

## ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

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## Introduction

This asylum instruction provides guidance on how to assess human rights claims under Article 8 of the European Convention on Human Rights (ECHR).

This guidance should be read in conjunction with the [Considering Human Rights](#) Instruction, including its sections on *Duration of grants* and *Recording the consideration on the Minute*.

For additional information see the asylum instructions on: [Humanitarian Protection](#); [Discretionary Leave](#); [Further Representations and Fresh Claims](#); and [Considering the asylum claim](#).

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to section 55. The UK Border Agency Instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

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## Article 8 ECHR

The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights (ECHR)) was adopted under the auspices of the Council of Europe in 1950 and entered into force in September 1953. The human rights that are enshrined within the ECHR are enforceable in the UK's domestic courts by virtue of the Human Rights Act 1998.

Article 8 ECHR constitutes what is known as a 'qualified right'. This means that state interference with the rights set out under Article 8 is permissible in certain specific situations.

Article 8(1) states that:

*"Everyone has the right to respect for his private and family life, his home and his correspondence."*

This is subject to the exceptions set out under Article 8(2), which allow these rights to be limited or interfered with in the interests of the permissible aims of the state. Article 8(2) states that:

*"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."*

Any interference on the part of the state with the rights set out in Article 8(1) must therefore be justified as being necessary and proportionate in pursuit of one of the permissible aims set out in Article 8(2). Although not expressly mentioned in Article 8(2), caselaw has established that the maintenance of an effective immigration control falls within these permissible aims.

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## General Considerations on Article 8 Issues

Article 8 claims in the asylum context may raise a number of issues concerning the private and/or family life of an individual. The right to respect for home and correspondence rarely arises in the context of asylum claims.

Article 8 claims may be stated explicitly by the claimant or be implicit on the particular facts of the case. **Caseworkers should consider implied Article 8 claims alongside the asylum claim in all cases. Any Article 8 issues should therefore be examined at interview and, if the claim is to be refused, addressed in the RFRL, regardless of whether or not the claimant mentions Article 8 specifically.**

Where a person makes an application for leave to remain on the grounds of Article 8, that application is a chargeable under the Immigration and Nationality (Fees) Regulations 2009 (as well as under previous Regulations in force since charging commenced on 1 August 2003). However, a fee exemption applies where the application for leave to remain is made on the basis that the applicant is:

- (a) a person making a claim for asylum which has not been determined or has been granted; or
- (b) a person who has been granted Humanitarian Protection under the Immigration Rules; or
- (c) a person who has been granted limited leave to enter or remain outside the provisions of the Immigration Rules (including Discretionary Leave) on the rejection of their claim for asylum; or
- (d) a dependant of a person referred to in (a), (b) or (c) above.

Since 21 May 2007, any fee payable has had to accompany the application in order for the application to be validly made. There is no power in law to waive the application fee where no exemption applies, and applications have to be made on a form FLR(O) or SET(O) or they will not be valid.

Where a person is found to have a legitimate claim to remain in the UK under Article 8, the period of leave to be granted should be determined in accordance with the asylum instruction on *Discretionary Leave*. As set out in the asylum instruction, it will normally be appropriate to grant three years' Discretionary Leave unless the person falls into an Excluded category.

Where an Article 8 claim is refused, it may be possible to certify the claim as clearly unfounded ([see Proportionality and certification of family life claims below](#) for more detail).

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## Domestic and Foreign Breaches of Article 8

There are two ways in which a claimant's removal from the UK may interfere with his rights to respect for family and/or private life. These are domestic breach and foreign breach.

### Domestic breaches

This is the most common form of Article 8 claim in the asylum context.

A domestic breach of Article 8 may occur where there is interference with an individual's private/family life in or by the UK.

Such claims usually relate to a claimant's right to respect for family life. For example, a person may claim that to refuse him leave to remain here and/or to remove him from the UK would separate him from his family here and would therefore constitute a breach of his right to respect for family life by the UK.

