

## THE RESIDENCE REQUIREMENTS

### 1. Introduction

1.1 The main purposes of the residence requirements are to allow an applicant to demonstrate close links with, and commitment to, the United Kingdom, and to enable the Home Secretary to assess the strength of that commitment and the applicant's suitability on other grounds (e.g. character). The normal expectation therefore is that applicants should meet the residence requirements.

1.2 Under **paragraphs 2 and 4 of Schedule 1** to the British Nationality Act 1981, the Home Secretary has discretion, in the special circumstances of any particular case, to waive certain of the residence requirements. He cannot, however, exercise his discretion in such a way as, virtually, to ignore those requirements.

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

### 2. Checking the residence requirements

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

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

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

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

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

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

2.3 Physical presence here is normally sufficient for the purpose of the Act. The applicant does not have to have been ordinarily resident or domiciled here. Normally, an applicant is to be regarded as present in the United Kingdom unless physically absent; but in certain circumstances, the Act requires periods of physical presence to be treated as absences (see paragraph 9 below).

2.4 In the remainder of this Annex, the figures in brackets relate to applications under **s.6(2)** unless the context otherwise requires.

3. **Presence in the UK at the beginning of the 5(3) year qualifying period**

3.1 With the exception of:

- applicants who are applying only on the grounds of Crown service (see Annex C)
- spouses/civil partner of British citizens in Crown or designated service (see paragraph 6 below)

- applicants who are technically absent from the United Kingdom (see paragraph 9 below)

there is no discretion to waive the requirement to have been physically present in the United Kingdom on a date five (three) years before the date of application (the date of application is defined in **Chapter 6**).

3.2 The start of the qualifying period of 5(3) years is the day after the corresponding application date. Thus, for example, if the application date is 5 January the 5(3) year qualifying period starts on 6 January.

3.3 Where an applicant misses the requirement to have been in the United Kingdom on the date 5(3) years prior to the application date by 2 months or less either way, for whatever reason, we may consider offering re-declaration if:

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

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

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

will normally have been lost as a direct result of the re-declaration process.

3.6 When an application form is re-declared, the original application date is superseded by a new application date, which is the date on which the re-declared form is received back in the Home Office. Re-declaration should normally be offered at the outset and the re-declared application returned to await consideration under its new application date. However, if re-declaration is only offered when the application has reached its turn for consideration, work should continue on the re-declared application. Care should be taken to advise applicants, where necessary, to avoid re-submitting application forms to arrive on dates when they would again fail to meet the 5(3) year start date. When an application is re-declared, the fee charged is that in force on the new application date. Any overpayment must be refunded from nationality fees immediately.

3.7 An applicant who does not meet either of the criteria at 3.3 above should be refused on the grounds of failing to satisfy the statutory requirement to have been in the United Kingdom on the date 5(3) years prior to the date of application. Normally, the fee paid should be refunded less any non-returnable element. From 1 April 1996, no part of the fee is returnable, and the implications of this will have to be pointed out at the time of inviting re-declaration. However, where an applicant misses the requirement by one month or less, and cannot otherwise be offered re-declaration, the whole fee should be refunded (part of this will be an ex gratia payment which will need Finance Section approval) unless other statutory requirements are also clearly not met. From 1 April 1996, if the whole fee is to be refunded, this will be by way of an ex gratia payment to be approved by Finance Section.

3.8 Minors included on the application form

3.8.1 Any minor who has turned 18 since the application was made, and has been included for registration on a form to be re-declared, should not be placed at a disadvantage because of a parent's inability to meet the requirements for naturalisation. In such cases, the original date of receipt should be retained as the date of application for the minor, who should be considered under the appropriate registration

provision.

4. **Excess absences in the 5(3) year qualifying period**

4.1 Under **paragraph 2 and 4 of Schedule 1** to the British Nationality Act 1981, there is discretion to waive excess absences in the qualifying period. We should normally consider exercising this discretion as set out below, but only when we are satisfied that applicants have genuinely thrown in their lot with the United Kingdom and meet the other requirements. NB. Where an applicant's absences include periods of "technical absence", the application should also be considered in accordance with paragraph 9 below.

4.1.1 Absences totalling 480 (300) days - normally disregard.

4.1.2 Total Absences of up to 900 (540) days - consider disregarding only if the application is otherwise in order, and if applicants have established their home, family and a substantial part of their estate here. We should also expect:

a. at least 2(1) years residence (without substantial absences) immediately prior to the 5(3) year qualifying period. If the period to be disregarded is greater than 730 (450) days, the period of prior residence should be at least 3(2) years; or

b. the excess absences to have been due either:

i. to postings abroad in Crown service under the government of the United Kingdom (see paragraphs 9.3-9.4 below). **[NB. Special provisions are in place for current and former members of HM Armed Forces (see Annex B(i))]**; or

ii. to accompanying a British citizen spouse/civil partner on an overseas appointment (see also paragraph 6 below where the appointment is in Crown or designated service); or

c. the excess absences to have been an unavoidable consequence of the nature of a career (for example

a merchant seaman or someone in UK-based business or employment which requires frequent travel abroad); or

d. exceptionally compelling reasons of an occupational or compassionate nature to justify naturalisation now, including, for example, because the applicant has a firm offer of a job for which British citizenship is a statutory or professional requirement.

