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21. Human Rights Claims and Racial Discrimination Claims

The Human Rights Act 1998 came into force on 2 October 2000.

Any person subject to enforcement action may make a claim under section 84(1)(c) of the 2002 Act that the decision (under Section 82) is unlawful under section 6 of the Human Rights Act 1988 as being incompatible with the appellant's Convention rights.

21.1 Procedures to follow when a Human Rights claim is made - illegal entrants/section 10 administrative removal cases

- ◆ forward all claims to the relevant case-working section:
 - a) Operational Certification and Support Unit (OSCU) where removal directions are set for less than 3 working days away
- ◆ The relevant casework department will fax any forms to the LEO for service by an IO

21.2 Article 6 (Right to a fair trial) and civil claims

Enforcement and Removals staff should consider the following when considering cases where it is alleged that:

- ◆ The individual has an outstanding civil action in the United Kingdom to which Article 6 applies; **or**
- ◆ The individual is a prospective party to a civil action in the United Kingdom to which Article 6 applies that has not yet commenced, but is being actively pursued;

And

- ◆ It is alleged that removal before the determination of the civil proceedings would breach the individual's Article 6 rights under the European Convention on Human Rights ("ECHR") in respect of those proceedings.

This guidance therefore **only applies primarily to private law damages** claims lodged in the United Kingdom to which Article 6 applies and not to applications for Judicial Review (JR) concerning substantive immigration decisions. Guidance on JR can be found in Chapter 27 of the Immigration Directorate Instructions (IDI's) and chapter 21 of the Operational Enforcement Manual (OEM).

This guidance is **not** concerned with cases where it is alleged that an individual will not receive a fair trial in their own country and that to remove them from the United Kingdom will breach their Article 6 rights. Such cases must be considered in accordance with the Asylum Policy Instruction (API) on ECHR - European Convention on Human Rights.

In addition to applying the factors set out in this guidance to all cases where Article 6 has been raised, staff handling these cases must also refer to the guidance on dealing with further submissions if the individual has previously made an asylum or human rights claim in the United Kingdom and any appeal rights against the refusal of that claim are now exhausted.

Active consideration must be given to the lawfulness of removal action in all cases covered by this guidance. If it is accepted that removal would breach Article 6, then removal must be deferred for an appropriate period. Each case must be considered on its individual merits after taking into consideration all relevant factors.

In all cases where it is proposed to reject the Article 6 claim, case-workers must seek guidance from a senior case-worker as to whether a right of appeal must be given.

21.3 Considering claims that Article 6 ECHR will be breached

This guidance explains what factors must be taken into consideration by Enforcement and Removals case-workers in deciding whether to proceed with or initiate removal action in cases where it is alleged that the removal of an individual from the United Kingdom who has an outstanding or proposed civil claim would breach his rights under Article 6 ECHR in respect of those proceedings. Article 6(1) applies to all proceedings, whether between two individuals or between an individual and the state, the result of which is decisive for “civil rights and obligations.”

Each case must be decided on its own merits. There is no blanket policy. Case-workers must consider each claim on a case- by- case basis taking into account all relevant factors.

This instruction covers:

- ◆ Claims that if Border and Immigration Agency continues with its planned removal of the individual from the UK before the conclusion of the litigation, this will breach his Article 6 rights in respect of those proceedings.

This instruction does **not** cover:

- ◆ Claims that the individual will not receive a fair trial in their home country.

21.3.1 The nature of Article 6

Article 6 is principally concerned with procedural fairness in the determination of both criminal charges and civil rights and obligations. This guidance is concerned with private law damages claims which are determinative of a person's "civil rights and obligations" and to which Article 6(1) therefore applies.

The right to a fair hearing in Article 6(1) ECHR is an absolute right. This was confirmed in *Brown v Stott [2001] 2WLR 817*. However, two important points were made by the Privy Council in this case:

- ◆ The right to a fair hearing is absolute but what constitutes a fair hearing may vary with the circumstances;
- ◆ At least some of the implied rights that are components of the right to a fair hearing, such as the principle of 'equality of arms' and the right of access to the court may be made subject to lawful restrictions.

21.4. The burden of proof – article 6 cases

The onus is on the individual to show that removal from the United Kingdom would breach his rights under Article 6. However case-workers must still consider all of the claims made by an individual on a case-by-case basis and form a view as to whether or not removal would breach his Article 6 rights in respect of civil proceedings to which he is a party (or prospective party). In practice, it will be necessary to investigate allegations made by an individual and obtain our own evidence on the points raised (for example the legal representatives may claim that there are no communication facilities available to their client in his home country) in order to be able to rebut the assertion that he would be unable to conduct the litigation from abroad.