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### Foreign breaches

A foreign breach of Article 8 may occur where there is interference with an individual's private and/or family life in the receiving country.

Such claims usually relate to a claimant's private life. For example, a person may claim that he would be unable to be openly homosexual in the receiving state because of societal prejudice and/or legislation banning homosexuality and that his removal from the UK would therefore lead to a breach of his right to respect for private life in the receiving country. Or a person may claim that he would be unable to get suitable medical treatment in the receiving country. (Please note that medical claims are not covered in this asylum instruction – caseworkers should refer to [IDI Chapter 1 section 8 \(Medical\)](#) and [section 10 \(Human Rights\)](#) and the asylum instruction on [Considering Human Rights Claims](#) ).

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### Hybrid breaches

A "hybrid" breach, as referred to by the House of Lords in para 18 of [Ullah and Do \[2004\] UKHL 26](#), refers to a claim which involves both a domestic and a foreign breach. There is no separate test for these cases. Each breach must be considered in the round in accordance with the appropriate test.

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# The Right to Respect For Family Life

## Family life

The right to respect for family life protects established family life and relationships from unjustified interference. A person may allege that to refuse him leave to remain and to remove him from the UK would constitute a disproportionate interference with his right to respect for family life.

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## The meaning of “family life” for Article 8 purposes

The concept of ‘family life’ is not the same as that of ‘family unit’. Caselaw has established that certain relationships will usually give rise to family life for these purposes, although ultimately it will be a question of fact in each case. The Court of Appeal in *Singh* [2004] EWCA Civ 1075 stated that “*The existence or non-existence of family life for the purposes of Article 8 is essentially a question of fact depending on the real existence in practice of close personal ties*”.

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## Close family

Family life will usually be found to exist in the following relationships:

### Husband/wife or civil partners

- A lawful and genuine marriage or civil partnership will normally constitute family life. Each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting.

### Unmarried and same-sex partners

- If the relationship is of sufficient substance or stability, family life may exist between unmarried and same-sex partners even if they do not fulfil the two years’ co-habitation requirement in the Immigration Rules so that they would not qualify under the Rules.
- Where the relationship lacks substance (e.g. consisting of a new or casual relationship), family life will not exist.

### Parent/ child/ adopted child

- In the case of natural parents and their minor children there is a general presumption of family life. The Court of Appeal in *Singh* confirmed that the “close personal ties” which establish family life “*will be presumed to exist as between children and their natural parents, but exceptionally the presumption may be displaced*”. Further, that “*the relationship between an adoptive parent and an adopted person is in principle of the same nature as a family relationship protected by Article 8*”.

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- Family life may exist between a child and natural parent even if at the time of birth the relationship between the two parents had ended and even if the child does not live with his parent. (However the fact that a parent has only infrequent contact with his child may be relevant to the question of whether removal would disproportionately interfere with their family life.)
- If a claimant has a child who is a British citizen (because the child's other parent has British citizenship/ ILR) this will not affect the assessment of whether family life exists.

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### Wider family

#### Grandparents/grandchildren, uncles/aunts, nephews/nieces

- These types of relationships may fall within the scope of family life, depending upon the strength of the emotional ties.

#### Adult siblings, parents/ adult children

- Relationships between adult siblings or adult children and their parents will not normally constitute family life unless there are special elements of dependency, beyond normal emotional ties.
- The Court of Appeal in *Kugathas* [2002] EWCA Civ 31 held that “a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties ... Such ties might exist if the appellant were dependent on his family or vice versa”. They also pointed out that “neither blood ties nor the concern and affection that ordinarily go with them are ... enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit ... from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8”.

### Foster families

- Relationships between foster parents and foster children may fall within the scope of family life, depending upon the strength of the emotional ties. In some circumstances, the relationship between an adult claimant and his foster carer may constitute family life (the test in *Kugathas* should be applied).

