

Enforcement Instructions and Guidance Chapter 60 (version 13 – 31/10/16)

Amendments to Policy

SECTION 6 - WHEN JUDICIAL REVIEW WILL NOT SUSPEND REMOVAL

KEY CHANGES TO POLICY

Note from Rakesh Singh, Public Law Project, 11 November 2016

This section concerns judicial review cases where removal arrangements are in place or Immigration Enforcement have made a removal request or when preparations are being made to put removal arrangements in place - see 6.4.

These changes do not apply to special arrangements (including charter flights) – that part is unchanged – see 6A.

The new process is summarised in the process map at 6.8.

6.1 Qualifying criteria

This is a change to the previous policy which extends the circumstances in which judicial review will not suspend removal to the following cases:

- Where the a judicial review is brought less than six months¹ from the last judicial review or statutory appeal
 - on the same or similar issues (it will be the same unless completely different e.g. previous judicial review was unlawful detention or a procedural challenge).
 - where the legal basis for the challenge is different but a judicial review or appeal was concluded on same evidence.
 - The issues being raised could have reasonably been raised previously.
- Where the judicial review is issued during the removal window.

See policy for other circumstance in which the policy will apply (same as previous policy).

6.2 When removal will always be suspended

But even if qualifying criteria are met removal will always be suspended in certain circumstances:

- Injunction
- If this is the first judicial review challenge to a decision to certify a claim where certification would result in either no appeal or an out-of-country appeal.
- Permission granted

¹ Under the previous policy it was three months

- Insufficient time to consider the merits and barrier test (see below)

Otherwise must consider merits/barrier tests.

6.3 Merits and barrier test

If removal is bound to fail and does not raise any issues which are a barrier to removal then removal does not need to be suspended.

6.3.1 - Merits test

The test is: is it bound to fail? Examples given – but not limited to those.

- Grounds are weak
- Obviously unarguable on the facts
- Clear authority on the legal issue

The merits test is a lower threshold than permission i.e. lower than arguability.

6.3.2 Barrier test

Must also consider this test which relates to matters that were not previously before the SSHD and which need to be determined.

Does judicial review raise new grounds e.g. first time protection/HR claim or fresh claim or EEA grounds?

Does judicial review raise new and relevant evidence not previously considered by SSHD in previous claim or by court in the appeal?

6.4.2 – Barrier test: Fresh claims/further submissions

If the grounds and/or evidence in the judicial review raise a:

1st time protection claim:

- Suspend removal

1st time human rights claim:

- Suspend removal
- Consider human rights' claim
 - If claim can be certified the judicial review will not suspend removal
 - Will give five days' notice of removal
 - If there is a further judicial review or amended grounds within the five days' notice period then removal should be suspended

EEA rights

- Where EEA grounds ‘do not demonstrate a person has a right of residence’ under EU law removal can continue
- Where grounds have ‘some merit’ as to whether a person has a right of residence under EU law then removal will be suspended.

Further submissions/Fresh claim

Will consider further submissions and removal will not be suspended if the decision is it is:

- not a fresh claim
- a fresh claim but any appeal right is certified (so there is no in-country right of appeal)

6.4 Process

See also process map at 6.8. Points to note:

- Generally it appears that although you will be told if your judicial review will not suspend removal and that removal will proceed, that there is no minimum notice period prior to removal to enable you to apply for an injunction, subject to one exception².
- If there was insufficient time to consider the merits and barrier test then it will instead be applied when preparing the acknowledgement of service and served at the same time that acknowledgement of service is filed. Removal will be reinstated if tests not met.

But it is not clear from the policy whether you will be informed that removal has been suspended because there was insufficient time for the merits and barriers test to be applied. If not then you would not know until you receive the acknowledgement of service that your judicial review does not prevent removal.

6.4.1 Family cases

Key change is that if judicial review issued more than five working days after the Family Returns Conference, then the judicial review will not necessarily suspend removal and Home Office will apply the qualifying criteria and merits/barrier test.

2.3 LIMITED NOTICE OF REMOVAL – KEY CHANGES

Limited notice is where there is no removal during the initial notice period and the flight and time of departure will be withheld and the individual/family will only be told that removal

² If it is first time human rights claim which is then certified - in which case you are given 5 days’ notice in which you can vary grounds of issue a new judicial review.

will then take place no later than 21 days from when notice is given. I.e. a 21 day removal window.

The previously policy stated that limited notice would only be used:

‘In cases where there is a risk to safety or a significant risk of disruption’

Now, unless there is expert evidence that limited notice is not appropriate³, it can be used in all cases as an initial return option or as a contingency where a return using alternative option has failed. It may be of particular use where non-compliance or disruption has led to previous failed return or where there is reasonable likelihood of future disruption or future non-compliance.

Point to note: the amended policy extends the use of limited notice and lowers the threshold for its use.

³ Limited notice should not be used where a medical or social work professional has advised that it may not be appropriate.