

Suspensive Claims and Appeals under the Illegal Migration Act 2023

What are the avenues for challenging removal?

A national of a country listed as a “Safe State” in the new section 80AA of the Nationality, Immigration and Asylum Act 2002, inserted by section 59 of the Illegal Migration Act 2023, (at the time of writing the Government intends this to include EEA, Albanian, Swiss, Indian or Georgian¹ nationals):

- who is to be removed to their country of nationality or a country in which they have obtained an identity document, who makes a protection or human rights claim, will not have it considered, unless ‘exceptional circumstances’² apply. They will have no right of appeal and the intention of the Act is for them to have no ability to suspend their removal, unless they make a removal conditions suspensive claim.³ Therefore, Albanians can be removed to Albania, with very limited ability to prevent removal.
- who is to be removed to a third country, in which they embarked for the UK or any other country (listed in the Schedule to the Act) where there is reason to believe they may be admitted (such as Rwanda), may bring a removal conditions or a serious harm suspensive claim regarding their removal to that third country.
- can make a human rights claim against removal to a third country (such as Rwanda), which does not suspend removal, and, if refused, there is no right of appeal but the decision may be challenged by way of an application for judicial review.⁴

An individual who is not a national of a “Safe State” listed in section 80AA:

- cannot be removed to their country of nationality or to a country in which they have obtained an identity document. *Therefore, for example, an Afghan cannot be removed to Afghanistan.*
- who is to be removed to a third country, in which they embarked for the UK or any other country (listed in the Schedule) where there is reason to believe they may be admitted (such as Rwanda), may also bring a suspensive removal conditions and serious harm suspensive claim regarding removal to that third country.
- can additionally make a human rights claim against removal to a third country (such as Rwanda), which does not suspend removal, and, if refused, there is no right of appeal but the decision may be challenged by way of an application for judicial review.⁵

¹ The Nationality, Immigration and Asylum Act 2002 (Amendment of List of Safe States) Regulations 2024 will add India and Georgia if it comes into force. At the time of writing, the Statutory Instrument has not been made.

² ‘Exceptional circumstances’ are narrowly defined in s 6(5) with reference to Article 15 ECHR and Article 7(1) of the Treaty on European Union.

³ On the Bill’s introduction, Clause 4(1)(d), read with Clause 1(2)(h), appeared to mean the Home Secretary must disregard court orders (including those suspending removal) made under judicial review procedures. This intention of the Government was confirmed in Report stage by the addition of a Clause (now s. 54) on ‘Interim remedies’.

⁴ Illegal Migration Act 2023, section 41(3)-(6).

⁵ Illegal Migration Act 2023, section 41(3)-(6).

What is a suspensive claim? The only claim under the Act that can suspend removal.

Suspensive claims are not human rights claims. Therefore, any human rights claim (which would not itself be suspensive) would need to be made additionally and would run concurrently to the suspensive claim process. The priority would likely be to lodge the suspensive claim(s).

There are only two types of suspensive claims:

1. **Serious harm suspensive claims** for which a person must show that they would face a *‘real, imminent and foreseeable risk of serious and irreversible harm’* and, further, that the harm would arise before the period it will take for their human rights claim to be decided, including the time for judicial review⁶ to be concluded. Examples given include death, persecution, torture, inhuman or degrading treatment or punishment, onward removal to a country where a person would face a real, imminent and foreseeable risk of any of the aforementioned harms. Specifically precluded from constituting serious and irreversible harm is *‘any pain or distress resulting from a medical treatment that is available to P in the United Kingdom not being available to P in the relevant country or territory’*.⁷ Furthermore, section 40 still provides that the Home Secretary *may* amend the definition of *serious and irreversible harm* in regulations, defining any aspect or giving further examples.
2. **Removal conditions suspensive claims** for which a person must show that they do not meet the removal conditions. Important to recall is the third condition in section 2 ‘that, in entering or arriving... the person did not come directly to the United Kingdom from a country in which the person’s life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.’ It will be important to consider if all the countries through which they passed were countries in which their life and liberty were not threatened. It will also be important to challenge any incorrect allegation of deception by the Home Secretary.

The Act proposes a new “fast track” procedure for appeals.

1. **Individual to lodge suspensive claim within 8 days**, beginning with the day on which the person is given the removal notice. The claim must contain *‘compelling’* evidence, be in a form and manner yet to be prescribed, and contain information yet to be prescribed.⁸ This is an extremely short period of time for a person without a legal representative to find one, give instructions, gather evidence, and make the suspensive claim. The Home Secretary has the power to extend the claim period.⁹

⁶ See definition of ‘relevant period’ in Illegal Migration Act 2023, s 37(9).

⁷ Illegal Migration Act 2023, section 39(7).