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### Nature of family life

A decision which affects a person's family life by its nature affects those with whom he enjoys family life. Therefore in any case where family life is considered to exist, there will be a single family life for the particular group of individuals concerned. **The UK must respect this family life as a single entity, taking into account both the rights of the principal claimant and also those of the other persons in the UK with whom he claims to enjoy a family life.** In *Beoku-Betts* [2008] UKHL 39 the Lords found that the AIT should expressly consider the Article 8 rights of family members who are not party to proceedings.

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## Consideration of Article 8 Family Life Claims

When considering express and/or implied family life claims, caseworkers should complete the five stage process below. Even where caseworkers think that there is no family life, or no interference with family life (because it would be reasonable to expect the family/ spouse/ civil partner to leave the UK with the claimant), they should **always** go on to consider proportionality.

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### Stage 1: Does the claimant have a family life in the United Kingdom?

The first question to ask is whether the claimant has a family life in the UK (as to which [see paragraphs above on the right to respect for family life](#)). In considering this issue, caseworkers might find the following questions helpful:

- *Who is the relationship with and how long has it existed? If the claimant lives with the relevant family member(s), how long have they been living together?*
- *Are there any minor children or other dependants involved?*
- *If the claimant does not live with the family, where do they live, how often does he see them? What other contact does the claimant have with his family, for example by telephone?*
- *If extended family members are involved, what level of contact do they have? Is there any support or dependency between them?*

Even where caseworkers think that family life is not established, they should **always** go on to consider interference and proportionality (see paragraphs below on stages 2-5 and proportionality).

If the claim is refused on the basis that there is no family life caseworkers should consider whether it is appropriate to certify the Article 8 claim as clearly unfounded under section 94(2) of the 2002 Act. If it is clear that there is no family life, certification may be considered to be appropriate (see the paragraph on certification at the end of this guidance). Reference should be had to the standard Article 8 paragraphs on CID.

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### Stage 2: If (or assuming that) family life exists, will refusal / removal interfere with that family life – is it reasonable to expect the family to leave with the claimant?

The Court of Appeal found in AG (Eritrea) [2007] EWCA Civ 801 that, while the threshold for Article 8 to be engaged requires the interference with the applicant's right to be real, it is not otherwise a specially high threshold.

Article 8 does not guarantee a person or their family the right to choose to live in the UK if they are able to live with their family elsewhere.

The Court of Appeal in VW [2009] EWCA Civ 5 noted that EB (Kosovo) now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insurmountable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant. (See the section on proportionality for more details.)

Caseworkers should ensure that claimants are asked why it would not be possible for the claimant and/or the claimant's family to pursue their family life elsewhere. Factors that should be considered in assessing the extent to which removal would interfere with the right to family life include the following:

- *What is the claimant and his family members' country/countries of nationality (or country/countries of former habitual residence if he/ they do(es) not have a nationality)?*
- *What is the claimant's and his family members' immigration status in the UK?*

If the family/ spouse / civil partner of the claimant has been granted refugee status in the UK or ELR/ HP for safety reasons, this may mean that the family/ spouse/ civil partner cannot reasonably be expected to leave the UK with the claimant, and return to his/ her country of nationality (or, if not having a nationality, country of former habitual residence).

In some cases however, for example where there has been a significant and non-temporary change in country conditions since the grant of refugee status or leave, it may be reasonable to expect the family/ spouse/ civil partner to leave the UK with the claimant in order to return to the country of nationality (or, if not having a nationality, country of former habitual residence).

See for example **SS (Sri Lanka) [2004] UKIAT 00126**, in which the IAT said that “[t]he fact of former recognition of refugee status does not of itself show that there is a continuing insurmountable obstacle to returning to the country of origin. Such cases will depend upon a consideration of the specific facts upon which the claim had been recognised. It is not necessary for the Refugee Convention cessation provisions to be applied to someone with refugee status and ILR in order for the potential for his return to the country of origin, so as to remain with his family, to be contemplated in an Article 8 case. **There is no automatic insurmountable hurdle in the mere fact of the past grant of ILR**”. It is important for caseworkers to note that the language of SS refers to “insurmountable obstacle”, but that the test of “insurmountable obstacle” has now been replaced by a “reasonableness test” (as set out in VW).

