

## RESIDENCE REQUIREMENTS - SECTION 4(2) APPLICATIONS

### 1. Introduction

1.1 The main purposes of the residence requirements are to allow an applicant to demonstrate close links with, and commitment to, the United Kingdom, and to enable the Home Secretary to assess the strength of that commitment. The normal expectation therefore is that applicants should meet the residence requirements.

1.2 Under **s.4(4)** of the British Nationality Act 1981, the Home Secretary has discretion, in the special circumstances of any particular case, to waive certain of the residence requirements. This discretion is not normally exercised in a way that would, without good reason, detract from the objectives set out above.

NB. In the BNA 1981, the expression "the United Kingdom" does not include United Kingdom territorial waters and periods of time on ships or oil rigs in those waters therefore count (subject to paragraph 2.2.below) as absences from the United Kingdom.

### 2. Checking the residence requirements

2.1 We should assess whether the applicant has met the residence requirements from checking the following:

- original passport(s) or travel document(s) which have been endorsed to show arrival in and departure from the United Kingdom; or
- Home Office records; or
- failing these, any other evidence (e.g. employers' letters, a Seaman's Record Book, tax and National Insurance letters)

NB. Passports will not necessarily be stamped to show embarkation from the United Kingdom. In these and other circumstances (e.g. involving lost or stolen passports), applicants should be given the benefit of any doubt where claimed

absences cannot be otherwise verified but are within the limits we would normally allow and there are no grounds to doubt the accuracy of the claim. Doctors' letters, on their own, are not normally acceptable proof of residence. However, if nothing else is available, and the doctors can confirm that they have seen the applicant on a regular basis during the period concerned, this may be accepted. A Seaman's Record Book may be accepted as evidence that there have been no excess absences, but it is not conclusive proof that there have been excess absences, since it only contains dates of the seaman's joining and discharge from a ship rather than dates of the ship's sailing from, and arrival in, the United Kingdom ports. Letters from shipping companies listing sailing and arrival dates may need to be requested in suspected excess absence cases involving seamen.

If there are gaps in person's evidence of residence and it is clear from the information available that they could not have travelled, we may proceed. Examples of this might include a refugee who has no means of travel or where immigration records confirm continuous residence.

- 2.2 Only whole days' absences should be counted (see **s.50(10)(b)** of BNA 1981). The dates of departure and arrival are not to be counted as absences.

3. **Presence in the United Kingdom at the beginning of the 5 year qualifying period**

- 3.1 With the exception of applicants who were settled in the United Kingdom on 31 December 1982 (see 12.1.8), there is no discretion to waive the requirement to have been physically present in the United Kingdom on a date five years before the date of application. The date of application is explained in **Chapter 6**.
- 3.2 The start of the qualifying period of 5 years is the day after the corresponding application date. Thus, for example, if the application date is 5 January, the 5 year qualifying period starts on 6 January.
- 3.3 Where an applicant who was not settled in the United Kingdom prior to 1.1.1983 misses the requirement to have been in the United Kingdom on the date 5 years prior to the application date by 2 months or less either way, for whatever reason, we may consider

offering re-declaration if:

- (subject to the initial two month limit) the applicant could meet the unwaivable residence requirements now that the case is being looked at (there is no maximum time limit between application date and consideration of this point), or
- if the case is being considered within two months of the date of application the requirement would be met within that two months (i.e. if the application date was 1.7.03, and we were looking at the case on 1.8.03, we would need to see whether applicants were likely to meet the requirements by 1.9.03 to ensure they had had at least two months from the date of application)

3.4 There is no flexibility to extend the periods included in this guidance. If, for example, an applicant misses the requirement by 2 months and 1 day, the application should be refused regardless of any other circumstances.

3.5 Officers should decide whether or not the start date requirement is/will be met by weighing up the information already on the application form/file (which should be assumed to be correct), and need not send for passports, etc. If it turns out that this information is incorrect, and the applicant is eventually refused either because of the start date or for some other reason, we will at least have tried to help the applicant by offering re-declaration, and no money will normally have been lost as a direct result of the re-declaration process.

3.6 When an application form is re-declared, the original application date is superseded by a new application date, which is the date on which the re-declared form is received back in the Home Office. Care should be taken to advise applicants, where necessary, to avoid re-submitting application forms to arrive on dates when they would again fail to meet the 5 year start date. When an application is re-declared the fee charged is that in force on the new application date. Any overpayment must be refunded from nationality fees immediately.

3.7 An applicant who does not meet either of the criteria at 3.3 above should be refused on the grounds of failing to satisfy the

statutory requirement to have been in the United Kingdom on the date 5 years prior to the date of application. Normally the fee paid should be refunded, less the non-returnable element. From 1 April 1996, no part of the fee is returnable, and the implications of this will have to be pointed out at the time of inviting re-declaration. However, where the applicant misses the requirement by one month or less, and cannot otherwise be offered re-declaration, the whole fee should be refunded (part of this will be an ex gratia payment which will need Finance Section approval), unless other statutory requirements are also clearly not met. From 1 April 1996, if the whole fee is to be refunded, this will be by way of an ex gratia payment to be approved by Management Unit.