4.1.3 Only if it is clear from the information we have that the above considerations are met may the excess absences be disregarded. In some cases, it may be necessary to make further enquiries (e.g. using the RESIDENCE QUESTIONNAIRE) before a decision is made.

4.1.4 It would be extremely rare for absences exceeding 900/540 days to be waived (but note special provisions for current and former members of HM Armed Forces - see Annex B(i)). Applicants with absences exceeding 900/540 days should normally be refused and invited to re-apply when they are better able to bring themselves within the statutory requirements. If the circumstances of an individual case suggest the waiver of absences on this sort of scale, the papers should be considered at a senior level.

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

## 5. Excess absences in the final year

5.1 In **s.6(1)** cases, we should normally exercise discretion over absences in the final year only if the future intentions requirement is met (see Annex F). If that requirement is met, and in **s.6(2)** cases, the following should apply (NB. Where the applicant is a current or former member of the Armed Forces, this should be subject to the guidance contained in paragraph 9.4 and Annex B(i) below):

5.1.1 Total absences not exceeding 100 days - normally disregard.

5.1.2 Total absences of more than 100 days but not more than 180 days where the residence requirements over the full 5(3) year qualifying period are met - consider disregarding if applicants have demonstrated links through the presence here of family, an established home and a substantial part of their estate.

5.1.3 Total absences of more than 100 days but not more than 180 days where the residence requirements over the full 5(3) year qualifying period are not met - consider disregarding only if:

a. applicants have demonstrated that they have made this country their home by establishing home, family and a substantial part of their estate here; and

b. the absence is justified by Crown service (but see also paragraph 9.4 and Annex B(i) below if the applicant is/was in the Armed Forces) or by compelling occupational or compassionate reasons, taking account of the examples at b, c. and d. in paragraph 4.1.2 above.

5.1.4 Total absences exceeding 180 days where the residence requirements over the full 5(3) year qualifying period are met - consider disregarding if the criteria in paragraph 5.1.3 are met.

5.1.5 Total absences exceeding 180 days where the residence requirements over the full 5(3) year qualifying period are not met - consider disregarding only in the most exceptional circumstances and where the criteria in paragraph 5.1.3 are met (a decision to waive excess absences in these circumstances should be referred to NPT for noting on completion).

6. Spouses/civil partners of British citizens in Crown or designated service (Section 6(2) cases only)

6.1 Paragraph 4(d) of Schedule 1 provides that where the British citizen spouse/civil partner is in Crown or designated service, and was recruited in the UK for that service (see Chapter 4), the following requirements may be waived:

- the requirement to have been in the UK on a date 3 years before the date of application
- the requirements not to have been absent for more than 270 days in the 3 years ending with the date of application or more than 90 days in the final year

## 6.2 Criteria for discretion

6.2.1 The discretion may be exercised where the following circumstances apply:

- a. the applicant is of full age, full capacity and of good character (see Annex A and Annex D)); and
- b. on the date of application, and while the application is under consideration, the applicant's spouse/civil partner is a British citizen who:
  - i. is serving abroad, or is likely soon to be posted abroad (see 6.2.3 below), in Crown service (see 6.2.4 below) or service designated under **s.2(3)**; and
  - ii. was recruited to the service in question in the United Kingdom; and
- c. the marriage has subsisted for 3 years or more on the date of application; and
- d. the applicant is unlikely, for the foreseeable future, to be able to meet the residence requirements because of the spouse's/civil partners service abroad; and
- e. the employing organisation certifies that naturalising the applicant would be in its interests in order to avoid difficulties:
  - in retaining the services of an essential officer; or
  - in enabling an applicant to accompany the officer on a foreign posting; or

- of a security nature

**NB.** If the employing service has not given the information described in c, d, or e above, this should be requested.

6.2.2 Where the marriage has not subsisted for 3 years on the date of application, the employing service should be expected to provide compelling operational or security reasons to justify granting the application. The other requirements of 6.2.1 above should be met.

6.2.3 Discretion should not normally be exercised where the applicant (and/or the spouse/civil partner) has returned to the United Kingdom and a further posting abroad is unlikely to occur in the foreseeable future. In such cases, the applicant should normally be expected to meet the residence requirements.

6.2.4 For the purposes of the discretion mentioned in paragraph 4(d) of **Schedule 1**, "Crown service" means:

- (in respect of applications made before 21 May 2002) Crown service under the government of the United Kingdom
- (in respect of applications made on or after 21 May 2002) Crown service under the government of the United Kingdom or the government of a qualifying territory (see Annex F to **Chapter 6**)

### 6.3 Armed Forces spouses/civil partners

6.3.1 The criteria in paragraphs 6.2.1 c, d and e above may be waived in the case of an Armed Forces spouse/civil partner who has the citizenship neither of the UK nor of the country to which the couple are (or are likely to be) posted. The employing organisation should be asked what it knows about the applicant's general character and suitability.