If the family has no permanent right to reside in the UK there may be no obstacle to relocation. However, an outstanding asylum or human rights appeal of one family member may constitute a temporary obstacle to family life being pursued elsewhere. The question of whether it is reasonable for family life to be pursued elsewhere is one of fact which must be considered on a case by case basis. Further to the judgment in **Chikwamba [2008] UKHL 40**, where there is a possibility of separating the family temporarily with the option of the family who have been removed seeking entry clearance at a later date to join family members who have remained in the UK, the test in **Chikwamba** must also be applied to assess the proportionality of requiring the family to seek entry clearance. (See the section dealing with proportionality of removal for details of **Chikwamba**.)

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Where a claimant is involved in family proceedings in the UK, for example with regards to contact with his child, it may not be appropriate to remove him until the outcome of those proceedings has been determined. Again, each case must be considered on its particular facts, as it is well established that involvement in, or orders made in, Children Act

proceedings cannot deprive the Secretary of State of his powers of removal and deportation, although it may be something to which he should have regard when deciding whether to exercise those powers. It should also be noted that applications under the Children Act may be abusive. It is relevant to note that if a contact order is made the claimant may be able to apply for leave to enter the UK under the Immigration Rules (paragraph 246 of HC 395). As such, an important factor in such cases is whether the claimant is able to pursue the litigation (whether in whole or in part) from abroad. In addition, the test in **Chikwamba** should also be considered. In particular, the court noted in **Chikwamba** that in family cases, particularly those involving children, it is only in comparatively rare circumstances that it will be proportionate for an individual to be required to seek entry clearance from abroad.

- *If the family life consists of a marriage, civil partnership or unmarried or same-sex relationship, do the couple have any dependent children, either between them or by any other persons?*

If the couple have children between them it will generally be reasonable to expect the children to return with the parents. If one of them has a child by another person who resides legally in the UK and the child has an established family life with that person, this may mean that the family cannot reasonably be expected to leave the UK with the claimant.

If the family life consists of a relationship between a parent and a minor child, where the parents are divorced and there is a contact order in place, the Immigration Rules provide a mechanism (paragraph 246 of HC 395) by which the claimant may apply for leave to enter to exercise access rights to their child.

- *Are there any health or other welfare issues which would make return unreasonable?*

Where the dependant/s of a claimant have been taken into care by social services on the grounds that the claimant is not fit to care for them and where appropriate arrangements cannot be made for their care in the receiving state, this may mean that the family cannot reasonably be expected to leave the UK with the claimant.

- *Does the claimant/family have relatives or other support in the receiving country (which might ease their return)?*

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If the claim is refused on the basis that it would be reasonable to expect the claimant and his family to live in the receiving country, caseworkers should consider whether it is appropriate to certify the Article 8 claim as clearly unfounded under section 94(2) of the 2002 Act.

In order to certify the claim as clearly unfounded, caseworkers must be satisfied that any argument that the family could not accompany the claimant to the receiving country would be bound to fail. This is a high threshold, especially when it is uncertain whether the claimant's family would be granted entry to the country to which the claimant would be removed. It would not, therefore, be appropriate to certify on the basis that the family can accompany the claimant to the receiving country if they are not of the same nationality as the claimant, unless there is evidence to show that it would be possible for them to live as a family in that country (if, for example, they have lived there together previously).

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### **Stage 3: If (or assuming that) there is interference with family life, is it in accordance with the law?**

*Is the decision to remove in accordance with the Immigration Rules, published policy and procedures?*

Interference with family life, that is, the decision to refuse/ remove, will be in accordance with the law where:

- It is in accordance with domestic law as set out in primary and secondary legislation, the Immigration Rules, or published policies and procedures; and
- The relevant law is accessible (published) and precise.

Provided a decision is in accordance with the Immigration Rules and the UK Border Agency's published policies it will be in accordance with the law for these purposes, and caseworkers should proceed to question 4. However if the caseworker is concerned that a decision may not be permissible by law, caseworkers should refer to a Senior Caseworker.

