Human Rights: family and private life

You may be able to apply for the right to remain in the UK based on a human rights argument: your right to family and/or private life in the UK.

This right is known as an Article 8 right, because it comes from Article 8 of the European Convention on Human Rights, which is part of UK law through the Human Rights Act. This right will continue to exist after Brexit.

Family and private life

Your family life consists of your relationships with members of your family. Your relationships with your wife, husband, civil partner, long-term partner or any children under 18 are considered to be family life that you have a right to have protected under Article 8 of the Convention. Your life with other family members is not always considered to amount to family life under Article 8.

Your private life includes things like your work or studies, your life with your friends and neighbours, and involvement with your local community or charity activities. It also includes long-term NHS medical treatment. You can read more about Article 8 (and Article 3) arguments based on medical grounds here: righttoremain.org.uk/human-rights-cases-medical-grounds/

Living in the UK does not, in itself, amount to private life in this legal sense.

Not everything we think would be family and private life would be defined as Article 8 family/private life. The definition is case-specific and is shaped by case law.

The Home Office’s position is that, in terms of family life, only relationships between spouses and/or between parents/carers and children under 18 engage family life in the Article 8 sense. The courts, however, have tended to disagree and prefer a case-specific determination of whether someone’s family or private life engages Article 8.

The 2014 Immigration Act gave instructions to judges on how to decide Article 8 human rights appeals. That legislation says that “little weight” should be given to a private life or relationships formed if you are in the UK unlawfully, or to private life established when your immigration status in the UK is “precarious”. The Supreme
Court has recently decided that precarious immigration status means anything less than indefinite leave to remain.

This means that it is difficult to succeed with family life arguments based on time when, for example, you had no application pending with the Home Office and no leave to remain, or private life arguments when you had no right to remain or had time-limited leave to remain. Leave to remain may still be granted in these circumstances, if the case is exceptionally strong.

Article 8
Article 8 of the European Convention on Human Right says:

1. Everyone has the right to respect for his or her private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 is not absolute. This means there are circumstances in which this right can, lawfully, be breached.

Human rights law recognises that people have the right to a family and private life, but also recognises that the state has the right to exercise immigration control.

Article 8 arguments for the right to remain in the UK are therefore always about weighing up these opposing rights – if you can prove that the breach to your Article 8 rights would be so serious that it outweighs the state’s right to remove/deport you (a “disproportionate breach”), you should be granted leave to remain.

Because there are many case specific factors to Article 8 cases, and because proportionality and other factors are subject to interpretation, how Article 8 cases are decided depends very much on the latest case law.

Generally, the interference is in accordance with the law (unless the Home Office hasn’t followed its own policies, and is attempting for example an unlawful removal). The interference does comply with a legitimate aim – it has been accepted in law that maintaining effective immigration control is a legitimate aim. The Home Office may concede that they are breaching your Article 8 rights, but say that it is a proportionate
breach when considering the other factors, and that your grounds to stay don’t outweigh the government’s need to pursue its legitimate aim. Factors that count against you in these arguments are things like poor immigration history and criminal convictions.

Factors that could be in your favour are family in the UK (particularly British children), lack of connection to your country of origin, length of time in the UK and community connections, and some medical and mental health needs.

It is worth remembering that having a British partner or child is not enough to be granted leave to remain in the UK. The Home Office do have to show that they have considered the “best interests” of the British child, but having a British child is not enough in itself to obtain leave to remain.

Sometimes, the Home Office will say the breach is proportionate (or even that there will not be a breach) because the British citizen or resident can go and live with the person being removed in their country, or they can keep in touch by Skype and email etc. See below for information on gathering evidence to counter this argument.

The immigration rules

The Home Office’s position is that the immigration rules cover the extent of the UK’s obligations under human rights law, and so any Article 8 family/private life case that could be successful would meet the requirements of the immigration rules.

However, the fixed immigration rules criteria cannot possibly cover all case-specific variations of cases, and the courts have since ruled that if a case does not meet the requirements of the immigration rules, Article 8 arguments should be considered outside of the rules.

The immigration rules are even harder to meet if you are applying for the right to stay based on family/private life after a criminal conviction. Read more about this in the Removal/Deportation section of the Toolkit.