### 6.4 Diplomatic Service spouses/civil partners

6.4.1 Special considerations also apply to applications under **s.6(2)** made by the spouses/civil partners of British citizens in the Diplomatic Service. We should normally

agree to waive the residence requirements provided:

- the application is supported by the Foreign and Commonwealth Office; and
- on the date of application, the British citizen spouse/civil partner is in Diplomatic Service employment, and was recruited to that service in the United Kingdom; and
- at the time the application is being considered, the British citizen spouse/civil partner is likely to continue in diplomatic service employment for the foreseeable future; and
- the criteria at paragraph 6.2.1.a and c are met

#### 6.5 Priority

6.5.1 Priority should be given to applications made by the spouses/civil partners of British citizens in Crown or designated service if a foreign posting is involved. Where the application has been received via FCO, Consular Directorate, all communication with the applicant must be made through them.

### 7. Immigration time restrictions in the year prior to the application date

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

- people who are not in the United Kingdom (but see 7.3 below)
- people who have entered the UK illegally (whether clandestinely, in breach of a deportation order or by their own or another person's deception) and have not been granted limited leave;
- people refused leave to remain prior to 2 October 2000 who are not required to leave the United Kingdom by virtue of

having immigration appeals pending against those refusals (see paragraph 8.3);

- people exempt from immigration control under **s.8(2), 8(3)** or **8(4)** of the **Immigration Act 1971** (however, those exempt under **s.8(3)** or **8(4)** will be technically absent - see paragraph 9 below);
- certain EEA or Swiss nationals or their family members (see "**EUROPEAN ECONOMIC AREA AND SWISS NATIONALS**" in Volume 2)

**NB. People in the second and third categories mentioned above are, however, in breach of the immigration laws (see 8.1 - 8.10 below).**

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

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

7.3 A person who is *outside* the United Kingdom will necessarily be free, at that time, from any restriction under the immigration laws on the period for which s/he might remain in the United Kingdom. However, it would be contrary to the spirit of the Act to allow an application to succeed where the sole or main purpose in applying from abroad was to circumvent the requirement about freedom from immigration time restrictions - in other words where, had s/he remained in the United Kingdom at the relevant date, the applicant would have failed to qualify because s/he would then have had only a limited leave or conditional right to be in the UK. Any such cases should be referred initially to a SCW to consider whether refusal would be appropriate. When refusing an application on this basis, the following explanation may be offered: "The Secretary of State is not *obliged* to naturalise a person who meets the requirements in Schedule 1 to the 1981 Act, and will not normally be prepared to do so if it appears to her that the sole or main purpose in applying from outside the United Kingdom was to circumvent the requirement for the applicant to

be free, on the date of application, from any restriction under the immigration laws on the maximum length of his or her stay in the United Kingdom".

- 7.4 Applicants under **s.6(1)** must also have been free of immigration time restrictions for the remainder of the 12 months before the date of application. Under **paragraph 2(c)** of **Schedule 1** to the British Nationality Act 1981, there is discretion to waive this requirement.

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

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

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

requirements, including the other residence requirements, are met, only if :

- i. the applicant has established links with the UK through presence here of home, family and a substantial part of estate, and
- ii. there are compelling business or compassionate reasons to justify granting the application now; or
- f. the period of limited leave exceeded 10 days at the beginning of the 12 months period, and the other statutory requirements, including the other residence requirements, are not met, only in the most exceptional circumstances and if the criteria at e. above are met; or
- g. consideration of an application for indefinite leave to remain, made more than 15 months before the citizenship application, had been protracted through no fault of the applicant, providing ILR was eventually granted. This can include applications for asylum which have resulted in the grant of ILR (you should note that any asylum cases granted on or after the 30 August 2005 will not result in ILR, applicants will instead be given limited leave); or
- h. an application for asylum or leave to remain was refused but later acknowledged to be an incorrect decision and the appropriate leave granted **and** had the correct decision been made at the outset, the applicant could have applied for ILR earlier and met this requirement on the date of consideration

**NB. In the case of applicants in categories 7.4.e and 7.4.f above: If information has not been provided to indicate that there are any special grounds to justify the exercise of discretion, we should assume that no special circumstances exist and consider the application on the basis of the information available (i.e. there is no need to send a Residence Questionnaire).**

8. Breaches of the immigration laws during the 5/3 year qualifying period

8.1 **Section 2** of the **Immigration Act 1971** (as amended by **s.39** of the **BNA 1981**) identifies persons having the right of abode in the UK. All others (except certain EEA nationals, their family members and persons who are exempt from immigration

control under **s.8** of the **1971 Act** - see paragraphs 8.2 and 9 below) require leave to enter the UK. (In the case of EEA nationals, see also "**EUROPEAN ECONOMIC AREA AND SWISS NATIONALS**" in Volume 2). Under **s.11** of the **Nationality, Immigration and Asylum Act 2002**, any such person who has entered the United Kingdom (within the meaning of **s.11** of the **Immigration Act 1971**) but does **not** have leave to enter or remain is deemed, for the purposes of the BNA 1981, to be here in breach of the immigration laws. **Section 11** of the **NIAA 2002** came into force on 7 November 2002, and the definition of "in the United Kingdom in breach of the immigration laws" which it contains is, generally speaking, to be treated as having always had effect. Guidance on the position of people who are in the UK pending determination of an application for, or appeal against refusal of, further leave to remain/ILR is given in paragraphs 8.3 - 8.6 below. (NB. Unlawful residence should not be confused with technical absence. A person is not technically absent merely because he is in breach of the immigration laws by being here unlawfully. Technical absence is a separate issue (see paragraph 9 below).