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### **Stage 4: Is the interference in pursuit of one of the permissible aims set out under Article 8(2)?**

Case law has established that the maintenance of an effective immigration control falls within the permissible aims under Article 8(2). Other permissible aims include public safety, the prevention of crime and disorder, and national security. The question, therefore, is whether the interference (i.e. refusal/ removal) is intended to achieve one or more of these objective(s).

If there is an additional aim, such as prevention of crime, the RFRL should make this clear. It is important for the caseworker to identify which of the permissible aims are being pursued and to set this out explicitly in the RFRL, as proportionality will have to be considered in the context of that aim/ those aims.

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### **Stage 5: Is the interference proportionate to the permissible aim?**

The assessment of proportionality is a balancing exercise between the individual's private interests and the public interest in maintaining an effective immigration control. (In criminal deportation cases, there is an additional public interest in the prevention of crime.) The conclusion reached will be specific to the facts of the particular case – all relevant factors must be considered when determining whether refusal or removal will result in a disproportionate interference with Article 8 rights in any particular case.

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## The proportionality test

In the case of *Huang & Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, the House of Lords established that the ultimate question to be asked in assessing proportionality is “*whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8*”.

The content of the Immigration Rules would be relevant in assessing whether any interference with family life would be proportionate. The task for caseworkers is therefore to:

- Consider all the relevant factors and weigh up all relevant considerations and decide whether refusal or removal will result in a disproportionate interference with Article 8 rights- **there is no requirement to consider whether a case is ‘truly exceptional’** in reaching this decision.
- Consider the merits of the Article 8 claim as a whole.
- Consideration of the factors needs to be explained fully in the refusal letter and determination.

## What factors should be considered in assessing proportionality?

In the assessment of proportionality, caseworkers should consider all relevant factors – no one factor is decisive.

Until recently the UK Border Agency’s policy has been that if there was a procedural requirement requiring a person to leave the UK and make an application for entry clearance then such a person should do so. In such cases interference with Article 8 would have been considered to be temporary and therefore likely to be proportionate and many cases have been refused on that basis.

However, the policy position has changed in light of the judgment in the case of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. The House of Lords concluded that the reason UKBA applied this policy was to deter people from coming to the UK without entry clearance. The Lords considered this to be a legitimate objective but the way it had been applied (i.e. in a fairly universal manner) was essentially wrong. The Lords stated that it was only comparatively rarely that it would be lawful to require someone with family here to return home and apply for entry clearance, particularly where children are involved.

The House of Lords emphasised that cases should, where possible, be considered fully at the earliest stage, i.e. in-country. Applicants making Article 8 claims still need to demonstrate on the balance of probabilities that they enjoy private and/or family life in the UK and that there would be an interference with that private and/or family life if they were not allowed to remain in the UK. The UK Border Agency, if minded to reject the claim, then has to show that the interference is proportionate, having regard to all the facts of the case.

Returning an applicant to his/her home country in order to make an entry clearance application may still be proportionate in a small number of cases. All cases must therefore be considered on their own merits and a decision made about whether it is appropriate to expect the individual to go abroad and apply for entry clearance.

For the process of assessing whether it is appropriate, the House of Lords considered that the prospective length and degree of family disruption involved would always be highly relevant, but

accepted that it could well be proportionate to enforce removal in a case, for example, where there was an appalling immigration history or an abusive asylum claim, provided the practicalities of going abroad to obtain entry clearance did not entail a serious disruption to family life. It is also relevant to consider whether the applicant arrived illegally in the UK and, if so, for what reason. If the applicant came to the UK to seek asylum, and was successful, or would have been successful if there had not been a change in circumstances in their country, that would be a good reason. Someone arriving in the UK illegally simply to enrol as a student would not have a good reason for arriving illegally.

