their parents or close relatives but is later abandoned, or a trafficked child, or one brought in on false papers with an adult claiming to be a relative

An unaccompanied child is a child who is:

- applying for entry or leave in their own right; and
- is separated from both parents and is not being cared for by an adult who in law or by custom has parental responsibility.

When you become aware of an unaccompanied child this requires immediate attention. Children's services should be contacted as soon as possible to alert them to the fact that you are aware of a child who is likely to need their assistance.

There may be circumstances where an unaccompanied child has been refused under the Rules but cannot be returned to their country of origin because it is established that there are no safe and adequate reception facilities available to them. The decision maker must consider whether a grant of [discretionary leave](#) is appropriate, and if not whether there are other reasons for allowing entry or stay. This will require consideration of a range of factors based on the individual circumstances of each case.

You must consider the individual facts of the case and identify what the reasons are for the child arriving in the UK alone. You should consider how the child arrived in the UK, including to identify whether they may have been exposed to exploitation under the [Modern Slavery Act](#). You should be alert to the possibility and to any indicators that the child is at risk of harm or abuse or may have been trafficked. See further guidance (including making referrals to the local authority) contained in the Victims of Trafficking instruction.

A child may be in the care of their local authority, for reasons such as family breakdown, or for child protection reasons, or because they have been abandoned. Where the child is in the care of their local authority, apply the guidance in the case [R \(SM and TM and JD and Others\) v Secretary of State for the Home Department \[2013\]](#) which states where it is clear a child's future is to remain in the UK, the decision should be made accordingly to prevent prolonged uncertainty.

If you are uncertain whether it is appropriate to exercise discretion to grant entry or stay you can seek guidance from a Senior Caseworker.

Adult at risk

An adult at risk is a person over the age of 18, who is or may be for any reason unable to take care of themselves, or unable to protect themselves against significant harm or exploitation, which may be increased by their personal characteristics or life circumstances. This essentially is an assessment of the vulnerability of the applicant by identifying indicators of risk.

One identifying indicators of risk is the applicant's health (both physical and mental). Based on the evidence provided, you can establish the severity of any medical condition, the impact on the applicant's day to day quality of life, their ability to care for themselves, their dependency on family members for their day to day care, their age and life expectancy.

Protecting vulnerable [adults](#) and [children](#) is a key cross-cutting departmental priority and safeguarding is everyone's responsibility. You must be alert to applicants, both adults and children, who might be vulnerable.

Fairness

Decisions must be taken in accordance with public law principles - they must be procedurally fair, rational, based on relevant information and not irrelevant information and must be reasonable.

Human Rights Act 1998

All decision made must be compatible with the [Human Rights Act 1998](#). On some routes, such as protection and family routes the human rights consideration is an integral part of the decision making process. In other cases there may be a relevant concession under which the human rights claims is considered, for example Article 3 ECHR medical cases are covered by the [Discretionary Leave policy](#).

If you have considered and established that applicant's illness/medical condition does not reach the threshold of Article 3 ECHR you should also consider whether there are grounds for exercising discretion outside the rules. For example, taking into account relevant factors such as the following:

- whether the person is vulnerable
- availability of care and treatment in home country
- family network to provide care both in the UK and in home country
- immigration history and length of stay in the UK
- prospect of removability in the long term
- public interest in maintaining effective immigration control (including relevant policies)

The Court of Appeal case of [Mubeen v Secretary of State for the Home Department \[2021\] EWCA Civ 886](#), concerning an adult relative of a family of Naturalised British Citizens, without leave, sets out principles around consideration of leave on the basis of Article 8 ECHR.

There are other [human rights claims](#) which are not directly covered by Rules or concessions but where, for example, the removal of a person from the UK, or the refusal of entry, would be a breach of the Human Rights Act 1998. In such cases it may be necessary to either defer removal or grant permission to enter or stay, depending on the facts of the case. In such cases the period of grant and conditions will need to be decided based on the particular facts of the case and consistently with similar routes.

Prospect of removal from the UK

Having considered the individual circumstances of the applicant in conjunction with all available evidence, such as risk of harm, availability of treatment, family networks and length of stay, you must consider whether it would be reasonable to remove applicant from the UK.

Even if it is not appropriate to remove the applicant now it may be appropriate to do so in the future and you should not grant on the basis of current legal or practical difficulties in removal. However, where it is unlikely to ever be possible remove the applicant that will be a relevant consideration, alongside any compelling or compassionate circumstances and other relevant factors, in considering discretion.

Evidence

The burden of proof is on the applicant to prove relevant facts and the standard of proof is the balance of probabilities (i.e. it is more likely than not). Where consideration is being given to the exercise of discretion you should consider relevant evidence of the material facts and, where you are not satisfied of those facts you should consider whether to request more evidence. You should only ask for evidence that is relevant to your decision. You must think about whether it is reasonable to expect the person to be able to provide documentary evidence and any reasons they give for not being able to do so.