8.2 People without the right of abode or leave to enter or remain in the United Kingdom who are not regarded as being in breach of the immigration laws for BNA 1981 purposes

8.2.1 The following persons are **not** regarded as being in breach of the immigration laws for the purposes of the BNA 1981 just because they do not have the right of abode or leave to enter or remain:

- People who are entitled to reside here without leave under EC law as extended by the European Economic Area Agreement;
- Crew of ships or aircraft;
- Other persons exempt from immigration control;
- Persons who have disembarked at a United Kingdom port but who:
  - a. are still in the immigration control area; or
  - b. have been detained or given "temporary admission" pending a formal decision on their eligibility to enter

**NB** it is therefore possible that a person can be in the UK lawfully even if they have absconded - details on how to deal these cases are contained in **paragraphs 9.7.5-6** below)

8.2.2 In addition, a person within the first category mentioned above is not to be regarded as having been unlawfully resident in the United Kingdom at any time before 7 November 2002 unless he or she then remained here in defiance of a deportation or removal order.

8.3 People refused prior to 2 October 2000

8.3.1 The position of people refused leave to remain before 2 October 2000 was covered by the **Immigration (Variation of Leave) Order 1976** (VOLO). VOLO automatically extended the limited leave of a person who applied "in time" (i.e. before the expiry of a period of leave to enter or remain) for variation of his leave, until 28 days after the date on which the application was decided. The **1976 Order** was amended in 1989 so that it also gave the person 28 days after any withdrawal of the application. Extension of leave under this Order operated without any endorsement of the applicant's passport or the need to give any other notice in writing to the applicant. The **1976 Order** did not apply to an "out of time" application (i.e. one made after the expiry of the person's leave to enter/remain), or where an application was refused whilst a person had more than 28 days of current leave to enter or remain left.

8.3.2 Unlike a citizenship application, a postal application for further leave to remain is "made" on the date it is sent to, rather than received in, the Home Office.

8.3.3 Under VOLO, the conditions attached to a person's limited leave to enter or remain were also extended.

8.3.4 **Sections 13-21** of the **Immigration Act 1971** set out the circumstances in which it was possible to appeal against immigration decisions taken before 2 October 2000. Although, in the case only of appeals to an adjudicator or the Immigration Appeal Tribunal in respect of a variation of leave to enter or remain or a

refusal to vary that leave, **s.14(1)** of the **1971 Act** ensured that no action was taken to require an appellant's departure, this did not amount to leave to remain, and once any leave to enter or remain as extended by VOLO had expired (whereupon any conditions attached to the leave also expired) the appellant was an overstayer and therefore resident here in breach of the immigration laws.

8.4 People refused from 2 October 2000 to 31 March 2003

8.4.1 **Section 3C** of the **Immigration Act 1971**, as inserted by **s.3** of the **Immigration and Asylum Act 1999**, applied to a person who had a limited leave to enter or remain and applied "in time" for further leave. If the application was refused between 2 October 2000 and 31 March 2003 inclusive, the person's leave was automatically extended for 10 days after the date on which the notice of the decision to refuse was received (this being the time allowed for an appeal). If there was an appeal, the person's leave was further automatically extended under **paragraph 17** of **Schedule 4** to the **1999 Act** for the period during which the appeal was pending.

8.5 People refused leave from 1 April 2003

8.5.1 The appeal provisions of the **1999 Act** were replaced on 1 April 2003, when a new version of **s.3C** came into force under **s.118** of the **Immigration, Nationality and Asylum Act 2002**. From that date, people who (before or from 1 April 2003) have applied "in-time" for further leave have their leave extended:

- until notice of decision is served or the application is withdrawn; and
- while an appeal under **s.82** of the **2002 Act** could be brought (appeal deadlines, which vary, are indicated on refusal notices and are usually final - if the deadline is unclear in any individual case, advice should be sought from AJRU); and
- if there is an appeal, while the appeal is pending

8.6 A person's immigration status under the **1971 Act**/VOLO will not

be affected solely as a result of representations from MPs or agents on his/her behalf. Representations made against a decision to refuse further leave to remain/ILR in the UK do not amount to an appeal against that decision, and where a person remains in the UK following the expiry of limited leave (including VOLO), he/she will still be considered to be in the United Kingdom in breach of the immigration laws.

8.7 Immigration law breaches and persons who have sought asylum in the United Kingdom

Having a pending asylum application does not, in itself, mean that the applicant is not 'in breach of the immigration laws'. Whether they are 'in breach...' will depend on whether or not they had leave to enter/remain in the UK at the time they lodged their application or did so immediately on arrival in the United Kingdom. For the purposes of determining whether or not a breach of the immigration laws has occurred it is convenient to separate former asylum seekers into three broad categories:

1. If the applicant claimed asylum immediately on arrival in the United Kingdom they will have been granted temporary admission pending determination of their claim. Such applicants will not have been in breach of the immigration laws throughout the period which their application was being considered and, if appropriate, during consideration of any in-time appeals. Further, even if their application is refused and any subsequent appeal dismissed, the applicant will still not have been 'in breach of the immigration laws' unless and until their temporary admission was revoked and leave to enter formally refused.