⁸ Illegal Migration Act 2023, sections 42(5)(a) and 43(5)(a). These will also be prescribed in regulations made by the Secretary of State.

⁹ Illegal Migration Act 2023, sections 42(6) and 43(6).

Out of time claims:

- a. If a person fails to meet the 8-day timeframe, they must provide '*compelling reasons*' why they did not claim in-time.¹⁰
 - b. If the Home Secretary decides there were not compelling reasons, a person can apply to the Upper Tribunal within 7 working days for a declaration that there were such reasons.
 - c. The Upper Tribunal must determine the declaration application and give notice within 7 working days.
 - d. There is no right of appeal, and there are limited grounds for judicial review, if the Upper Tribunal finds there were no such reasons.
2. **Secretary of State to make a decision on the suspensive claim within 4 days beginning with the day of receipt**, unless the decision period is extended.¹¹ The decision maker may accept the claim, refuse the claim, or refuse it and also certify that it is '*clearly unfounded*'.
- a. **If the claim is accepted**, the person may not be removed from the United Kingdom to the country or territory specified in the removal notice, unless there has been a change of circumstances in relation to the person.
 - i. If there has been a change of circumstances (including if a human rights claim or judicial review application regarding their removal is unsuccessful) the Secretary of State may revise the decision and instead make a decision to refuse their suspensive claim.
 - ii. However, if it is only their serious harm suspensive claim that is successful, the Home Secretary would still have a section 2 duty to make arrangements for the removal of a person from the United Kingdom, as soon as is reasonably practicable.
 - b. **If the claim is refused but not certified as clearly unfounded:**
 - i. A notice of appeal, with '*compelling*' evidence,¹² must be given to the Upper Tribunal within 7 working days.¹³ The only available grounds of appeal are:

¹⁰ Illegal Migration Act 2023, section 46.

¹¹ Illegal Migration Act 2023, section 42(6) and 43(6).

¹² Illegal Migration Act 2023, section 43(3) and 44(3).

¹³ Illegal Migration Act 2023, section 49(1)(a)(i).

- that the ‘*serious harm*’ condition is met; or
 - that the person does not meet the removal conditions.
- ii. The Upper Tribunal must make a decision within 23 working days, beginning with the day on which the appellant gave notice of appeal to the Upper Tribunal.¹⁴
 - iii. Onward appeal is to the Court of Appeal or Court of Session.¹⁵
- c. If the claim is refused and certified as clearly unfounded¹⁶:**
- i. An application for permission to appeal must be made to the Upper Tribunal within 7 working days, beginning with the day on which the applicant was given notice that the Secretary of State had certified the person’s suspensive claim as clearly unfounded.¹⁷
 - ii. There is no automatic right of appeal.
 - iii. The thresholds are raised for obtaining permission to appeal.
 - For a serious harm suspensive claim, the Upper Tribunal may grant permission ‘*only*’ if it considers there is ‘*compelling*’ evidence that the person meets the ‘*serious harm condition*’ and the risk is ‘*obvious*’.¹⁸
 - For a removal conditions suspensive claim, the Upper Tribunal may grant permission to appeal ‘*only*’ if it considers that there is ‘*compelling*’ evidence that the person does not meet the removal conditions.¹⁹
 - iv. Permission hearings will be on the papers only, unless the Upper Tribunal considers an oral hearing is necessary for justice to be done in a particular case.²⁰

¹⁴ Illegal Migration Act 2023, section 49(1)(b).

¹⁵ Illegal Migration Act 2023, section 44(7). CPR 52.12 provides for a notice of appeal to be filed as directed by the Upper Tribunal or 21 days after the date of the Upper Tribunal’s decision.

¹⁶ Illegal Migration Act 2023, sections 42(3) or s 43(3).

¹⁷ Illegal Migration Act 2023, section 49(2)(a).

¹⁸ Illegal Migration Act 2023, section 45(3).

¹⁹ Illegal Migration Act 2023, section 45(4).

²⁰ Illegal Migration Act 2023, section 45(5).

- v. The Upper Tribunal must determine the permission application and give notice within 7 working days, beginning with the day on which the application was made to the Upper Tribunal.²¹
- vi. If permission to appeal is granted, then the procedure reverts to §2(b) above, as if the claim had been refused but not certified.
- vii. If permission to appeal is refused, there is no right of appeal, and there are limited grounds for judicial review.²²

d. New Matters:

- i. Under section 48(2) the Upper Tribunal can take into account any matter it considers relevant to the substance of the decision.
- ii. But under section 48(3), without the permission of the Home Secretary, the Upper Tribunal may not consider ‘new matters’ (i.e matters raised in an application or appeal it is raised by the person in the course of the appeal or application, which the person did not provide details of to the Secretary of State before the end of the 8-day suspensive claim period).
- iii. The Home Secretary may provide consent *only* if the Home Secretary considers that there were compelling reasons for the person not to have provided details of the matter before the end of the claim period. She has 3 working days beginning with the day after the day on which the new matter is raised by the person in the course of the appeal or application.
- iv. If the Home Secretary refuses consent to consider the ‘new matters’, section 48 provides that the Upper Tribunal may determine that there were compelling reasons for the person not to have provided details of the matter to the Home Secretary before the end of the claim period.
- v. There is no right of appeal in relation to a decision of the Upper Tribunal to make or not to make a determination, and there are limited grounds for judicial review.²³

Time limits can be extended by the Upper Tribunal ‘if it is satisfied that it is the *only* way to secure that justice is done in a particular case’, and time limits for determining applications for permission to appeal or making a decision on an appeal can be extended by up to 3 working days where a new matter is raised.²⁴

²¹ Illegal Migration Act 2023, section 49(2)(b).

²² Illegal Migration Act 2023, section 51(3)-(4).

²³ Illegal Migration Act 2023, section 51(3)-(4).

²⁴ Illegal Migration Act 2023, section 49(4) (emphasis added).

When is the duty to remove suspended? See section 47 of the Illegal Migration Act 2023:

- where a person has made an in-time suspensive claim, removal is suspended until the Secretary of State has made a decision on the claim;
- where a person has made an out-of-time suspensive claim, removal is suspended until the Secretary of State has made a decision on whether there were compelling reasons the claim was out-of-time;
- where a person has made an out-of-time suspensive claim and the Secretary of State considers there were no compelling reasons for an out-of-time claim, removal is suspended until either the person has applied to the Upper Tribunal for a declaration that there were compelling reasons for an out-of-time claim, or the period for making such an application has expired;
- where a person has made an out-of-time suspensive claim and the Secretary of State considers there were compelling reasons for an out-of-time claim or the Upper Tribunal grants an application under section 46 requiring the Secretary of State to consider the out-of-time claim, removal is suspended until the Secretary of State has considered the suspensive claim;
- where the Secretary of State has refused a suspensive claim and has not certified the claim as clearly unfounded, removal is suspended until any appeal is determined or the time for lodging an appeal has expired.
- where the Secretary of State accepts the suspensive claim, or where a person successfully appeals to SIAC or the Upper Tribunal, they may not be removed to that country or territory in the removal notice. Although, the duty to remove still applies, and so a removal notice for a different country could be issued and this process repeated. But if a person has a change of circumstances, such as a failed judicial review or human rights claim regarding their removal, it can cause the Home Office to also issue a new removal notice following a successful appeal or revise their decision if the Home Secretary previously accepted the suspensive claim.

A court or tribunal cannot grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom,²⁵ and is restricted by Ministerial decision as to whether it can consider interim measures indicated by the European Court of Human Rights.²⁶

²⁵ Illegal Migration Act 2023, section 54.

²⁶ Illegal Migration Act 2023, section 55.

What is happening with legal aid?

It is worth noting that in England and Wales, civil legal services are in scope of legal aid to an individual who has received a removal notice, in relation to the removal notice (including in relation to a suspensive claim relating to the removal notice, and an application, under section 46(4) of the Illegal Migration Act 2023, for a declaration from the Upper Tribunal that there were compelling reasons for the person to not have claimed in-time).²⁷ They are not merit tested.²⁸

Advocacy in proceedings in the Upper Tribunal, under any of sections 44 to 49 of the Illegal Migration Act 2023, or under Tribunal Procedure Rules made for the purposes of any of those sections, are also brought into scope.²⁹

The Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023 amend:

- a. the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 to ensure that means-testing does not apply to these civil legal services brought into scope of legal aid by section 56(3)-(4); and
- b. the Civil Legal Aid (Remuneration) Regulations 2013 to introduce new hourly rates (increased by 15%) to remunerate legal aid providers and barristers in independent practice for this work.

There is also increased scope of legal aid for individuals who wish to judicially review refusals of human rights claims regarding removal to third countries, where their claim arises from Article 2 or 3 of the European Convention on Human Rights.³⁰ However, such judicial reviews will still be subject to any relevant means tests within the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

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²⁷ Illegal Migration Act 2023, section 56(3).

²⁸ Illegal Migration Act 2023, section 56(5). Subsections 56(6)-(15) also remove means and merits tests for legal aid services for this work in Northern Ireland.

²⁹ Illegal Migration Act 2023, section 56(4).

³⁰ Illegal Migration Act 2023, section 56(2) amends paragraph 19 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). This prevents the exclusion from legal aid in paragraph 19(5) of Schedule 1 of LASPO from applying to such judicial reviews.