

FURTHER SUBMISSIONS

Table of Contents

Introduction

Purpose of Instruction

Use of Terms

Definition

Submitting further submissions

Application proforma

Cases being managed by the Case Resolution Directorate

Cases being managed by Asylum Teams in the Regions

Further Submissions made at port

Exceptional Cases

Inability to travel

Ongoing Judicial Review or other litigation

Removal Directions have been set or the individual has been accepted on a charter flight

Individual comes to light through enforcement action

Further submissions made before 13 October (CRD & regional)

Action to take when further submissions are submitted by post

Paragraph 353 of the Immigration Rules

Two-Stage Process

Making a decision under Paragraph 353

Consider whether leave should be granted

Inviting applicant to interview

Conducting the interview

Decide whether further submissions constitute a fresh claim for asylum

The first limb of the test - Has the material already been considered?

The second limb of the test – does the material create a realistic prospect of success?

Further submissions are refused as a fresh claim for asylum

Further submissions are rejected as further representations

Criteria for applying Paragraph 353

Earlier Asylum and/or Human Rights claim

No Appeal Pending against refusal of previous Asylum/Human Rights Claim

New material raised before appeal hearing

Applicant decides not to appeal against initial claim

Applicant's initial appeal dismissed

Further submissions raise issues under ECHR and/or Refugee Convention relating to removal

Implied Human Rights Claim

Section 4 Support

Withdrawn asylum applications

No connection between initial claim and further submissions

When Paragraph 353 should not be applied

Pre- 2 October 2000 cases

Applicants refused asylum but granted leave for more than one year on another basis

Applicant refused asylum but granted leave for one year or less on another basis. Further submissions have been considered before and raise a realistic prospect of success

Applicant is asking UK Border Agency for discretion to afford a further right of appeal aside from paragraph 353, on the grounds of fairness

A further immigration decision will give rise to a right of appeal regardless of whether or not there is a fresh asylum or human rights claim

Applicants who have left and subsequently returned to the United Kingdom

Claims lodged overseas

When is Section 96 Certification an Option?

Section 96(1) – Earlier Appeals

Section 96(2) – One-Stop Notices

Certifying under both sections 96(1) and 96(2)

Annexes

Annex A - Equality Impact Assessment

Annex B – Further Submissions Application pro forma

Introduction

Purpose of Instruction

This Asylum Instruction sets out the policy, processes and procedures to be followed when considering further submissions.

The operational instructions in this guidance apply to both adults and children.

This guidance applies to case owners in both the asylum teams in the regions and the Case Resolution Directorate. This instruction provides guidance to both on:

- Applying Paragraph 353 of the Immigration Rules; and
- Certifying claims under section 96 of the Nationality, Immigration and Asylum Act 2002.

For the purpose of simplicity, the generic terms he, him and his will be used for all officers and applicants regardless of their gender.

The main aim of this guidance is to provide step-by-step guidance on how to deal with further submissions in practice.

Use of Terms

Within this instruction, the term:

“Case Owner” refers to case owners or caseworkers within the Regional Asylum Teams, Detained Fast-Track (DFT), Criminal Casework Directorate (CCD), or the Case Resolution Directorate (CRD).

“Senior Caseworker” applies to SEO Senior Caseworkers within the regional teams or DFT and to Technical Specialists and SEO Senior Caseworkers within CRD.

“Applicant”, “individual”, “person” and **“subject”** are all interchangeable terms referring to the asylum seeker.

Definition

A further submission refers to a situation where an applicant has had an initial asylum and/or human rights claim refused, or has withdrawn such a claim, or had such a claim treated as withdrawn under paragraph 333C of the Immigration Rules, and has exhausted all appeal rights in relation to that claim. Following this, the applicant provides additional information which may or may not be different from the information provided previously. It does not refer to individuals included on initial claims as dependants who subsequently claim asylum and/or human rights in their own right. The tool for handling further submissions is Paragraph 353 of the Immigration Rules.

Submitting further submissions

Application proforma

Failed asylum seekers and their legal representatives are encouraged to submit further submissions using the application proforma, which can be found at Annex B and on the UK Border Agency website. Case Owners are reminded that further submissions received in the form of a letter rather than on the application proforma must still be considered, provided they are submitted following the relevant processes outlined below.

Cases being managed by the Case Resolution Directorate

With effect from 14 October 2009, any failed asylum seeker whose case is being managed by the Case Resolution Directorate (CRD) is required to submit their further submissions by appointment and in person at the Liverpool Further Submissions Unit (FSU).

Failed asylum seekers being managed within CRD must make an appointment in order to submit their further submissions. The FSU cannot accommodate individuals walking in without a pre-arranged appointment. To make an appointment to submit further submissions, individuals should call the FSU on the following number:

0151 237 0980

When an appointment has been booked, staff at the FSU should send written confirmation of the appointment to the individual, including the address of the FSU and a blank further submissions application proforma.