2. Applicants who claimed asylum during a period of leave to remain/enter in the United Kingdom were also not in breach of the immigration laws during consideration of their asylum claim and any in-time appeals. However, in the event of refusal of the application and dismissal of any subsequent appeal, 28 days' further leave to remain will normally have been given and the applicant will have been "in breach of the immigration laws" if still in the United Kingdom after that 28-day period. This also applies to cases where the applicant was granted leave to enter or remain under a Humanitarian Evacuation Programme (HEP).

3. If an asylum claim was made whilst the applicant was in the

UK illegally (for example, as an overstayer or following clandestine entry), the applicant will have been in the UK in breach of the immigration laws until such time as s/he was finally granted leave to remain in the UK. In other words, such a person will have been 'in breach..' throughout the period his or her application (and any subsequent appeal) was being considered. This will have been the case irrespective of any temporary admission they may or may not have been given following detection.

Before deciding whether to refuse an application on the basis that the applicant was in the United Kingdom in breach of the immigration laws for all or part of the qualifying period, please refer to paragraphs 8.8-8.11 below.

8.8 Under **paragraphs 2 and 4 of Schedule 1** to the 1981 Act, there is discretion to disregard breaches of the immigration laws during the qualifying period. Such breaches only involve being here without leave to enter or remain. Other immigration offences, such as breaching a restriction on taking employment and harbouring other immigration offenders, should not be considered under the residence requirement, but under the good character requirement (see Annex D).

8.9 In most cases, it will be apparent from CID or the passports whether or not an applicant has been here in breach of the immigration laws. Where this is in doubt, any previous files should be obtained and advice sought, as necessary, from NPT.

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

- it was inadvertent (e.g. the applicant genuinely forgot to ask for an extension of stay or indefinite leave to remain); or
- it was due to rejection of an "in-time", but incorrectly completed, mandatory application form for leave to remain, provided there is no reason to doubt that the form was submitted in good faith; or
- it was outside the person's control (e.g. the applicant was a minor when parents failed to obtain or renew the minor's leave to remain in the UK); or
- possible regularisation of the persons stay was under

consideration during the period of breach - i.e. there was a pending immigration appeal OR an undetermined application for leave to enter or remain; or

- a person who entered the United Kingdom clandestinely presented himself without delay to the immigration authorities following arrival or was detected by the immigration authorities shortly after arrival. In either case, the maximum period involved should normally be 1 month but, if there are extenuating circumstances, it may be longer. In these cases we can waive the breach that occurred from entry until the person's first application for leave/asylum has been determined (and all appeal rights exhausted)
- an application for asylum or leave to remain was refused but was later acknowledged to be an incorrect decision and the appropriate leave was granted

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

8.12 For guidance on how to consider cases where the applicant has absconded please refer to paragraphs 9.7.5 and 9.7.6 of this Annex.

## 9. Technical absences

9.1 Normally, all the time that applicants are physically present in the UK should be counted as residence. However, **paragraph 9 of Schedule 1** to BNA 1981 provides that applicants are regarded as absent from the UK (although physically present here) at any time when they are exempt from immigration control under **s.8(3)** (diplomats) or **s.8(4)** (members of home, Commonwealth or visiting forces) of the **Immigration Act 1971**, as amended by **s.4** of the **Immigration Act 1988**). The **1988 Act** removed the exemption from control of locally engaged non-diplomatic members of missions (see below). Persons exempt from immigration control under **s.8(2)** of the **Immigration Act 1971** (Consular staff and certain employees of international organisations) are not regarded as being technically absent from the United Kingdom whilst so exempt.

9.2 Treatment of technical absence for naturalisation purposes

9.2.1 There is discretion under **paragraphs 2(b) and 4** of **Schedule 1** to the BNA 1981:

- to regard technical absence as residence for naturalisation purposes; and
- to accept that an applicant can be treated as present here on the date 5(3) years before the date of application if it comes within the period of technical absence

9.2.2 Immigration Policy Directorate (Croydon) can advise on whether an applicant is, or has been exempt, from immigration control, either as a locally engaged non-diplomatic employee of an Embassy or High Commission, a diplomat or as a member of a home, Commonwealth or visiting force, or as a member of the family and part of the household of such a person. This may be particularly important in cases where 1 August 1988 is included in the qualifying period for naturalisation, because of the changes made by the **Immigration Act 1988**.

9.3 Applicants exempt from immigration control under section 8(3) or (4) of the Immigration Act 1971, as amended by section 4 of the Immigration Act 1988

9.3.1 For the purposes of naturalisation such applicants can be divided into 3 categories:

- a. Those who are, or have been, members of the home forces (i.e. HM Forces and were serving in the United Kingdom on the date of application);
- b. Past and present members of the diplomatic staff of a mission, a Commonwealth or visiting force, whether locally engaged or otherwise;
- c. Past and present locally engaged members of the non-diplomatic administrative, technical and service staff of a mission whose employment began before 1 August 1988, or were locally recruited on or after 1 August 1988 and were not at that time entitled to exemption from control but became so entitled upon re-admission following an absence abroad.