The Lords considered it would also be relevant to take into account any delay in considering the claim, where the applicant was not responsible for the delay (see next section below). They also accepted that there would also be some cases where the Entry Clearance Officer (ECO) would be better placed to investigate the claim than the UK authorities, although this would have to be balanced against the disadvantage to the applicant in his/ her being unable to give evidence at the appeal hearing of a refusal to grant entry clearance.

Examples of where the ECO may be better placed to assess an application could be where knowledge of local laws and customs are highly relevant or where the ECO, rather than the UK authorities, is better placed to assess relevant facts, for example the genuineness of a marriage or a claimed relationship between family members. This might include, for example, cases where it is not clear whether the applicant is legally divorced from a previous spouse. It is Government policy to prevent the formation of polygamous households in the UK, and section 2 of the Immigration Act 1988 and paragraphs 278 and 279 of HC 395 are intended to achieve this policy.

In the case of *VW (Uganda)* [2009] EWCA Civ 5 the Court of Appeal has provided clarification of the approach to be taken when considering whether Article 8 is engaged, and the proportionality assessment in any given case. The Court stated that the House of Lords' decision in *EB (Kosovo)* [2008] UKHL 41 was authority for the proposition that the enquiry which decision-makers must make into the question of the proportionality of removal or a refusal of entry clearance in any given case does not involve a search for the existence of any "insurmountable obstacles" preventing the applicant's family members from joining him in his country of origin. Rather the relevant question is whether the family members can or cannot "reasonably be expected" to join him. This involves "a balanced judgment of what can reasonably be expected in the light of all the material facts".

Nevertheless, the Court went on to hold in *VW* that, if a removal is to be held disproportionate, "what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacle or difficulties to go beyond matters of choice or inconvenience... The question in any one case will be whether the hardship consequent upon removal will go far enough beyond this baseline to make removal a disproportionate use of lawful immigration controls".

### What effect does a delay in consideration have on the proportionality test?

In the case of *EB Kosovo v Secretary of State for the Home Department* [2008] UKHL 41 the House of Lords considered what bearing delay in decision making has on a person's rights under Article 8. The Lords identified three ways in which delay would work in the applicant's favour:

1. By allowing the individual to develop closer ties to the UK in terms of family and private life;

2. Where the individual entered into a relationship or established private life after arrival in the UK, by reducing the significance of the fact that the individual and any partner knew the individual had no right to remain. A relationship entered into where one person has a precarious immigration status may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if UKBA had intended to remove the applicant it would have taken steps to do so. This may affect the proportionality of removal.
3. By reducing the force of the argument that removal is necessary in the interests of upholding immigration control if the delay is shown to be a result of an inconsistency in outcomes which will have a bearing on the proportionality of removal or requiring an applicant to apply out of country.

The last point above, on consistency of treatment between one applicant and another, is one of fairness. The House of Lords saw it as particularly significant that EB's cousin, with whom he had arrived in the UK and who claimed asylum at the same time on the basis of the same facts, had his claim dealt with without delay and was granted exceptional leave to remain (under the policy then in force) (and later indefinite leave to remain) as a result.

Delay in decision making may therefore make removal disproportionate if the applicant:

- can demonstrate that as a result they were treated inconsistently with other applicants in similar circumstances or
  - had an expectation that their case would have been handled differently had it been considered earlier (e.g. that they would have benefited from policies in place at that time).
- 
- *If the claimant is a convicted criminal and one of the aims of his removal is public safety and the prevention of crime, how serious was his crime? What is the likelihood of re-offending?*

Where the claimant is a convicted criminal and the permissible aim is the prevention of disorder and crime, the seriousness of the offence and the likelihood of the claimant committing further offences should be taken into account as part of the balancing exercise. In the case of some crimes the public interest will mean that, even if there is no evidence of an intention to reoffend, removal may still be proportionate. The case of N (Kenya) [2004] EWCA Civ 1094 refers.

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### Proportionality and certification of family life claims

Proportionality should **always** be addressed in RFRLs, even where the caseworker thinks that family life does not exist or that removal will not amount to an interference with family life or where the caseworker thinks that the claim is so weak that it can be certified. Please refer to the standard Article 8 paragraphs on CID.