When attending an appointment at the FSU, individuals are requested to bring with them:

- A completed Further Submissions application proforma or letter detailing the additional information the failed asylum seeker would like the UK Border Agency to consider
- Supporting Documents (including, where available, Reasons for Refusal Letter, appeal determination, documents in support of the further submissions. NB All documentary evidence to be considered in support of the further submissions must be submitted at the further submissions appointment. If all the documents are not available, UK Border Agency staff should not give an extension, but should request that the individual makes a further appointment. If the individual is unwilling to do so the consideration will be made on the documents submitted)
- Application Registration Card (if still in possession of this)
- Passport (of main applicant and any dependants in the UK, where owned and not held by the UK Border Agency)
- Police Registration Certificates (if held)
- Other Identity documents (if held)
- 4 unseparated passport-sized photographs (of main applicant and any dependants)
- Evidence of accommodation (if not provided by the UK Border Agency)
- Any other relevant documents

When the further submissions are received, the Case owner should record these on CID, see Making a decision under Paragraph 353 for the process.

Cases being managed by Asylum Teams in the Regions

With effect from 14 October 2009, any failed asylum seeker whose case is being managed by a regional asylum team is required to submit their further submissions in person at a reporting centre specified by the UK Border Agency in the region responsible for their case, either via an appointment at their reporting centre or at their regular reporting event.

If the individual regularly reports somewhere other than a reporting centre, for example a police station, then they must attend an event arranged with UKBA at a designated reporting centre in order to submit any further submissions.

Each region operates a distinct process. If a failed asylum seeker wishes to submit further submissions in person, they should contact their Case Owner in order to find out what steps to take. Further information on regional processes can be found on the UKBA website.

Depending on frequency of reporting, individuals are encouraged, where possible, to submit their further submissions as part of their regular reporting regime. Where that is not possible, individuals can request an appointment. It will be rare that reporting centres operate without an appointment system.

When attending a Reporting Centre to submit further submissions, individuals are requested to bring with them:

- A completed Further Submissions application proforma or letter detailing the additional information the failed asylum seeker would like the UK Border Agency to consider
- Supporting Documents (including, where available, Reasons for Refusal Letter, appeal determination, documents in support of the further submissions. NB All documentary evidence to be considered in support of the further submissions must be submitted at the reporting event or the further submissions appointment. If all the documents are not available, UK Border Agency staff should not give an extension, but should request that the individual makes a further appointment. If the individual is unwilling to do so the consideration will be made on the documents submitted)
- Application Registration Card (if still in possession of this)
- Passport (of main applicant and any dependants in the UK, where owned and not held by the UK Border Agency)
- Police Registration Certificates (if held)
- Other Identity documents (if held)
- 4 unseparated passport-sized photographs (of main applicant and any dependants)
- Evidence of accommodation (if not provided by the UK Border Agency)
- Any other relevant documents

When the further submissions are received, the Case owner should record these on CID, see Making a decision under Paragraph 353 for the process.

Further Submissions made at port

Where an individual returns from abroad and wishes to raise issues relating to a previous asylum or human rights claim, they are able to do so in person at their port of entry to the UK.

Exceptional Cases

Inability to travel

Failed asylum seekers who fulfil the following criteria can submit written further submissions by post:

- ✓ those who have a disability or severe illness and are physically unable to travel
- ✓ those who are imprisoned or in detention and unable to make their application in person

It should be noted that satisfactory medical evidence must be provided to substantiate postal further submissions where the applicant claims to have a disability or severe illness and is physically unable to travel to FSU Liverpool or their designated reporting centre.

Ongoing Judicial Review or other litigation

Where there is an ongoing Judicial Review or ongoing litigation of another kind, further submissions should be accepted by post. This will enable the member of UK Border Agency staff managing the JR/litigation to also consider the further submissions as part of the overall case management. If in doubt, Case Owners should contact their Judicial Review Team.

Removal Directions have been set or the individual has been accepted on a charter flight

Where Removal Directions (RDs) have been set, or a failed asylum seeker has been accepted on a charter flight, and the failed asylum seeker wishes to make further submissions, they should immediately contact their Case Owner who will advise them on what action to take. It will usually be appropriate for the Case Owner to obtain the further submissions by fax and contact the Operational Support and Certification Unit (OSCU) who will consider the further submissions on the Case Owner's behalf, where appropriate.

For further information see [Chapter 29 - Repeat Asylum Claims](#) of the Enforcement Instructions and Guidance.

Individual comes to light through enforcement action

Where a failed asylum seeker who has been picked up as a result of enforcement action indicates that they wish to submit further submissions, they should not normally be released to follow the CRD or regional 'in person' process. Their further submissions can be submitted in person to the UK Border Agency enforcement staff, who should follow [Chapter 29 - Repeat Asylum Claims](#) of the Enforcement Instructions and Guidance.