In each case where the claim is being rejected, it must be shown in the rejection letter that all the issues raised have been fully considered and a full explanation given as to why they are being rejected.

21.5. Obligation on the individual to issue and pursue claims expeditiously

The fact that an individual asserts, without more, that removal will breach his Article 6 rights will not automatically suspend any proposed removal action. There is an obligation on the individual to substantiate his assertions and provide evidence to show that he is pursuing civil litigation.

Moreover it is expected that an individual will issue and pursue his claim expeditiously so as not to delay removal action unnecessarily. Where an individual has not yet issued a 'letter before claim' (this is the letter that advises of a proposed civil action) despite there being a lapse in time since the events which gave rise to the claim took place, case-workers should ask the individual to explain the reasons for the delay.

Consideration should be given as to whether the individual's conduct has contributed to any delay in respect of the progress of the litigation (to frustrate the proceedings and prolong their stay in the United Kingdom). Similarly, the conduct of the party against whom the civil claim has been made (including the Home Office) should be considered to establish if the actions of that party have resulted in the delay.

A case-worker must not expect an individual pursuing civil action to give their entire attention and time to the claim as soon as the alleged cause of the action arises. Neither should they assume that the individual had failed to avail themselves of reasonable opportunities to issue and pursue the civil action simply because there has been a delay. The individual must be given the opportunity to explain any delays if they are not apparent from available documentation.

If the individual can give no reasonable explanation for a lengthy delay then the case-worker may decide, having taken into consideration all the relevant circumstances, that he was given a reasonable opportunity to present his case as required by the principle of 'equality of arms' but failed to avail himself of that opportunity. If so, the case-worker may

properly form the view that removal will not breach Article 6. In cases of this nature, the case-worker should write to the person concerned informing him of the decision and making clear that removal action will now proceed. It is vital that the letter addresses all of the Article 6 issues.

21.6 Civil proceedings brought against the Secretary of State

Additional considerations arise where the Secretary of State is a party to the proceedings for example where an individual is bringing a civil action against the Home Office for unlawful detention. It is extremely important that an individual is not removed from the United Kingdom **for the purpose of** frustrating the civil action being brought, or that any action is taken that **gives that appearance**. Therefore, case-workers should consider how their actions, when dealing with these cases, may be perceived.

This principle was stated by the European Court of Human Rights in Strasbourg which has stated that:

“Article 6 requires not only that justice be done but also that it be seen to be done”
(*Delcourt v Belgium* [1970] 1 EHRR 355 paragraph 31)

21.7 Article 6(1): general

Article 6(1) affords an individual, whose civil rights or obligations are being determined the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In essence, Article 6 is therefore predominately concerned with procedural fairness in the determination of an individual’s civil rights and obligations (or criminal charges).

A number of specific rights have effectively been added to Article 6(1) by virtue of ECHR case law. The five rights guaranteed by (or derived from) Article 6 which are of most relevance in the present context are:

- ◆ The right of access to a court or tribunal;
- ◆ The right to a fair hearing (including the principle of “equality of arms”);
- ◆ The right to a public hearing;

- ◆ The right to a hearing within a reasonable time:

It is the first two rights that will have the greatest relevance when considering whether removal would breach a person's Article 6 rights in respect of private law proceedings to which he is a party (or prospective party). The latter rights are primarily concerned with the conduct of the proceedings more generally and are reflected in the Civil Procedure Rules.

It must be remembered that the rights conferred by Article 6(1) apply to any person who is a party (or prospective party) to proceedings before a court which are determinative of that person's "civil rights and obligations". These rights apply wherever they are and whatever their immigration status may be.

Whilst some of these rights are explained in more detail below, case-workers should remember that when addressing the Article 6 claim they should not confine themselves to the issues raised by the applicant or his representative. Rather case-workers should address all aspects of the Article 6 claim whether stated or implied.

If a decision is taken to reject the Article 6 claim, case-workers must produce an assertive letter which examines all implied as well as stated claims. For example, even if not raised, case-workers should always consider the principle of 'equality of arms' and 'right to a fair trial'.

21.7.1 Article 6(1): right to a fair hearing/right of access to a court

In considering whether removal would breach a person's Article 6 rights in respect of a private law proceedings to which he is a party (or prospective party), case-workers must have particular regard to the right to a fair hearing – including the principle of "equality of arms" - and the right of access to a court. In most cases, the right to a fair hearing will be the more important consideration, although the right of access to a court may also be relevant.