NB. Those in category c whose employment first began on or after 1.8.88 are not entitled to exemption from immigration control (i.e. they remain subject to control) by virtue of the **1988 Act** if they do not leave the United Kingdom. They do not need to rely on **paragraph 2(b)** and **4** of **Schedule 1** to the BNA 1981 to meet the residence requirements.

9.4 Members of HM Forces

9.4.1 Applications made by those in category 9.3.1.a should be considered in accordance with the guidance in Annex B(i).

9.5 Diplomats and Members of Diplomatic Missions

9.5.1 **Section 8(3)** of the **Immigration Act 1971** gives total exemption from immigration control to members of a diplomatic mission (within the meaning of the **Diplomatic Privileges Act 1964**) - i.e. the head of a mission, members of the diplomatic staff and the administrative, technical and service staff (but see paragraph 9.5.2-9.5.3 below). Exemption is also granted to a person who belongs to the family and forms part of the household of the member. Private servants of members of a mission do not qualify for exemption.

Locally engaged staff (non-diplomats)

9.5.2 **Section 8(3)** was amended by the **Immigration Act 1988** to ensure that, from 1 August 1988, locally engaged members of a mission in the non-diplomatic categories of administrative and technical staff and service staff, and their family, would only be entitled to exemption from control if they entered the UK:

- a. as a member of that mission; or
- b. in order to take up a post offered to them before arrival.

This had been done to prevent any abuse of obtaining employment at a mission to prolong a person's stay in the United Kingdom when the person would not otherwise qualify under the Immigration Rules.

9.5.3 The position of persons recruited in the above categories prior to 1 August 1988 is not affected, and their exemption continues. After that date, missions are only able to engage locally persons in the above categories whose status allows them to take employment, or persons whose appointments are formally notified to the Protocol Department of the Foreign and Commonwealth Office under **Article 10 of the Vienna Convention on Diplomatic Relations**. If the Foreign and Commonwealth Office are satisfied that the persons are in bona fide employment, and entitled to privileges and immunities, employment is permitted. They are, however, subject to control, unless they subsequently re-enter the UK as an established member of the mission following an absence abroad.

9.5.4 For applicants in category 9.3.1.b, and subject to the additional considerations in paragraph 9.5.5 below, we should consider disregarding up to 730 (450) days technical absence where the applicant:

- was granted indefinite leave to remain at least 12 months before the application date; and
- can show strong links with the United Kingdom which are wholly independent of the exempt employment (e.g. a period of residence before entering exempt employment); and
- is otherwise qualified for naturalisation

9.5.5 There may be exceptional reasons relating to either the applicant's employment or to the interests of the UK when we should normally be prepared to exercise discretion. For example, the applicant is a foreign or Commonwealth diplomat who has rendered particular service to UK interests and/or has spent a significant part of his/her career here and wishes to live here permanently in retirement. We would, however, not normally expect to disregard more than 730 (450) days technical absence unless there were particularly compelling circumstances relating to the applicant or the interests of the United Kingdom to justify such action. We would not normally expect to naturalise a serving diplomat, and any such case should be referred

to FCO (Protocol Department). The normal expectation would be for the diplomat to wait until the exempt employment had come (or was about to come) to an end before applying for British citizenship. Granting an application in these circumstances would be exceptional.

9.5.6 It would be unreasonable to treat those in category 9.3.1.c whose exempt employment had begun before 1 August 1988 less favourably than those whose similar employment had commenced on or after that date and did not attract exemption from control. It would also be unreasonable to discriminate against persons whose post-1 August 1988 recruitment attracted exemption following an absence abroad. It will, therefore, normally be appropriate to regard any technical absence as residence here for the purpose of the application provided the applicant:

a. either -

- i. has ceased to be in exempt employment, and has obtained or could immediately be given ILR; or
- ii. would immediately be given ILR on leaving exempt employment;

AND

b. is otherwise qualified for naturalisation.

9.5.7 If the applicant is otherwise qualified for naturalisation, and has ceased to be exempt from control under **s.8(3)** or **8(4)** of the **Immigration Act 1971**, but has not been granted ILR, the file should be referred to the appropriate immigration CMU to consider the grant of ILR. If the applicant is still exempt from immigration control under **s.8(3)** or **s.8(4)** of the **Immigration Act 1971**, the file should be referred to the immigration CMU to advise whether, given the present circumstances, ILR is likely to be granted if the exemption from control were to cease now. The immigration CMU should not be expected to do more than express an opinion.

9.5.8 If the applicant is otherwise qualified for naturalisation, and has already been, or would be likely to be, given ILR, the application may be granted.

9.5.9 If the applicant is otherwise qualified for naturalisation, but has not been, or is unlikely to be, given ILR, the application should normally be refused unless there are particularly compelling circumstances which might justify the grant of naturalisation now.