Further submissions made before 13 October (CRD & regional)

In order for postal further submissions to be valid they **must** have been received on or before 13 October 2009. Further submissions submitted by post received on or before these dates, or with a post mark date from Royal Mail of 12 October 2009 or before, should be accepted as valid further submissions. Where the date of the postal further submissions precedes these dates but was not postmarked by Royal Mail until on or after these dates, further submissions should be rejected.

Action to take when further submissions are submitted by post

If an individual submits further submissions to the UK Border Agency by post following the 13 October 2009, and they do not fit one of the exceptional criteria outlined above, Case Owners should refuse to accept these submissions. The standard letter to use when refusing to accept further submissions made by post, ASL.4093, can be found on Doc. Gen in the Miscellaneous and Acknowledgements folder. The further submissions should be returned to sender (either the legal representative or the failed asylum seeker) with the original letter. No copy should be retained on the Home Office file however CID notes should be updated.

Paragraph 353 of the Immigration Rules

Paragraph 353 of the Immigration Rules sets out how to deal with further submissions. It states:

“When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- (i) has not already been considered; and**
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.**

This paragraph does not apply to claims made overseas.”

Two-Stage Process

Paragraph 353 requires that a two stage process be applied when further submissions are received:

- **Stage One** – consider whether to grant leave.
- **Stage Two** – decide whether the further submissions amount to a fresh claim.

If stage one results in a grant of leave, the case owner does not need to proceed to stage two.

Paragraph 353 requires this two stage test to be applied sequentially on all occasions. In other words, the case owner must always decide whether the newly submitted material taken together with the old material warrants a grant of leave before carrying out any further actions. Only if the case owner decides not to grant further leave to the applicant does it become necessary to decide whether there is a fresh claim.

In cases where there is no need to make a further immigration decision (as defined in section 82 of the Nationality, Immigration and Asylum Act 2002), the purpose of paragraph 353 is to provide a mechanism whereby case owners decide whether or not the rejection of further submissions warrants another right of appeal. As a matter of policy case owners will make a further immigration decision thereby generating a further right of appeal (which will be exercisable in-county) if there is a fresh claim, but will not do so if there is no fresh claim.

Making a decision under Paragraph 353

As mentioned in Paragraph 353 of the Immigration Rules, a two-stage process is used for applying paragraph 353.

Consider whether leave should be granted

In all cases where further submissions are received, the first stage is to decide whether or not to grant leave to the applicant. The case owner must consider all available evidence when deciding whether the applicant qualifies for leave. This will include all information put forward by the applicant, but also information such as new country information or a new policy. Case owners must also act upon the findings in any final appeal determination which override conclusions expressed in the original reasons for refusal letter. For information on granting leave, see Asylum Instructions [Refugee Leave](#), [Humanitarian Protection](#) and [Discretionary Leave](#).

If a case owner decides to grant leave to an applicant, he should act as follows: -

- Follow instruction on minute sheet ASL.2898 Asylum Claim – Grant of Leave to Enter or Remain.
- Ensure that CID is updated

The decision should be served in person or by recorded or special delivery post, in line with local practices.

If the individual is in receipt of support, Case Owners should consider whether discontinuation is appropriate.

Inviting applicant to interview

Case owners may be uncertain whether to grant leave to an applicant on the basis of the information provided. In this event, it may be appropriate to invite the applicant to attend an interview.

If a case owner decides that it would be appropriate to invite an applicant who has lodged further submissions to an interview, he should act as follows: -

- Forward one copy of ASL.0062 (Invitation to Asylum Interview) to the applicant and one copy to the legal representative where appropriate. One copy should be retained on the applicant's file.
- If the applicant fails to attend the interview, the submissions should be decided on the basis of the information on the papers.
- If the applicant does attend, the case owner should ensure that CID is updated

Conducting the interview

Where an applicant was interviewed in relation to their initial asylum claim, the Case owner should inform the applicant that the purpose of the interview is to establish whether the new information justifies a grant of leave, and therefore the applicant is not required to repeat details of their initial claim. However, where information relating to the initial application is material to the new information that has been provided, the case owner should allow the applicant to expand upon this information.

Where an applicant has not previously been interviewed in relation to his asylum and/or human rights claim, the case owner should treat this as an initial interview and ensure that the applicant is questioned about both his initial claim and further submissions where the information provided in both is different.

Regardless of whether or not an interview has previously been conducted, the case owner should adhere to the guidelines set out in [Conducting the asylum interview](#).

Case owners should use Interview Record ASL.1123.

Decide whether further submissions constitute a fresh claim for asylum

If the case owner decides that it would not be appropriate to grant leave, the second stage is to determine whether the further submissions constitute a fresh claim for asylum. This is important because the applicant will only be entitled to an in-country Right of Appeal if it is accepted that there is a fresh claim. Paragraph 353 states that submissions will amount to a fresh claim if they are “significantly different” from the material that has already been considered. Submissions will only be significantly different if the content:

- has not already been considered; and
- taken together with the previously considered material, creates a realistic prospect of success.