### 3.8 Minors included on the application form

3.8.1. Where a minor appears to have an entitlement to registration under **s.4(2)**, we might also need to consider whether it is necessary for the form to be re-declared so that the minor meets the residence requirements for registration (using the criteria set out above). If it is, the application date for the minor's application will be the date of receipt of the re-declared form. If the minor was originally part of a multiple minor application, a separate fee will need to be requested if the applicant has turned 18 since the application was made.

3.8.2 We might alternatively consider whether it would be more appropriate to treat the minor's original application as one for registration under **s.3(1)**. This will be particularly appropriate where a minor without a **s.4(2)** entitlement has turned 18 since the application was made. The applicant would not then be placed at a disadvantage because of a parent's inability to meet the requirements for registration.

## 4. Excess absences in the 5 year qualifying period

4.1 Under **s.4(4)(a)** of the British Nationality Act 1981, there is discretion to waive excess absences in the 5 year qualifying period. We should normally consider exercising this discretion as follows:

- 4.1.1 Absences totalling 480 days - normally disregard.
- 4.1.2 Total absences of up to 900 days - consider disregarding only if the application is otherwise in order and applicants have established their home, family and a substantial part of their estate here. We should also expect:
- a. at least 2 years residence (without substantial absences) immediately prior to the 5 year qualifying period. If the period to be disregarded is greater than 730 days the period of prior residence should be at least 3 years; or
  - b. the excess absences to have been due to postings abroad in Crown service under the government of the United Kingdom for example as a member of HM Forces; or
  - c. the excess absences to have been an unavoidable consequence of the nature of a career, for example a merchant seaman or someone in UK-based business or employment which requires frequent travel abroad; or
  - d. exceptionally compelling reasons of an occupational or compassionate nature to justify registration now, including for example because the applicant has a firm offer of a job for which British citizenship is a statutory or professional requirement; or
  - e. the excess absences to have been due to accompanying a British citizen spouse on an overseas appointment.
- 4.1.3 Only if it is clear from the information we have that the above considerations are met may the excess absences be disregarded. In some cases, it may be necessary to make further enquiries, using for example the RESIDENCE QUESTIONNAIRE before a decision is made.
- 4.1.4 It would be extremely rare for absences exceeding 900 days to be waived. Applicants with absences exceeding

900 days should normally be refused and invited to re-apply when they are better able to bring themselves within the statutory requirements.

- 4.2 All cases involving consideration of the exercise of discretion for the reasons at c. and d. in paragraph 4.1.2 and in paragraph 4.1.4 above should be sent to Nationality Policy Team (NPT) for noting on completion, whether the application is granted or refused.

5. **Excess absences in the final year**

- 5.1 Total absences not exceeding 100 days - normally disregard.
- 5.2 Total absences of more than 100 but not more than 180 days where the residence requirements over the total period are met - consider disregarding if applicants have demonstrated links with the United Kingdom through the presence here of family, an established home, and a substantial part of their estate.
- 5.3 Total absences of more than 100 days but not more than 180 days where the residence requirements over the total period are not met - consider disregarding only if:
- applicants have demonstrated links with the United Kingdom through the presence here of family, an established home, and a substantial part of their estate here; and
  - the absence is justified by Crown service under the government of the United Kingdom or by compelling occupational or compassionate reasons, taking account of the examples in 4.1.2.b - d above
- 5.4 Total absences exceeding 180 days where the residence requirements over the total period are met - consider disregarding if the criteria in paragraph 5.3 are met.
- 5.5 Total absences exceeding 180 days where the residence requirements over the total period are not met - consider disregarding only in the most exceptional circumstances and where the criteria in paragraph 5.3 are met (a decision to waive excess absences in these circumstances should be referred to NPT for noting on

completion).

6. **Immigration time restrictions in the year prior to the application date**

6.1 All applicants for registration must be free of immigration time restrictions on the date of application. There is no discretion to waive this requirement. This does not mean that the applicant must have ILE or ILR. The following people may also be regarded as meeting the requirement:

- people who are not in the United Kingdom;
- people who have entered the UK illegally (whether clandestinely, in breach of a deportation order or by their own or another person's deception) and have not been granted limited leave;
- people refused leave to remain prior to 2 October 2000 who are not required to leave the United Kingdom by virtue of having immigration appeals pending against those refusals (see paragraph 8.3 of Annex B to **Chapter 18**);
- people exempt from immigration control under **s.8(2), 8(3) or 8(4)** of the **Immigration Act 1971**;
- family members of certain EEA or Swiss nationals (see "**EUROPEAN ECONOMIC AREA AND SWISS NATIONALS**" in Volume 2)

**NB** People in the second and third categories mentioned above are, however, in breach of the immigration laws (see paragraphs 8.1 - 8.10 of Annex B to Chapter 18).