9.5.10 The criteria in paragraphs 9.4.1 and 9.5.4-9.5.9 above under which we should consider disregarding technical absences should normally also be applied to applicants who are entitled to an exemption by being members of households. Members of households are defined as:

- Spouse/civil partner
- Dependent offspring under 18 (see 9.5.12 below)
- Dependent offspring over 18 who are still in full-time education
- Dependent relatives who formed part of the household abroad (e.g. elderly widowed parent)
- Other close relatives who have no one else to look after them (e.g. young orphaned brothers and sisters)

9.5.11 Care should be taken in cases where it is known or suspected that the applicant has ceased to be a member of a household, and thereby ceased to be entitled to an exemption. Immigration status should be clarified with the appropriate immigration CMU because the applicant may either meet the normal residence requirements (i.e. have no technical absence) or need to have his/her stay regularised (i.e. be granted ILR/put on restriction).

9.5.12 Dependants under 18 included in a parent(s) application fall to be considered for registration under **s.3(1)** (unless they have an entitlement, e.g. under **s.1(3)**). If we are approving the parent(s) application for naturalisation, we should normally register the children, provided the relevant criteria in **Chapter**

9.15 are met.

9.6 Persons detained in hospital or other place of detention in the UK or unlawfully at large following conviction for an offence

9.6.1 We should not normally consider exercising discretion to accept as residence periods spent in any place of detention (including a hospital, under a hospital order) in the UK or unlawfully at large following a conviction unless:

- the applicant has been granted a free pardon by the exercise of the Royal Prerogative of Mercy; or
- it has been officially recognised that the grounds on which the applicant was sentenced cannot be relied on; or
- the conviction is spent under the **Rehabilitation of Offenders Act 1974** (see Annex D)

9.7 Persons detained, on temporary admission or unlawfully at large under the immigration laws

9.7.1 Under **paragraphs 9(1)(b) and (d) of Schedule 1** to the BNA 1981, a period of detention in the UK under the immigration laws, or a period when a person is unlawfully at large and required or authorised to be detained under the immigration laws, is to be regarded as "technical absence" for the purposes of naturalisation.

9.7.2 As an alternative to detention, an immigration officer may release a person into the UK on temporary admission. As this is not referred to in **paragraph 9 of Schedule 1**, a period of temporary admission should not be treated as a "technical absence".

9.7.3 Nevertheless, as the only difference will have been the perceived risk of the person absconding, we should treat periods of detention and temporary admission in as similar a way as possible.

9.7.4 Detention

9.7.4.1 If, at the end of a period of detention, the applicant has been granted leave to enter the UK, this period should normally be counted as residence.

9.7.4.2 If, at the end of the period of detention, the applicant was either removed, or departed voluntarily, from the UK, discretion should not normally be exercised to count this period of "technical absence" as residence.

9.7.5 Temporary Admission

9.7.5.1 The criteria for grant or refusal are the same as for periods of immigration detention.

If a person has been removed, or has made a voluntary departure, from the United Kingdom following a period of temporary admission, we should normally treat that period as if it were a period of "technical absence". If it is decided to refuse an application in these circumstances, we cannot, however, say that the Secretary of State is not prepared to exercise discretion to waive a "technical absence". The following explanation may be offered. "The Secretary of State is not obliged to naturalise a person who meets the formal statutory requirements, and he will not normally be prepared to naturalise a person whose period of temporary admission under the **Immigration Act 1971**, combined with any absences from the United Kingdom during the 5(3) year period ending with the date of application, exceeds 450 (270) days. Your/your client's application has been carefully considered, but the Secretary of State is not of the opinion that there are exceptional circumstances in your/your client's case which would justify a departure from his normal practice".

9.7.6 The same considerations should apply to periods of presence in the UK while unlawfully at large under the immigration laws as to periods of detention or temporary admission (i.e. persons are not technically absent if they abscond while on temporary admission).

To be consistent with the policy set out above, periods of unlawful presence in the UK when a person should be in detention or while on temporary admission should not normally count as residence for the purposes of naturalisation.

Applications for naturalisation as British citizens made by members/ex-members of the British Armed Forces

1. General

1.1 All applicants **must** satisfy:

- the requirement to be free of immigration time restrictions on the date the application is made;
- the unwaivable requirement to have been physically present in the UK on the first day of the qualifying period (NB. If an applicant fails to meet this requirement we can apply the usual discretion with regard to re-declaration);
- the good character requirement (see Annex D);
- the language and 'life in the United Kingdom' requirements (see Annex E);
- the future intentions requirement (see Annex F);

**AND**

- the criteria described in paragraphs 2 or 3 below (depending on whether or not they are currently serving in the Brigade of Gurkhas).

2. **CURRENTLY SERVING MEMBERS OF THE BRIGADE OF GURKHAS**

2.1 If, at the time of consideration, the applicant is currently serving in the Brigade of Gurkhas, we should:

- a. calculate the number of days' technical absence in the qualifying period and exclude this from the residence count;
- b. combine technical absences with actual absences to obtain the total number of days' absence during the qualifying period;

c. apply the normal levels of permitted absence (i.e. 450/270/90 days) and **not** waive any excess absence

- 2.2 Most applications from serving members of the Brigade of Gurkhas will therefore fall for refusal, as they will have excess absences. In such cases, the applicant should be advised their application has been refused along the lines of the draft letter in Annex B(ii).
- 2.3 Applications which, in spite of our unwillingness to exercise discretion over excess absences, would otherwise be successful should be referred to NPT for further advice.
3. **FORMER ARMED FORCES PERSONNEL (INCLUDING FORMER GURKHAS) AND THOSE CURRENTLY SERVING OTHERWISE THAN IN THE BRIGADE OF GURKHAS**

3.1 Absences

3.1.1 In these cases, we should exercise discretion under **paragraph 2(b)** of **Schedule 1** to the BNA 1981 and treat any "technical" absences during the qualifying period as residence.