The first limb of the test - Has the material already been considered?

If material has been considered by UK Border Agency or at appeal, it will have been considered already for the purposes of paragraph 353 and there will be no fresh claim. In these cases, it is important for the case owner to apply paragraph 353 and establish that there is no fresh claim because the material has been considered before and therefore the first limb of the test is not satisfied. It is not sufficient to say simply that the material has already been considered and that leave is therefore not being granted. The fact that something has been considered previously does not mean that paragraph 353 should not be applied. It instead means that the test in paragraph 353 will not be satisfied when applied.

If the material has previously been considered, it is not necessary for case owners to proceed to [The second limb of the test – does the material create a realistic prospect of success?](#)

The second limb of the test – does the material create a realistic prospect of success?

If the material put forward in the further submissions has not previously been considered, the case owner should then decide whether the new information, taken together with the material previously considered, raises a realistic prospect of success.

Case owners should note that the threshold with regard to a “realistic prospect of success” is a low one. The Court of Appeal has described the test as “somewhat modest”.

The test is described as somewhat modest for three reasons. First, the question is whether there is a realistic prospect of success in an application before an immigration judge, but not more than that. Second, the immigration judge himself does not have to reach a position of certainty, but only to think that there is a real risk of the applicant being persecuted on return. Finally, since asylum is in issue, the consideration of all the decision-makers, the Secretary of State, the immigration judge and the court, must be informed by the anxious scrutiny of the material.

Case owners should broadly interpret success to mean ‘being allowed to stay’. For example, an applicant who raises asylum issues in further submissions will have a fresh claim if there is a realistic prospect of an immigration judge deciding that he should be granted leave on humanitarian protection grounds.

It is inadvisable to suggest that there is no realistic prospect of success solely on the basis that an applicant has demonstrated poor credibility in the past. An applicant may have been untruthful in the past but be telling the truth now, at the further submissions stage. That said, credibility should be taken into account where appropriate in assessing whether there is a realistic prospect of success, but this is simply the same exercise as would be undertaken in assessing an initial claim. For further information, see [Assessing Credibility in Asylum and Human Rights Claims](#).

For example, both a case owner and an immigration judge might consider that an applicant’s account of torture has been fabricated. However, the applicant might later submit expert reports which conclude that, based on physical evidence, the applicant has been tortured in the past. As the reports would be based on physical evidence and not merely the applicant’s account, earlier findings on the applicant’s credibility would not be relevant. Were the reports to be based simply on what the applicant told the doctors, past credibility findings would become relevant.

Material should never be discounted entirely on the basis that the applicant could or should have raised it earlier. However, in assessing whether there is a realistic prospect of success, case owners may treat material with circumspection if it is raised late and could have been raised sooner. This is of particular relevance to submissions that are raised at the point of removal. For further information, see [Assessing Credibility in Asylum and Human Rights Claims](#).

Where the further submissions consist wholly or partly of documentary evidence, case owners must consider all available material when deciding whether or not there is a realistic prospect of success. The question of whether any particular document can be relied on to support the applicant’s case must be considered in light of all the evidence. The issue is not, in most cases, whether any particular document is a forgery; it is whether, in light of all the evidence considered as a whole, there is a realistic prospect of success.

If an applicant challenges the decision that his further submissions do not amount to a fresh claim by lodging a Judicial Review, the Court will ask whether this decision was reasonable. The decision will only be reasonable if the case owner has very carefully considered whether there is a realistic prospect that the submissions will, when taken together with all the previously considered material, lead an immigration judge to decide that the applicant should be allowed to stay in the United Kingdom.

In addition, the case owner must have considered the low threshold which applies, given proper weight to issues such as credibility and the timing of the submissions and considered all the evidence in the round.

The case owner must very carefully consider whether there is a realistic prospect that the submissions will lead an immigration judge to decide that the applicant should be allowed to stay in the UK when taken together with all the previously considered material. If the case owner considers that this test is met, the submissions must be refused as a fresh claim for asylum. If this test is not met, the case owner should reject the submissions as further representations, meaning that no new immigration decision has been made.

Further submissions are refused as a fresh claim for asylum

Where a case owner decides to refuse further submissions as a fresh claim for asylum, he should act as follows: -

- Follow instructions on minute sheet ASL.2899 – Asylum Claim (Refuse Outright).
- Decide whether the fresh claim should be certified under section 96 of the Nationality, Immigration and Asylum Act 2002. If so, see [When is Section 96 Certification an Option?](#) If not, see the bullet point below.
- Ensure that CID is updated

The decision should be served in person or by recorded delivery post, in line with local practices.

If the individual is in receipt of support, Case Owners should consider whether discontinuation is appropriate.