Where Article 8 claims are refused on the basis of proportionality, care should be taken when considering certification of the claim as clearly unfounded under section 94(2) of the 2002 Act. Caseworkers must be satisfied that any argument that interference is disproportionate would be bound to fail, which is a high threshold. It is particularly important to note that following **Chikwamba** the basis on which the majority of Article 8 cases used to be certified on the basis

of proportionality, namely that there is no reason why the claimant could not seek to gain entry clearance from abroad, is almost always not available where the claimant has family in the UK.

[Please refer to the [Asylum Instruction on S.94 Certification \(NSA\)](#)]

If a claim falls to be refused but it is not appropriate to certify, the claim should simply be refused.

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# The Right to Respect For Private Life

## Private life

The right to respect for private life protects against unjustified interference with an individual's personal identity, his ability to form relationships with others and his physical and moral integrity. Private life can therefore encompass a person's work, friends, lifestyle etc. Physical and moral integrity often includes claims relating to medical issues, particularly mental health. It relates to the physical and moral wellbeing of the claimant.

Medical claims are not considered in this Asylum Instruction. For guidance on handling medical claims please refer to [IDI Chapter 1 section 8 \(Medical\)](#) and [section 10 \(Human Rights\)](#) and the asylum instruction on [Considering Human Rights Claims](#)

A person may allege that to refuse him leave to remain and to remove him from the UK would constitute a disproportionate interference with the private life which he has established here (a domestic breach of Article 8). Alternatively he may allege that his right to respect for private life will be disproportionately interfered with by the authorities of the country to which he will be returned (a foreign breach of Article 8).

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## Meaning of private life

The meaning of private life and indeed, of private life sufficient to engage the UK's obligations under Article 8, is less clear-cut than the meaning of family life. The following are examples of private life claims:

### Personality and relationships with others

Where a claimant alleges that on removal he will not be able to continue some aspect of his private life here, such as his studies, employment, friendships.

### Homosexuality

Where a person claims that as a homosexual, he may also claim that he would be subject to such severe societal prejudice and legislation in the receiving country, that he would be unable to be openly homosexual and that his removal from the UK would therefore lead to a violation of his right to respect for private life. The current legal position (following the case of [HJ \(Iran\)](#)) is that it is not necessarily a breach of an individual's private life to require that person to act with discretion in respect of their homosexuality in order to avoid prejudice and / or prosecution in their home country. It is a question of fact in each case, to be decided on the evidence of the individual's history and experiences as well as the measures deployed against homosexuals in the country of origin.

Claims based on the general right to form and develop homosexual relationships should be treated as private life rather than family life claims (as they relate to a general right rather than a particular relationship or family unit).

Claims relying on an individual's right to pursue a homosexual relationship with his partner should be treated as family life claims (as to which, see paragraphs above on [the right to respect for family life](#) and [consideration of Article 8 family life claims](#)).

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## Consideration of Private Life Claims

As in the consideration of family life issues, caseworkers should complete the entire five stage consideration process. The question of whether a case alleges a domestic breach or a foreign breach will be relevant when considering stage 5.

- **Stage 1: Does the claimant have a private life in the United Kingdom?**

It is first necessary to assess the precise nature of the private life in question. Factors that should be taken into account include the following:

- *What is the nature of the claimant's private life in the UK?*
- *Does that private life involve the claimant's personal relationships or his physical and/or moral integrity?*
- *What is the claimant's present (mental/ physical / emotional) condition?*

If the claim is refused on the basis that there is no private life, caseworkers should consider whether it is appropriate to certify the Article 8 claim as clearly unfounded under section 94(2) of the 2002 Act. If it is clear that there is no private life (or no sufficient private life to engage Article 8), certification may be considered to be appropriate. Reference should be had to the standard Article 8 paragraphs on CID. Please also refer to the [Asylum Instruction on Certification under Section 94 of the NIA Act 2002](#).