21.8 Principle of 'Equality of Arms'

One component of the right to a fair hearing is the principle of "equality of arms". This means that everyone who is a party to proceedings must have a reasonable opportunity of

presenting his case under conditions which do not place him at a substantial disadvantage compared to his opponent.

When dealing with a claim from a person subject to removal action, particular consideration must be given as to whether the principle of “equality of arms” will be met if the individual is not present for the preparation of the litigation, or thereafter for one or more subsequent stages of the civil action including the hearing. The questions that should be addressed are:

- Will the individual be able to conduct proceedings from outside the United Kingdom;
and
- Will conducting a civil action from outside the United Kingdom afford the individual a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage compared to his opponent?

It may be argued for example that the individual needs direct personal contact with their legal representatives in the United Kingdom. It is for the legal representative to put forward their case to substantiate this claim and case-workers cannot make a judgement on the frequency of contact required. Alternatively the legal representative may allege that the individual will be required to give continued instructions or to sign documentation (it is worth noting that this is more likely at an early stage of the proceedings). Where there is a sufficient communication infrastructure in the country of return it is unlikely that an individual will need to remain in the United Kingdom solely to properly instruct his legal representative. Case-workers may make a judgement on any statement put forward by the representative. In order to fully assess whether the individual can conduct proceedings from abroad case-workers must refer to the relevant CIPU country information and must reach a decision based on fact.

Another argument which may be encountered is that the individual is representing himself in court and so therefore needs to remain in the United Kingdom. This in itself will not preclude removal action if it can be established that telephone or video conferencing facilities are available in the country of return which again can be determined by referring to the relevant country assessment. Case-workers should be aware that the Civil Procedure Rules make provision for telephone and video and conferencing facilities. Part 23.11 refers to the powers of the court to hear a case in the absence of a witness. In addition, Part 32.3 clarifies that witness evidence may be given via a video link or other methods.

If a decision is taken to reject the Article 6 claim, the decision letter must fully address all of the Article 6 issues whether implied or stated. For example the letter should always address the principle of ‘equality of arms’ even if not expressly referred to by the individual or his representative. The letter must also set out the full immigration history of the case.

If it is considered that removing the individual before the conclusion of his civil action may not be consistent with the principle of “equality of arms” the case-worker must consider whether to defer or suspend removal action, and for what period.

21.9 Right of access to a court

Although there is no express guarantee of the right of access to a court in the text of Article 6, it was held in *Golder v United Kingdom* [1979] 1 EHRR 524 (a case involving a refusal to permit a convicted prisoner to contact his solicitor with a view to instituting civil proceedings for libel against a prison officer) that the right of access to the judicial process is inherent in Article 6. The European Court of Human Rights stated that it was inconceivable that Article 6(1) should have detailed procedural guarantees for civil cases without first having protected the right of access to a court.

21.10. Lawfulness of a case-worker’s actions

It is imperative when considering Article 6 issues, that case-workers consider the lawfulness of their actions under the legislation that they are applying; they must also ensure that their actions are compatible with the rights guaranteed by Article 6(1) as described in para 6.2. It is unlawful under section 6(1) of the Human Rights Act 1998 for a public authority to act in a way which is incompatible with a Convention right.

An important point that must be remembered is that it is not for the case-worker to prejudge the outcome of any civil proceedings that are being pursued; this is for the courts to decide. Any letter dismissing the Article 6 contentions must **not** therefore make any reference to the likely outcome of the civil proceedings itself.

In considering the nature of the litigation and the circumstances that have resulted in the civil claim being brought, it is permissible for case-workers to take account of issues such as an individual’s need to submit to medical examinations, or the complexity of the case.

However, these considerations must not develop into an investigation of the alleged assault or incident.

21.11. Conducting litigation overseas

The right to a fair hearing and the principle of 'equality of arms' does not mean that a party to a civil action will always have the right to be in the United Kingdom throughout the duration of the litigation. If the individual can conduct the litigation from outside the United Kingdom, then removal will not breach Article 6.

Consideration should be given to the use of video links or other similar facilities if the case proceeds to trial. Rule 32.3 of the Civil Procedure Rules specifically provides that the court may allow a witness to give evidence through a video link or by other means. This was recently confirmed in *The Attorney General of Zambia for and on behalf of the Republic of Zambia and Meer Care & Desai (A firm) and Others* [2005] EWHC 2102 where it was held that Article 6 does not afford a party to civil proceedings a right to be present at a hearing.

