

Human Rights

The UK is bound by the European Convention on Human Rights, and the protection of these rights is part of UK law through the Human Rights Act.

The main rights that lead to a specific form of leave to remain are those under **Article 3 and Article 8** of the Convention.

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 to arise after an initial application for asylum.

Article 3

Article 3 protects individuals from being subjected to torture, inhuman and degrading treatment.

Article 3 is absolute, so there is no situation in which it can lawfully be breached.

Many cases in which Article 3 rights could be breached are likely to fall under the Refugee Convention, such as if you are at risk of torture. Some Article 3 cases are about different risks, however. This includes exceptional medical cases.

The threshold for Article 3 medical cases is extremely high. Case law says that the threshold is when a person is close to death and where removal would hasten their death, and expose them to a real risk of dying “under most distressing circumstances”, because this would amount to inhuman treatment.

It is not sufficient to argue that you need to stay in the UK because the medicine you need to keep you well would be too expensive for you in your own country (unless it is so prohibitively expensive it is in effect unavailable).

To succeed, you would need medical and expert evidence to show that the treatment you need is not available in your home country. If you are successful in a human rights medical case, you are likely to be granted a time-limited period of Discretionary Leave. You may be given the right to work/claim benefits with this leave, but in some cases the Home Office may try to prevent you having the right to claim benefits/housing support (having “recourse to public funds”).

Medical grounds may also form part of an application based on Article 8.

You can find the application form and guidance for making an application on medical grounds (not as part of an asylum or other claim) here:

<https://www.gov.uk/government/publications/application-to-extend-stay-in-the-uk-flrhro>

If you are applying under Article 3 there is no fee, but if you are applying under Article 8 on medical grounds, you may have to pay the specified fee and health surcharge unless you can prove you are eligible for a fee waiver. For links to forms and fees, see the links on the Toolkit webpage *Human Rights*.

Article 8

Article 8 protects the right to 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 under Article 8. 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.

Article 8 is not absolute. 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 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.

Razgar Test

You may hear lawyers and the Home Office refer to the “Razgar Test” when talking about Article 8 rights. This is the case law from 2004 that provides a five-point test for Article 8 claims based on family or private life in the UK.

The Razgar test asks:

- would someone's removal be an interference with their private or family life;
- would this interference engage the operation of Article 8;
- would the interference (removing the person) be in accordance with the law;
- would the interference comply with the legitimate aim of a democratic society;
- and would such an interference be proportionate to the legitimate public end sought to be achieved by the public authority (the Home Office)?

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 minor children 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. See here for more on this: www.freemovement.org.uk/when-is-article-8-private-and-family-life-engaged

Generally, the interference *is* in accordance with the law (unless the Home Office hasn't followed its own policies, and is attempting an unlawful removal etc). 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. Supporting evidence could be gathered to show why that would not work – why the person with British citizenship or leave to remain in the UK has to be in the UK, or why the relationship wouldn't work over the internet or through occasional visits.

Article 8 and the immigration rules

Since the government introduced new immigration rules in 2012, their position has been that the immigration rules cover the extent of the UK's obligations under human rights law, and so any Article 8 case that could be successful would meet the requirements of the immigration rules.

Some of the immigration rules can be helpful, and if you meet them, your application for leave to remain should be relatively straightforward. An example of this is the immigration rule that covers private life, and leads to leave to remain if you are between 18 and 24

years old and you've lived continuously in the UK for more than half your life. This also gives you access to the ten year route to settled status (indefinite leave to remain). See Toolkit *Family Migration* section for more information.

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 elements should be considered outside of the rules.

It is increasingly difficult to prevent a deportation following a criminal sentence using Article 8 grounds. The decision makers (the Home Office and the courts) follow the official guidance on this, which states that it will “only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors”.

Making an article 8 application

Article 8 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 is very high.

You do not have to use a specified form for an Article 8 application if you have claimed or are claiming asylum; if you are in detention (in which case you make your Article 8 application to a member of Home Office staff at the detention centre, a detainee custody officer, or a prison officer/prisoner custody officer if you are being held in prison under immigration powers); you are making an appeal; or you are making an asylum/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 application form and guidance here:

<https://www.gov.uk/government/publications/apply-to-extend-your-stay-in-the-uk-form-flrfp>

See Toolkit *Human Rights* webpage for links information on exceptional legal aid funding, forms and fees.

Application Fee

At the time of writing, the fee for making the application is **£1033** (and an additional £1033 for each dependent included in the application). See the notes at the start of the application form for the latest information on this.

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

If you are **destitute** and cannot afford to pay the 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.

Fee waiver

If you are destitute and cannot afford to pay the application fee, you can apply for a fee waiver.

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, fill in the form. Submit the form, with your evidence, with your leave to remain application. Link to the form is on the Toolkit webpage *Human Rights*.

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 Toolkit section *Entering the UK*.

ACTION SECTION

As you will see if you look at the fee waiver form, it is a long form to fill out! Friends/supporter may be able to help with this, and with gathering the essential evidence to help your application be successful.

If a fee waiver is not granted, your supporters/community could help raise the money for the application/health surcharge.

After reading this page, and the page on *Rights of the child* if relevant to your case, think about the evidence you need to gather. Friends, supporters, your community can help gather this evidence and may even provide evidence in the form of statements/supporting letters.

Article 8 and appeals

If you apply for leave to remain (perhaps on human rights grounds, perhaps initially on asylum grounds) and you have the right to appeal, you may wish to raise Article 8 issues during your appeal, if they apply to you.

Colin Yeo, the top immigration barrister who edits the Free Movement blog, has some helpful advice about Article 8 appeals. The advice makes reference to young men, as it is from a blog post about young Afghan boys and men, but much of the advice is useful for all Article 8 appeals:

"In all cases based on Article 8, evidence of social, cultural, educational and other connections to the UK will be critical. Such evidence requires witnesses; current and former foster carers, friends from school, teachers, social workers, counsellors and anyone else who can vouch for the young man should be approached. Many young men are reluctant to do this because they do not like to ask favours, they are proud and they do not want to appear needy or vulnerable. This tendency must be resisted and overcome.

It is best if the witnesses can attend court. The more the merrier. More than 10 or 12 is probably excessive but it is helpful to convey in the strongest way possible that the young man is genuinely well regarded and integrated, to the point that many different people are willing to go out of their way and come to court to support him. Judges tend to be self important (it is virtually part of the job description) and attending court is the best, perhaps only, way anyone can show their respect to a judge. Written statements by those "unwilling" to attend in person are bound to be given less weight.

With considerable social and community support for a particular Appellant, perhaps combined with his having done very well at school or college (I have had the privilege to represent young Afghans who have qualified for university), there is a possibility that an appeal might succeed. Without that visible support, though, an appeal on private life human rights grounds is basically doomed to fail."

From www.freemovement.org.uk

Leave to remain based on Article 8

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 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