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- **Stage 2: If (or assuming that) private life exists, will refusal/ removal interfere with that private life?**

The Court of Appeal found in AG (Eritrea) [2007] EWCA Civ 801 that, while the threshold for Article 8 to be engaged requires the interference with the applicant's right to be real, it is not otherwise a specially high threshold.

Caseworkers should ensure that claimants are asked why it would be impossible for them to enjoy the particular element of private life in the receiving country. Factors that should be considered in assessing the extent to which removal would interfere with the right to private life include the following:

### Personality and relationships with others

- *Why would it be unreasonable for the claimant to establish or pursue his private life in the receiving country?*
- *Is there a likelihood that the claimant's removal from the UK would cause serious adverse effects upon his psychological well-being?*

### Homosexuality

- *How significant are the barriers to the development and enjoyment of homosexual relationships?*

If it would be reasonable to expect the claimant to maintain his private life in the receiving country, removal will not violate Article 8. However, caseworkers should nevertheless proceed to stage 3.

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- **Stage 3: If there is interference with private life, is it in accordance with the law?**

[See stage 3 above](#). (Family Life section)

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- **Stage 4: Is the interference in pursuit of one of the permissible aims set out under Article 8(2)?**

[See stage 4 above](#). (Family Life section)

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- **Stage 5: Is the interference proportionate to the permissible aim?**

[See stage 5 above](#) (Family Life section), which sets out how caseworkers should assess proportionality in Article 8 cases. In addition:

As with family life, caseworkers should balance the private interests of the individual on the one hand against the public interest in the maintenance of an effective control (and any other permissible aim) on the other.

In addition to the potentially relevant factors set out [in stage 5 above](#), caseworkers should also consider:

- *How serious are the likely adverse effects of removal upon the claimant's right to respect for private life?*

**When considering foreign breaches, the question which must be asked is whether there will in the case in question be a flagrant denial of the right to respect for private life in the receiving country.**

In *Ullah and Do*, the House of Lords held that in order to rely upon a foreign breach of ECHR articles other than Article 3, a claimant would have to show that he would risk suffering a “**flagrant denial or gross violation**” of such rights in the receiving state. This is a very high threshold. In so doing, the House of Lords endorsed the stringent approach taken by the Immigration Appeal Tribunal in *Devaseelan v SSHD* [2003 Imm AR1] whose judgment stated, “**flagrant denial or gross violation is where the right will be completely denied or nullified in the destination country.**”

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For example, in a case where a person claims that the laws or practices in the receiving country will preclude them from developing and enjoying homosexual relationships, this will amount to a breach of Article 8 only if there is a flagrant denial, or complete nullification, of that right.

Where an Article 8 claim is made on this basis, caseworkers should first consider whether there is an imputed Article 3 claim, i.e. whether the person has an individualised risk of Article 3 ill-treatment by reason of his homosexuality.

Caseworkers should then go on to consider whether there will be a flagrant denial of Article 8 rights on the basis that the person's homosexuality will be repressed.

Legislation banning homosexuality and/or societal prejudice in the receiving country is not sufficient in itself to amount to a flagrant denial of the right to respect for private life. Nor is the fact that a person would have to live discreetly as a homosexual in the receiving country. Caseworkers should consider two questions:

- *How likely is it that the person will be identified as a homosexual?*  
Country information and the person's past behaviour will be relevant to this question.
- *What are the likely consequences of his being identified as such?*  
The more serious the consequences, the more likely there is to be a flagrant denial.

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### Proportionality and certification of private life claims

Proportionality should **always** be addressed in RFRLs, even where the caseworker thinks that private life does not exist or that removal will not amount to an interference with private life or where the caseworker thinks that the claim is so weak that it can be certified. Please refer to the standard Article 8 paragraphs on CID.

Where Article 8 claims are refused on the basis of proportionality care should be taken when considering certification of the claim as clearly unfounded under section 94(2) of the 2002 Act. Caseworkers must be satisfied that any argument that interference is disproportionate would be bound to fail, which is a high threshold. [See the [Asylum Instruction on Certification under Section 94 of the NIA Act 2002](#)].

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