The case-worker should consider whether the individual would be able to communicate effectively with his solicitor from outside the United Kingdom and whether it will be necessary for the individual to be in the United Kingdom at certain stages of the litigation.

21.12. Article 6 together with other human rights claims

Where an individual raises additional human rights issues together with the Article 6 claim, case-workers will need to consider whether these issues have been considered previously. Each article will need to be addressed in turn and in accordance with the normal procedures for such consideration. It is important that priority should be given to any additional human rights articles where a positive decision will result in a grant of leave (specifically Article 3 or 8).

The grant of leave under another article of the ECHR will make the claim that removal is a breach of Article 6 obsolete as the grant of leave means that removal is no longer under consideration.

21.13. Summary of criteria to take into consideration when deciding whether to pursue removal action

When considering whether to remove an individual from the United Kingdom before their outstanding civil action has been settled, the following issues may be raised:

- ◆ The individual does not have access to communication facilities in the Country of return
- ◆ The individual needs to undertake a medical examination
- ◆ The individual will not have access to funding to pursue his civil action
- ◆ The individual won't be able to have access to interpreters
- ◆ The individual wants to represent himself in court
- ◆ The need for the individual to give evidence in court
- ◆ The amount of direct personal contact the individual claims they will need to instruct their UK legal representatives

Other factors which may not have been raised by the individual must be considered in all cases:

- ◆ Timing of the application:
- ◆ Complexity of the case:
- ◆ Access to telephone and conferencing facilities in the country the individual is to be returned to:
- ◆ Reliability of postal/email/fax facilities in the country the individual is to be returned to;
- ◆ Whether liability has been admitted;

None of the above factors are necessarily barriers to removal (and this list is not exhaustive) and each case must be considered on its individual merits taking into consideration all relevant factors, in order to decide whether removal would breach Article 6. If after consideration it is viewed the claim should be rejected, the reasons for the rejection must be fully addressed in the decision letter.

21.14. Deciding that removal would not infringe article 6

Once this guidance has been applied to an Article 6 claim then case-workers should be able to reach a decision on whether removal action can proceed. Case-workers must remember that if they are handling a case where a previous asylum or human rights claim

has been made that they should additionally refer to the guidance on dealing with further representation.

In cases where removal may need to be deferred for a substantial period of time e.g. the principle of 'equality of arms' is not met if the individual is removed, case-workers should seek advice from the Enforcement Policy Unit by emailing their query to EPU Enquiries@homeoffice.gsi.gov.uk.

In particularly complex cases especially those where the individual is subject to deportation action, advice must be sought from EPU before a decision on the case is reached.

21.15. Procedures to follow when Human Rights issues are raised - deportation cases

Where a deportation decision is initiated on or after 2 October 2000 a one-stop notice and statement of additional grounds (IS74 and IS76) should accompany the notice of intention to deport. At this stage the person is under an obligation to raise any human rights issues in the statement of additional grounds.

21.16. Racial Discrimination Claims

The Race Relations Amendment Act 2000 (RR (A)) came into force on 2 April 2001. This extends racial discrimination legislation on the grounds of colour, race, nationality, or ethnic or national origins to Border and Immigration Agency and other public authorities. The RR (A) contains a limited exemption for Border and Immigration Agency for lawful discrimination on the grounds of nationality or ethnic or national origin if it is required by legislation or has been authorised by Ministers. It also provides for a right of appeal to an immigration judge on racial discrimination grounds against an immigration decision and for a right to bring a claim for damages in the civil courts for conduct-related complaints. **Discrimination on the grounds of race or colour is not permitted under any circumstances.**

21.16.1 Decision based Racial Discrimination claims

Section 82 (1) of the 2002 Act states:

“Where an immigration decision is made in respect of a person, he may appeal to an immigration judge.

Section 82 (2) outlines what “immigration decisions” may be – Chapter 20 refers.

Grounds of Appeal

Section 84 of the 2002 Act sets out grounds of appeal, specifically:

- Section 84(1)(b) – decision is unlawful under Race Relations Act 1976

21.17. Procedures to be followed where a Racial Discrimination claim is made under Section 84 of the 2002 Act

Once a claim is made:

- ♦ ensure that the decision is one taken under the Immigration Acts in relation to immigration status (see above);
- ♦ Serve relevant Notice of Appeal IS87 (non-UK) form according to Section 82 decision: - notice of an appeal to an immigration judge. Date when appeal should be returned must be completed where possible. The form contains a box for reasons for late return of form, which then forms the basis of out of time consideration.