Further submissions are rejected as further representations

Where a case owner decides to reject further submissions as further representations, he should act as follows:

- Follow instructions on minute sheet ACD.2843 – Further Representations.
- Draft the response using the further submissions response pro forma, found on Doc. Gen
- Ensure that the decision to reject as further representations is considered by a second pair of eyes where appropriate.
- Ensure that CID is updated

The decision should be served in person or by recorded delivery post, in line with local practices.

If the individual is in receipt of support, Case Owners should consider whether discontinuation is appropriate.

Criteria for applying Paragraph 353

Earlier Asylum and/or Human Rights claim

Paragraph 353 can only be applied where there has been an earlier human rights or asylum claim which has been refused or withdrawn or treated as withdrawn under paragraph 333C of the Immigration Rules. Where an applicant has not previously lodged an asylum and/or human rights claim, or has submitted additional information relating to an initial claim before the initial decision has been made (unless the initial claim was withdrawn or treated as withdrawn under paragraph 333C), the case owner should not apply Paragraph 353.

In addition, the case owner needs to ensure that the applicant has raised asylum and/or human rights issues by means of a claim to UK Border Agency. For example, Paragraph 353 cannot be applied in cases where asylum and/or human rights grounds have been raised for the first time in grounds of appeal.

No Appeal Pending against refusal of previous Asylum/Human Rights Claim

In addition, paragraph 353 can only be applied where there is no appeal pending against the refusal of the earlier claim. If there is an appeal pending, the applicant should, where possible, raise all relevant matters in the context of that appeal. If there is no appeal pending, either because the applicant never brought an appeal or because the appeal has been dismissed, withdrawn, abandoned or has lapsed, the case owner should apply paragraph 353.

New material raised before appeal hearing

Where an applicant raises new material after a decision has been made on his asylum and/or human rights claim but before his appeal is heard, Paragraph 353 should not be applied. The applicant should raise this material in the context of his appeal. However, if it has not been possible to raise this material during the course of his appeal for any reason, the case owner should consider it after the conclusion of the appeal and apply paragraph 353.

Applicant decides not to appeal against initial claim

If an applicant chooses not to appeal against the refusal of an initial asylum and/or human rights claim, it would be appropriate to apply Paragraph 353 to any further material raised.

Applicant's initial appeal dismissed

Many applicants who lodge further submissions will have had their initial asylum claims refused and their appeals dismissed. They will now be Appeal Rights Exhausted. Case owners should apply paragraph 353 to any further submissions that have been raised.

Further submissions raise issues under ECHR and/or Refugee Convention relating to removal

Paragraph 353 can only be applied where the further submissions raise issues under the ECHR and/or the Refugee Convention relating to removal. Although "further submissions" are not defined in paragraph 353, given that the purpose of the paragraph is to provide a mechanism for deciding whether a fresh claim has been made (i.e. a fresh "human rights

claim” or fresh “asylum claim”, as those terms are defined in section 113 of the Nationality, Immigration and Asylum Act 2002), it must only be applied where the further submissions raise asylum and/or human rights issues relating to removal. If the person is not alleging that removal will breach either Convention, but is instead making some other kind of human rights argument, it is not appropriate to apply paragraph 353.

Implied Human Rights Claim

Some applicants may delay removal on the grounds of implied human rights claims, in particular under Article 3 and Article 8 of the ECHR. It is not necessary for the applicant to have made explicit reference to the ECHR for further submissions to have been raised on these grounds. If such an applicant has previously been refused asylum and leave under the ECHR and appeal rights relating to that claim are exhausted, it would be appropriate to apply paragraph 353 in respect of the human rights issue.

Section 4 Support

It may be difficult to remove some applicants who are Appeal Rights Exhausted (ARE) in relation to their initial asylum and/or human rights claims. Some may then apply for support under section 4 of the Immigration and Asylum Act 1999 on the grounds that a refusal to provide support would amount to a breach of their human rights under the ECHR. Case owners should not apply paragraph 353 to the application for section 4 support as the human rights issues do not relate to the applicant’s removal. The issue relating to section 4 should instead be handled without reference to paragraph 353. For further information on whether such an applicant is entitled to support under section 4, see [Section 4 Support](#).

Withdrawn asylum applications

From 7 April 2008, paragraph 353 of the Immigration Rules may be applied to further submissions made after an original asylum claim has been withdrawn or treated as withdrawn under paragraph 333C of the Immigration Rules. In such cases, it is likely that any further submissions will meet the threshold to succeed at the first limb of the test, as the content is unlikely to have been considered previously. It is not certain, however, that the submissions will meet the threshold to succeed at the second limb of the test, in other words, that when taken together with the previously considered material, the content of the submissions create a realistic prospect of success in front of an Immigration Judge, notwithstanding the rejection of those submissions.

For further information on withdrawn applications and paragraph 333C, see the AI [Withdrawal of Applications](#).