Some of the immigration rules can be helpful. An example of this are the immigration rules that cover private life, and can lead to leave to remain if you have spent 20 years in the UK; or if you are between 18 and 24 years old and you’ve lived continuously in the UK for more than half your life. See Long Residence section for more information.

The immigration rules also allow for applications to leave to remain on the basis of your private life if you are over 18 years old, have been in the UK for less than 20 years, but
would have very significant problems living in the country you’d be returned to. The Home Office give the example of not speaking the language and not being able to learn it.

The immigration rules allow for applications for the right to remain based on your family life as the parent of a child. Read more about that in the Rights of the Child section of the Toolkit.

**Family life: relationships**

The Immigration Rules allow you to apply for the right to remain on the basis of family life, if:

- you have a “genuine and subsisting relationship”
- with a partner who is in the UK and they are a British citizen, or have indefinite leave to remain, or refugee status/humanitarian protection
- and there are insurmountable obstacles to your family life with your partner continuing outside of the UK. You need to provide evidence that your relationship is genuine (see Action Box below). The Home Office may invite you and your partner to attend an interview to assess this. They are unlikely to refer to it, to you, in language that makes it obvious that the interview is about testing the “genuineness” of your relationship. They might just refer to it as a “marriage interview” or “relationship interview”. Both of you in the relationship must attend this interview.

A subsisting relationship means a relationship that currently exists. See below for information on how to prove this. A partner is someone you are engaged to, married to, or someone you have lived with in a relationship like marriage, for at least two years. The meaning of “insurmountable obstacles” has been the subject of legal debate. If you have a lawyer, they will need to show that the reasons you couldn’t live outside of the UK amount to insurmountable obstacles. If you are making the application without a lawyer, concentrate on showing why it would not be reasonable for you to live with your partner outside of the UK, and providing evidence for this.
ACTION SECTION: evidence

Think about the evidence you need to gather to prove the strength of your family or private life in the UK.

If you are applying on the basis of a relationship, you need show evidence that your relationship is genuine, long-term, and ongoing. This might include evidence that you live together; a joint bank account or other joint financial responsibilities; evidence about meeting each other’s families; or your plans for the future together. Evidence might take the form of photographs, household bills, and statements from friends and family.

Remember you need to show that there are insurmountable obstacles to you living in another country – how can you prove this? Are there family, work, health or care reasons that mean you or your partner have to be in the UK? You will need official letters, documents and statements to prove these.

If you are applying on the basis of a child, read the Rights of the Child section for information about evidence in these applications. Remember you may need to prove that the relationship could not be maintained through occasional visits, or via Skype (as the Home Office may suggest this).

The guidance on Article 8 applications is that it is in the public interest to refuse them if you do not speak English, and if you are not financially independent. If you do speak English and are financially independent (meaning, you are not reliant on public funds such as benefits), you should provide evidence of this in your application.

Making the application

Article 8 family/private life cases, if they are not part of an asylum application, are generally not eligible for legal aid.

It is possible to apply for exceptional legal aid funding, but the threshold for this is high.

If you are seeking asylum, human rights arguments for leave to remain should be made at the same time as applying for asylum. It is common, however, for human rights grounds (such as a relationship or the birth of a child) to arise after an initial application for asylum. You do not have to use a particular form for an Article 8 application if you have claimed or are claiming asylum.

If you are in detention, your Article 8 application will need to be made to a member of Home Office staff at the detention centre.
If you are being held in prison under immigration powers, you will need to make your application to a detainee custody officer, or a prison officer/prisoner custody officer.

Article 8 arguments may also form part of your appeal submissions if you are refusing a decision on another application. Or if you are "appeal rights exhausted", you may make family/private life submissions as part of an asylum or human rights fresh claim.

If none of these apply to you, you need to use the correct form to make an application to stay in the UK under Article 8. You can find the online application form and guidance here: https://www.gov.uk/government/publications/apply-to-extend-your-stay-in-the-uk-form-flrfp

As with many immigration applications, there is also a “suitability” requirement, meaning that criminal convictions, “bad character”, poor immigration history or unpaid NHS debts could disqualify you. The immigration rules currently state that an application may be refused if you have failed to pay charges “in accordance with the relevant NHS regulations on charges to overseas visitors and the outstanding charges have a total value of at least £500.”

Application fee

At the time of writing, the fee for making the application from within the UK is £1033 (and an additional £1033 for each dependent included in the application).