3.1.2 In addition, and subject to the applicant meeting the requirement to have been in the United Kingdom on the first day of the qualifying period, we should, if necessary, be prepared to disregard any and all actual absences from the UK that were due to the applicant's armed forces service.

3.2 Evidence of residence

3.2.1 While applicants were in military service it is unlikely that their passports will have been stamped. However, as we would overlook any service-related absences, it is not necessary to see service records confirming each absence. We would, however, need to see something from the MOD confirming duration of service in the armed forces, and also evidence of the applicant's presence in the UK at the beginning of the qualifying period. Any non-service-related absences can be confirmed by the applicant's passport.

3.2.2 For periods after discharge we should expect ex-servicemen to be able to produce normal evidence of residence (either a passport or alternative evidence of residence).

3.3 Immigration time restrictions

3.3.1 While in the armed services, applicants are exempt from immigration control and therefore free of immigration time restrictions. Applicants will have been free of immigration time restrictions throughout their period of service. In many cases, former armed services personnel will have been granted ILR on discharge and will meet the requirement to have been free of immigration time restrictions in the 12 months prior to the date of application. However, this should not be assumed and we should check that applicants meet this requirement. NB. Until 25 October 2006, certain transitional provisions were in place for ex-Gurkhas (see paragraph 5 below).

3.3.2 Where an ex-member of the armed forces has not been granted ILR/ILE, we should refuse the application and advise the applicant to obtain ILR/ILE prior to submitting a further application for citizenship. Refusal would be on the grounds of either:

- breach of immigration laws, if the applicant is here unlawfully (but see also paragraph 5 below);  
or
- not being free of immigration time restrictions, if the person is on a work permit or has limited leave to remain

3.4 Refusals

3.4.1 No applications from current or former armed forces personnel, other than currently-serving members of the Brigade of Gurkhas, should be refused without first referring to chief caseworker level, who will determine if the case needs to be referred to Ministers.

4. Spouses/civil partners and children

- 4.1 Spouses/civil partners and children of servicemen are not exempt from immigration control while residing in the UK. Instead, they are generally given leave to remain as long as their spouse/civil partner is in service. While they still have limited leave to remain, neither spouses/civil partners nor children will be able to meet the criteria to be free of immigration time restrictions (spouse/civil partner) or future intentions (children), and their applications should be refused.
- 4.2 However, once settled, they will be able to apply for naturalisation/registration. They, too, may have high levels of absences either because they have been accompanying their spouse/civil partner while overseas or because they have not been able to accompany him while he is in the UK. If, in line with the policy in paragraph 3, we have been (or would be) prepared to disregard absences occasioned by an applicant's armed forces service, we should be prepared to do likewise in respect of his or her spouse's or civil partner's absences.
- 4.3 Any child born legitimately in the UK to a parent who is in HM armed forces is automatically a British citizen (where the mother is a BC or settled the child will be a BC irrespective of legitimacy). Where a child is not already a British citizen, we should consider the application in line with the parents and be prepared to waive the criterion for children over 13 years of age to have completed two years' residence in the UK.

## 5. Transitional arrangements

- 5.1 As regards the position of ex-Gurkhas living in the UK without the appropriate immigration status, immigration caseworkers were prepared, for a transitional period of 2 years ending on 25 October 2006, to waive any period of breach, or illegal residence when considering granting ILR/ILE.
- 5.2 To be consistent with this policy, we should also disregard any periods of breach/illegal residence in the UK between discharge and the granting of ILR/ILE when considering applications from ex-Gurkhas. It should be noted that this practice only applied for a transitional period of 2 years - until 25 October 2006. **NB. This will only apply to**

applications from ex-Gurkhas and no other category of serviceman/ex-serviceman.

**Draft refusal letter (Gurkhas)**

I refer to your application for naturalisation as a British citizen.

The success of an application depends on a number of statutory requirements being met. One is that the applicant should have had no more than 450/270/90 days' absence from the United Kingdom during the five/three year/twelve month period preceding the date of application.

While a person is serving in the British armed forces he is exempt from immigration control. The British Nationality Act 1981 provides that any time a person spends in the UK while exempt from immigration control will *not* count as residence in the UK for naturalisation purposes. The Home Secretary may exercise discretion to count it where appropriate, and to overlook actual absences in excess of those permitted by the 1981 Act, but his current policy is not to do so if the person is currently serving in the Brigade of Gurkhas. This reflects undertakings given to the Government of Nepal that nothing will be done to jeopardize a person's Nepalese citizenship whilst he is serving in the Brigade.

As your service in the Brigade of Gurkhas is ongoing and accounts for XXXX days of the five/three year qualifying period, I am afraid that your application will have to be refused.

We shall be happy to consider a further application once you have been discharged.