No connection between initial claim and further submissions

Whether or not there is any connection between an applicant’s initial claim for asylum and/or human rights and the further submissions does not impact on whether paragraph 353 should be applied to the latter. Even where they are entirely unrelated, paragraph 353 should still be applied where the conditions laid out in [Earlier Asylum and/or Human Rights claim, No Appeal Pending against refusal of previous Asylum/Human Rights Claim and Further Submissions raise issues under ECHR and/or Refugee Convention relating to removal](#) are met. For example, an applicant may claim asylum due to a fear of persecution on the ground of religion which is refused and subsequently dismissed at appeal. He may

subsequently make an Article 8 human rights claim. Despite the clear differences between the initial claim and further submissions, the case owner should still apply paragraph 353.

Initial asylum and/or human rights claim has been certified under section 94 of the Nationality, Immigration and Asylum Act 2002

Following the House of Lord's judgment in *ZT (Kosovo)*, paragraph 353 must be applied to unsuccessful further submissions where the initial claim(s) has/have been certified as clearly unfounded under section 94 of the NIA Act 2002. This is a change from the former process for dealing with further submissions in section 94 cases, where a specific section 94 procedure applied. For further information on handling NSA cases, see [Certification under Section 94 of the NIA Act 2002](#).

When Paragraph 353 should not be applied

This section sets out scenarios where it would be inappropriate to apply paragraph 353 of the Immigration Rules. There are some special cases where, notwithstanding that the points made in [Criteria for Applying Paragraph 353](#) are satisfied, paragraph 353 should exceptionally not be applied when handling further submissions.

Pre- 2 October 2000 cases

Where an applicant lodged an asylum claim and this was refused by way of an appealable decision made before 2 October 2000 and where no further decision has been made since that date which gave him

the opportunity to appeal on human rights grounds, paragraph 353 should not be applied to any human rights submissions he then goes onto make. This only applies to human rights submissions and applies even where the appeal itself took place after 2 October 2000. However, even if these conditions are satisfied paragraph 353 should always be applied if either or both of the following conditions apply:

- The human rights issue was considered and rejected in the context of the ECHR at the asylum appeal against the pre 2 October 2000 decision, or
- there was a basic finding of fact made at that appeal which means that any claim based on those facts is likely to fail. For example, the applicant may have maintained a history or nationality which has been found to be false and would therefore not be entitled to another appeal relying on the same false information. However, if no such finding was made at appeal, the case owner should not apply paragraph 353 to the submissions.

These cases are sometimes referred to as *Pardeepan* cases after a decision of the Immigration Appeal Tribunal.

Applicants refused asylum but granted leave for more than one year on another basis before making human rights submissions

Where an applicant is refused asylum but is granted leave in excess of one year for some other reason, he will have a right of appeal (under section 83 of the Nationality, Immigration and Asylum Act 2002) against the asylum refusal. However, due to the fact that he has been granted leave on another basis, he will not have been able to appeal on human rights grounds. Therefore, case owners should not apply paragraph 353 to any human rights submissions lodged after the refusal of the asylum claim.

Applicant refused asylum but granted leave for one year or less on another basis. Further submissions have been considered before and raise a realistic prospect of success

Where an applicant is refused asylum but is granted leave for one year or less for some other reason, he will not have a right of appeal against the asylum refusal. Therefore, the case owner should not apply paragraph 353 to any submissions lodged by the applicant after the expiry of his leave which would fail the paragraph 353 test solely on the ground that the content has been considered previously. It would not be appropriate to apply

paragraph 353 if it is also considered that the submissions raise a realistic prospect of success. If the further submissions do not create a realistic prospect of success, however, paragraph 353 should be applied as normal (whether or not the content has been considered before). For further information, see [What does the test in Paragraph 353 mean?](#)

Applicant is asking UK Border Agency for discretion to afford a further right of appeal aside from paragraph 353, on the grounds of fairness

Case owners should note that they have a discretion, aside from paragraph 353, to generate a further right of appeal in cases where to deny a right of appeal would be unfair. These cases are sometimes referred to as Kazmi cases after a decision of the Immigration and Asylum Tribunal (AIT). Where it is clear that an applicant is solely asking for a further right of appeal on fairness grounds, the case owner should address that issue without reference to paragraph 353.

For example, an applicant may lodge an appeal against a refused asylum claim but fail to attend the hearing. He may then claim that neither he nor his representatives were informed of the correct date of the hearing and that he was unable to attend for this reason. The applicant may then request a further right of appeal on the grounds that it was unfair that his earlier appeal was dismissed without him having the opportunity to attend and give evidence. In this situation, it would not be appropriate for the case owner to apply paragraph 353. The case owner should instead consider whether or not discretion to generate a further right of appeal on fairness grounds should be exercised.