The types of evidence which may be relevant may include, but are not limited to:

- proof of relationship where application is based on that relationship (for example, birth, death, marriage, civil partnership certificates);
- medical evidence (NHS letters, medical and/or psychiatric reports from qualified specialist outlining applicant's condition, treatment currently received, impact of applicant's condition on day to date life, level of care received and required, life expectancy/prognosis, impact on applicant if support/care is rescinded);
- availability of medical treatment in home country (where relevant);

- evidence of private life in the UK for example employment, community activities;
- court hearing – evidence of court hearing arrangements such as official court documents outlining court dates, involvement of applicant in the proceeding (accompanied by evidence of the court granting permission for the documents can be shared with the Home Office where relevant, for e.g. Family Court documents involving children);
- other supporting evidence/statement demonstrating that applicant's individual circumstances are of a compassionate or compelling nature that would justify the exercise discretion.

You must ensure that the relevant factors are not viewed in isolation. Instead, the cumulative effect of all relevant factors must be balanced when deciding whether to exercise discretion.

Decision making process

When considering discretion you must carefully review any statement of the applicant in conjunction with all other evidence provided in the round.

The standard of proof applicable is the balance of probabilities (which means it is more likely than not). Where the applicant is already lawfully in the UK, you must first consider whether the existing permission can be extended. If that is not appropriate consider the individual circumstances of the applicant.

You must be satisfied to the relevant standard of proof that the evidence provided demonstrates relevant facts i.e. The nature of the emergency, the unexpected event or personal tragedy; whether the event has a specific timeframe, for example funeral arrangements, life expectancy, exam date, etc.

You must consider the applicant's circumstances which might make them vulnerable. If you need to contact the applicant, you should be aware of the sensitivity surrounding applicant's circumstances and take this into account when assessing applicant's credibility and in any communications with them.

Having assessed the evidence you must be satisfied of the facts to the relevant standard of proof and be satisfied that applicant's circumstances are such that discretion should be exercised.

If having assessed the evidence you are not satisfied there is sufficient evidence to make a decision, you must ask yourself whether any additional evidence could potentially change the outcome of the decision; if so, what evidence you would like to

see; is it reasonable to expect that applicant to provide that evidence or is it available from another source.

Where discretion is not exercised the decision notice must include the reasons why, demonstrating a thorough consideration of the applicant's individual circumstances. All decisions must demonstrate the best interests of any child affected by the decision have been considered as a primary consideration.

Granting LOTR/IHS

The Immigration Health Surcharges (IHS) might be required prior to granting permission to enter or stay (IHS is not payable on settlement) to cover the period of grant. This means that you must contact the applicant expressing your intention to grant for a specified period but that this grant is subject to payment of the IHS (providing breakdown of amount due, e.g. 5 years x £624 per year = £3,120)

Secretary of State's personal discretion

The [Immigration Act 1971](#) permits the Secretary of State to exercise discretion to grant permission to stay or facilitate entry outside the rules.

Generally decisions are made on her behalf by decision makers but in some cases if may be appropriate for the Secretary of State to personally decide on the exercise of discretion, for example where there are diplomatic considerations or matters of national importance.

For example, where a person is in immediate and exceptional danger, an overseas request can be raised for example on the Immigration Minister's own initiative or in a letter from an Ambassador. The Secretary of State may then consider exercising discretion to facilitate entry.

The Secretary of State will take into account all relevant circumstances, with the national interest at the forefront of the consideration as to whether to exercise discretion, for example:

- Bilateral and regional relationships – the Secretary of State must carefully consider the impact and potential repercussions of their decision on the relationship between the UK and the country of origin and the associated region when considering exercising their discretionary power. The Secretary of State must be considerate that in exercising their discretion and facilitating safe passage to the UK to a person who is in immediate and exceptional danger overseas, they might unintentionally undermine the rule of law in the country overseas and by doing so damage bilateral relationship, such as those of economic, diplomatic and security nature.

In respect to matters of national interest, the Secretary of State may seek advice from their Foreign Secretary regarding potential diplomatic implications.

- Public perception – where a person is of a high profile, the Secretary of State must take into account the public perception of this person and the potential implication of their decision.

Home Office officials in cooperation with legal, operational and embassy officials should draft a submission in respect of the case, with the results of the fact-finding, which would ask the Secretary of State to consider whether to use their discretion to facilitate entry outside the rules. In particular, such advice would set out views on whether the case in question was exceptional and therefore worthy of an exercise of discretion.

FCDO will need to be consulted if there are diplomatic implications.

Right of appeal and administrative review

A refusal to grant permission to enter or stay outside the Rules or to otherwise exercise discretion is not in itself an appealable decision and does not give rise to an administrative review. However, if the decision on discretion is part of the refusal of a protection or human rights claim there may be a right of appeal against that decision and if the decision on discretion is part of a decision which may be subject to an administrative review.

A decision on discretion can be challenged by judicial review.

For further information please refer to the [Rights of Appeal Guidance](#) and [Administrative review guidance](#).