6.2 However, a person is not to be regarded as being free of immigration time restrictions if he or she:

- has overstayed a limited leave to enter or remain; or
- is on temporary admission; or
- is in immigration detention; or

- has absconded from temporary admission or detention

6.3 The applicant must also have been free of immigration time restrictions for the remainder of the 12 months before the date of application. But, under **s.4(4)(b)** of the British Nationality Act 1981, there is discretion to waive this requirement.

NB. For further information about the immigration status of the family members of EEA or Swiss nationals, see "**EUROPEAN ECONOMIC AREA AND SWISS NATIONALS**" in Volume 2.

6.4 Discretion to disregard immigration time restrictions in the final 12 months may normally be exercised if:

- at the date of application, the applicant has had less than 12 months free of conditions, but has been free of conditions for more than 12 months by the time the application is considered, provided the other requirements are met; or
- a time limit was imposed inappropriately on return to the UK after a visit abroad, and the applicant subsequently demonstrates eligibility for returning resident status or entitlement to an exemption under **s.8(2), (3) or (4)** of the **Immigration Act 1971** as amended by **s.4** of the **Immigration Act 1988** (see paragraph 9.1 in Annex B to **Chapter 18**); or
- the period of limited leave was less than 10 days at the beginning of the 12 month period before the date of application; or
- the period of limited leave was between 10 days and 90 days at the beginning of the 12 month period, if the other statutory requirements, including the other residence requirements, are met, and the applicant has demonstrated established links through the presence here of home, family, and a substantial part of estate; or
- the period of limited leave was more than 90 days at the beginning of the 12 month period, and the other statutory requirements including the other residence requirements are met, only if:

- i. the applicant has established links with the United Kingdom through presence here of home, family and a substantial part of estate, and
- ii. there are compelling business or compassionate reasons to justify granting the application now; or
- f. the period of limited leave exceeded 10 days at the beginning of the 12 months period, and the other statutory requirements, including the other residence requirements, are not met, only in the most exceptional circumstances, and if the criteria at e. above are met; or
- g. consideration of an application for indefinite leave to remain, made more than 15 months before the citizenship application, had been protracted through no fault of the applicant, providing ILR was eventually granted; or
- h. an application for asylum or leave to remain was refused but later acknowledged to be an incorrect decision and the appropriate leave granted and had the correct decision been made at the outset, the applicant could have applied for ILR earlier and met this requirement on the date of consideration.
- i. if the applicant is a family member of an EEA or Swiss national, we are satisfied that he or she was genuinely unaware of the need to satisfy this requirement.

## 7. Breaches of the immigration laws during the 5 year qualifying period

- 7.1 Under **s.4(4)(c)** of the British Nationality Act 1981, there is discretion to disregard breaches of the immigration laws during the 5 year qualifying period. For this purpose, a person is in the United Kingdom in breach of the immigration laws at any time when he or she has entered the United Kingdom (within the meaning of **s.11** of the **Immigration Act 1971**) but does not have permission or other entitlement (whether under UK or directly-applicable EC law) to be here. Further guidance on what constitutes a breach of the immigration laws for the purposes of the 1981 Act may be found in Annex B to **Chapter 18**.

7.2 We should normally exercise the discretion to disregard a breach of the immigration laws if:

- it was inadvertent (e.g. the applicant genuinely forgot to ask for an extension of stay or indefinite leave to remain); or
- it was due to rejection of an "in-time", but incorrectly completed, mandatory application form for leave to remain, provided there is no reason to doubt that the form was submitted in good faith; or
- it was outside the person's control (e.g. the applicant was a minor when parents failed to obtain or renew the minor's leave to remain in the UK); or
- (in the case of applications for leave to remain refused before 2 October 2000) the period of unlawful residence was due to the expiry of leave pending an appeal to an adjudicator or the Tribunal and ILR was granted prior to the registration application being made (see also paragraph 8 of Annex B to **Chapter 18**); or
- a person who entered the United Kingdom clandestinely presented himself without delay to the immigration authorities following arrival or was detected by the immigration authorities shortly after arrival. In either case the maximum period involved should normally be 1 month but, if there are extenuating circumstances, it may be longer; or
- an application for asylum or leave to remain was refused but was later acknowledged to be an incorrect decision and the appropriate leave was granted

7.3 We should not normally exercise the discretion to disregard a breach in any other circumstances, and particularly not when the breach was both substantial and deliberate.

**NB** A person does not cease to be "in the United Kingdom in breach of the immigration laws" just because he or she applies to regularise his or her stay or otherwise comes to the notice of the immigration authorities. However, when assessing the seriousness

of the breach it would be unreasonable to take into account the period during which consideration is being given to regularising the person's stay. This period should therefore be discounted in reaching a decision and should not therefore be included in the dates of the breach mentioned in the refusal letter.