A further immigration decision will give rise to a right of appeal regardless of whether or not there is a fresh asylum or human rights claim

The Court of Appeal found in the case of *BA (Nigeria)* that in cases where a further immigration decision is required after further submissions on human rights or asylum grounds have been made, regardless of whether those further submissions amount to a fresh claim for asylum under paragraph 353, section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 will be engaged and the individual will be entitled to a further in-country right of appeal. Consequently, paragraph 353 should not be applied in these cases. This is a change to the former process, where paragraph 353 would be applied to all further submissions except those where the immigration decision would give rise to an in-country right of appeal regardless of whether or not the applicant has made an asylum or human rights claim. For further information, see below and [section 92 of the Nationality, Immigration and Asylum Act 2002](#).

Applicants who have left and subsequently returned to the United Kingdom

Some applicants will have been refused leave in relation to their initial asylum and/or human rights claims before leaving the United Kingdom. If such an applicant subsequently returns and attempts to raise asylum and/or human rights issues again, if those submissions are unsuccessful the applicant will be refused leave to enter. This is an immigration decision under section 82 of the Nationality, Immigration and Asylum Act and therefore attracts a right of appeal. Following the Court of Appeal judgment in *BA (Nigeria)*, paragraph 353 should not be applied in such cases, as section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 will be engaged regardless of whether the submissions meet the test in paragraph 353, and as a result the appeal will be in-country. This is a

change to the former process in which case owners were advised to apply paragraph 353 if these submissions were unsuccessful.

Under previous procedures, the importance of applying paragraph 353 in these cases was that if there was either no fresh asylum or fresh human rights claim, then the right of appeal would have been out-of-country rather than in-country provided that the conditions set out in [No Appeal Pending against refusal of previous Asylum/Human Rights claim](#) apply.

Claims lodged overseas

Case owners should note that paragraph 353 does not apply to claims made overseas. For example, if an applicant has been removed from the United Kingdom and then attempts to submit a new asylum and/or human rights claim from another country, paragraph 353 should not be applied. The applicant would not be entitled to an in-country Right of Appeal against this decision as section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 only applies if the person has made an asylum or human rights claim in the UK.

When is Section 96 Certification an Option?

Section 96 of the Nationality, Immigration and Asylum Act 2002 (as amended) allows UK Border Agency to certify a right of appeal in certain circumstances. The result of certification is that an appeal may not be brought either in-country or out-of-country. However, as with a decision not to treat further submissions as a fresh claim under paragraph 353, a decision to certify under section 96 can be challenged by judicial review.

Case owners should note that if the further submissions are **not** being refused as a fresh claim for asylum, certification action is not possible. This is because there is no point in certifying under section 96 if there is no right of appeal to certify, and it is not appropriate to certify if the right of appeal is only exercisable out-of-country.

In cases where there is no need to make another immigration decision there will only be a right of appeal if there is a fresh claim. This is because a further right of appeal will be generated in these cases as a matter of policy. In cases where a further immigration decision will have to be made (and the decision is not one which normally attracts an in-country right of appeal), it is only if there is a fresh claim that the right of appeal will be exercisable in-country. Section 96 is intended to prevent people raising matters at the last minute to frustrate removal. That being the case, if there is no in-country right of appeal then there will be no bar to removal, and it will not be appropriate to certify under section 96.

In effect, section 96 certification can be seen as **stage three** in the process of handling further submissions. The three stages can be summarised as follows: -

- **Stage One** – consider whether to grant leave.

If (and only if) the decision is not to grant leave move onto:

- **Stage Two** – decide whether the further submissions amount to a fresh claim.

If (and only if) the decision is that there is a fresh claim move onto:

- **Stage Three** – consider whether to certify under section 96.

In all cases of further submissions paragraph 353 should be applied before section 96 is considered. A decision letter dealing with further submissions should never purport to certify under section 96 without first applying paragraph 353 and concluding that there is a fresh claim. Case owners cannot pursue certification action under section 96 if they have decided that there is no fresh claim on applying paragraph 353.

In cases where paragraph 353 should exceptionally not be applied when handling further submissions, section 96 certification is not appropriate except where a further immigration decision will have to be made and that decision will give rise to an in-country right of appeal regardless of whether or not there is a fresh asylum or human rights claim. In those cases, certification under section 96 is possible. For further information on where case owners should not apply paragraph 353, see [When Paragraph 353 should not be applied](#).

Case owners can pursue certification action under either section 96(1) or section 96(2) of the Nationality, Immigration and Asylum Act 2002. Section 96(1) deals with earlier rights of appeal, whilst section 96(2) deals with One-Stop Notices.

Section 96(1) – Earlier Appeals

Section 96(1) states the following: -

“An appeal under section 82(1) against an immigration decision (‘the new decision’) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies –

- (a) that the person was notified of a right of appeal under that section against another immigration decision (‘the old decision’) (whether or not an appeal was brought and whether or not any appeal brought has been determined),
- (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and
- (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for the matter not having been raised in an appeal against the old decision.”