See the Home Office website for the latest information on this: https://www.gov.uk/uk-family-visa

You do not have to pay the fee if your Article 8 application is part of a protection claim (asylum, humanitarian protection, Article 3).

Fee waiver

If you are destitute and cannot afford to pay the application fee, you can apply for a fee waiver. You will need to show evidence that you are destitute, or that you would become destitute by paying the fee.

The Home Office definition of being destitute is if you/your dependents do not have adequate accommodation or any means of obtaining it (whether or not your other essential living needs are met); or you have adequate accommodation or the means of obtaining it, but cannot meet your other essential living needs.

The Home Office will assess whether you have no or very limited disposable income:

- Could you pay the fee now?
- If not, could you realistically afford to save money for the fee so that you could apply within 12 months (if it were reasonable to delay your application for this length of time)?
- Could you borrow money from family or friends?
- Is there any prospect of your financial circumstances changing within the next 12 months?

You will need to show that you can't pay the fee and couldn't save the money for the fee in order to be eligible for a fee waiver.

It is essential that you provide evidence of your inability to pay the fee. Evidence might include:

- Information about and proof of your accommodation (or lack of it). Who provides the accommodation? If you do not pay for it, who does? Provide proof of this.

- If you have some income you will need to show how much this is. If you have a job, provide payslips or documents that show income over a period of time, like a P45 or P60. You will need to show that this income is not enough to meet you and your dependents' essential living needs and pay the application fees.

- If you are receiving asylum support, or support from the Local Authority (under the Children Act) the Home Office position is that, by being in receipt of these kinds of support, you are not destitute. Therefore you will need to show that paying the fees would make you destitute. Do you have any money left over from this support once your essential living needs are met? We know this sounds like a ridiculous question as the support amounts are so low, but you need to prove this. What do you spend the money on? Provide proof of utility bills (heating, gas, water); food bills; essential travel costs; bank statements if you have them.

- If you are being supported by friends/the community/a charity, provide proof of this. What/how much are they giving you? Could they give you more? How long will this support continue?

- If you are street homeless, can someone provide statements to prove this? Were you previously evicted from a property and if so, do you have a copy of the eviction notice? Do you have records of interaction with any homeless charities?

The Home Office may carry out “financial and residential enquiries”, such as credit checks, interviews and home visits, when deciding on your fee waiver application.

To apply for a fee waiver, you need to apply online here: https://visas-immigration.service.gov.uk/product/fee-waiver

Health surcharge

You will need to pay the health surcharge as well as the application fee, unless you fall into one of the exempt categories or can prove you are destitute and entitled to a fee waiver.

Read more about that in the Entering the UK section of the Toolkit.
If your application is refused

If your Article 8 application is refused, you may have a right of appeal. The Home Office may say, however, that they consider your human rights claim to be “clearly unfounded” and certify your claim. This means you wouldn’t be able to appeal the decision in the UK unless you can show that “serious and irreversible harm” would occur if you had to appeal outside of the UK. Read more about that in the Appeals section of the Toolkit.

If you do not have the right to appeal the refusal, you may wish to consider a judicial review. Read more in the Judicial Reviews section of the Toolkit.

If you do have the right to appeal, it’s important that people who may have provided witness statements – about your family and private life in the UK – attend the hearing. They may be asked to give evidence. If you had a lot of witnesses statements (for example, more than ten), they may not all need to attend. If you have a lawyer representing you, they will give you advice about this. Evidence from witnesses who are unwilling to attend the appeal hearing – or are seen to be, even if they simply cannot attend the hearing – will generally be taken less seriously.

If your application is successful

If you are successful in an application based on Article 8 where your situation falls under the immigration rules, you will receive leave to remain for 30 months. This is renewable, and you will be able to apply for Indefinite Leave to Remain (ILR) after a certain number of these 30 months periods - see Family Migration section of the Toolkit for more information,
as this depends on whether you are entering the five or ten year route to settled status.

If your application is based on Article 8 outside of the rules, and you are successful, you will receive leave to remain outside of the rules. This will usually be for 30 months, which you can apply to renew.

The Home Office may apply a “no recourse to public funds” restriction on your leave to remain, meaning you cannot access welfare benefits and housing support. If you are destitute or there are compelling reasons relating to the welfare of a child why this should not be applied to you, you need to tell the Home Office this and provide evidence.

Next section: Rights of the Child