21.17.1. Procedures to be followed where a Racial Discrimination claim is combined with a Human Rights claim made under section 84 of the 2002 Act - illegal entrants/section 10 administrative removal cases

Follow the procedures set out in 21.1 as for a human rights claim. (NB Racial Discrimination claims are non-suspensive).

21.17.2. Procedures to be followed where a Racial Discrimination claim is combined with an Asylum claim - illegal entrants/section 10 administrative removal cases

Follow the procedures set out in Chapter 22 as for an asylum claim.

21.17.3. Procedures to be followed where a Race Relations claim is combined with deportation cases

Follow the procedures set out in Chapter 20.11 as for deportation cases.

21.18. Decision and Conduct Based Racial Discrimination claims

Where an individual claims that they have been discriminated against unlawfully on racial grounds both in terms of:

- ◆ taking an immigration decision under section 82; and
- ◆ The behaviour of an individual involved in this decision; then they have a right of appeal under section 84 (1) (b) of the 2002 Act (see section 20.1). If the AIT upholds a claim of unlawful discrimination the case can be "exported" to the civil courts for consideration of the award of damages.

The majority of these cases will be dealt with by the Appeals Processing Centre.

In the event that there is a detailed claim that an individual has acted inappropriately, this must be forwarded to the IS Complaints Unit (ISCU) to co-ordinate the investigation. A "fact-finding" report from the investigating officer will be appended to the appeal statement.

Priority should be given to the investigation of such cases.

21.19. Mixed decision & conduct based claims

Once a claim has been made, follow the procedures set out above for a racial discrimination claim, but also copy the IS126r, with enclosures, to the local HMI to forward to ISCU.

21.17. Conduct Based Racial Discrimination Claims

Where a claim of unlawful discrimination is made which relates solely to the conduct of an individual member of staff, the complainant may take this case to the county or sheriff court. Although staff may be named, the case will be brought against Border and Immigration Agency. The complainant has 6 months from the action complained of to commence litigation.

Where notice of proceedings is received at a port or enforcement office it should be referred immediately to ISCU. Claims made to the County Court are non-suspensive, but an attempt to remove a person whilst litigation is ongoing may prompt a JR application. If this occurs refer the case to the relevant casework section.

Border and Immigration Agency staff are not individually liable for any damages awarded and Border and Immigration staff are responsible for arranging and taking forward the defence of such cases, or offering a settlement as appropriate on legal advice.

Investigating officers will be responsible for conducting a “fact finding” enquiry. A brief report will be copied to the member of staff subject to the complaint. **Any investigation report prepared will be disclosable in court.** The report will be used to inform legal advice on whether the case should be contested or not. This will be co-ordinated by ISCU who will liaise with Legal Advisers Branch and Treasury Solicitors.

It is anticipated that proceedings will normally be served on Treasury Solicitors on behalf of Border and Immigration Agency, but where these are served at a local office it is imperative that the matter is immediately brought to the attention of ISCU.

21.21. Racial discrimination breaches by staff

Where an investigation into a claim of unlawful racial discrimination produces evidence that a member of staff has wilfully and deliberately acted in breach of the standards of conduct and departmental procedures, such as to behave in a manner made unlawful by the Race Relations Act 1976 (as amended), the matter will be referred to HRD for consideration of disciplinary action.

HRD will **not** see those cases where an investigation identifies that a member of staff was acting fully in accordance with instructions and guidance and was acting professionally even though unlawful racial discrimination may have been the consequence.

21.22 Investigation and Prosecution of RR(A) Offences – Exemptions

The RR(A) Act exemption for the exercise of immigration and nationality functions, where required by specified immigration legislation or authorised by Ministers does not extend to the

investigation and prosecution of certain offences (sections 28A - 28K of the 1971 Act so far as they relate to offences under Part III of the Act). These offences include seeking to obtain leave to enter or remain by deception assisting unlawful immigration and possessing false immigration documents for use (see Chapters 10 and 33). This limitation reflects the fact that investigation and prosecution of offences should be based on objective evidence or intelligence and places the immigration service in the same position as the police in this respect.

21.21. Assistance to staff involved in legal proceedings

IS staff may be required to appear before the court in the event that they are the subject of a allegation of racial discrimination or a witness to matters covered by an allegation. Where staff are considered to have acted reasonably and correctly in accordance with their instructions, or where they are called as witnesses, support and advice will be provided to staff by the line managers, ISCU and Treasury Solicitors. Prior to any court hearing Treasury Solicitors will brief staff required to appear in court. Treasury Solicitors will also assist with the drafting any witness statements or responses to questions asked by the complainant. Border and Immigration Agency are liable for any costs awarded as a result of legal action.