For certification under section 96(1) to be possible, the case owner must be satisfied that the following criteria are met:

- The applicant must have been notified of a right of appeal under section 82 against a previous immigration decision (e.g. a refusal of leave to enter following an asylum claim). Whether the applicant chose to exercise his Right of Appeal is irrelevant.
- The fresh claim must rely on a matter which could have been raised on appeal against the earlier refusal. Case owners will need to carefully consider whether the new claim relies on a matter which could have been raised at an earlier appeal. In Article 8 ECHR cases, for instance, although the basic facts of the Article 8 case may have been available earlier, the case is likely to have evolved over time. For example, a child may have been born since the initial Article 8 claim was decided. If there has been a material change in the case certification is not likely to be appropriate, whereas a simple evolution of the facts over time which does not significantly impact upon the claim is not likely to make certification inappropriate.
- There must be no satisfactory reason for the matter not having been raised at the earlier appeal. For example, an applicant may submit a newspaper article some time after becoming Appeal Rights Exhausted in relation to his/her initial asylum claim. If the article was written a period of time before the appeal was heard, the case owner would be entitled to judge that this information could have been raised earlier. Therefore, in the event that the case owner decides both to refuse leave but accept a fresh claim, certification action may be suitable.

If an applicant appeals against the initial decision, raises the relevant matter in that appeal, but then abandons the appeal, the case owner should still consider certifying under section 96 if he later makes further submissions relying on that matter.

Where a case owner decides to certify under section 96(1), he should act as follows:

- Follow instructions on minute sheet ASL.2899 – Asylum Claim (Refuse Outright).

- Draft the response using the further submissions response proforma, found on Doc. Gen
- Ensure that CID is updated

The decision should be served in person or by recorded delivery post, in line with local practices.

If the individual is in receipt of support, Case Owners should consider whether discontinuation is appropriate.

Section 96(2) – One-Stop Notices

Section 96(2) states the following:

“An appeal under section 82(1) against an immigration decision (‘the new decision’) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies –

- (a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,
- (b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and
- (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for the matter not having been raised in a statement in response to that notice.”

For certification under section 96(2) to be possible, the case owner must be satisfied that the following criteria are met:

- The applicant must have received a one-stop notice in relation to an earlier application (e.g. an earlier asylum claim or an application for leave to enter as a dependant of a family member claiming asylum).
- The fresh claim must rely on a matter which should have been, but has not been, raised in a valid response to that notice. A one-stop notice gives rise to a *continuing* obligation to disclose reasons and grounds for staying in the United Kingdom. As a consequence, an applicant is obliged to provide information about any matters which arise subsequent to the service of the notice at the earliest possible opportunity. Where an applicant replies to a one-stop notice, but fails to do so *promptly* following receipt of the notice or at the point at which the new matter arises, the case owner should not consider this as a valid response to the notice.
- There must be no satisfactory reason for the matter not having been raised in a valid response to that notice. For example, where an applicant receives a one-stop notice in relation to an application and was clearly aware of the matter at that time but failed to disclose it, the case owner would be entitled to argue that section 96 certification is possible if he later raises submissions relying on the same matter.

Section 96 certification is possible in certain cases where paragraph 353 is not relevant. For example, although paragraph 353 should not be applied where a person who is named as a dependant on another person’s asylum or human rights claim then goes onto make a claim in his own right section 96 certification may still be appropriate. This is because a one-stop notice should have been served on the applicant when he applied for leave as a dependant. Therefore, he will have had an opportunity to submit a response to the one-stop notice meaning that section 96(2) can be applied when he subsequently makes a claim in his own right. However, section 96(1) will not be appropriate in this case, as a person refused leave as a dependant will only have been notified of an out-of-country right of appeal. This makes later certification on the basis of the earlier right of appeal inappropriate.

Case owners may not certify under section 96(1) or section 96(2) where the applicant did, in fact, raise the issue in an earlier appeal or in a valid response to the one-stop notice.

Certification is only possible where the applicant either could or should have raised the matter on appeal or by way of a valid response to the one-stop notice but failed to do so.

Where a case owner decides to certify under section 96(2), he should act as follows:

- Follow instructions on minute sheet ASL.2899 – Asylum Claim (Refuse Outright).
- Draft the response using the further submissions response proforma, found on Doc. Gen
- Ensure that CID is updated

The decision should be served in person or by recorded delivery post, in line with local practices.

If the individual is in receipt of support, Case Owners should consider whether discontinuation is appropriate.

Certifying under both sections 96(1) and 96(2)

Case owners should be aware that a fresh claim may be suitable for certification under both section 96(1) and section 96 (2) of the NIA Act 2002. If this is appropriate, case owners should make use of both certificates.

Annexes

Annex A - Equality Impact Assessment



EIA Further
submissions in person

Annex B – Further Submissions Application pro forma



Further submissions
application pro forma

Document Control

Change Record

Version	Authors	Date	Change Reference
1.0	C. C./J. C.	03/04/08	First approved version
2.0	S. K.	29/10/08	Update branding only
3.0	C. C.	13/10/09	Update for further submissions in person