CHAPTER 9 **REFUSAL OF ENTRY CLEARANCE,**
SECTION 1 **LEAVE TO ENTER OR REMAIN**

ADVERSE DECISIONS - GENERAL GUIDANCE

1. INTRODUCTION

This instruction is intended to assist immigration officers and ICD caseworkers in deciding whether an adverse decision is justified on the information available, and to ensure that a valid and meaningful notice of that decision is communicated to the applicant or his representatives. It comprises general procedural guidance which ***supplements*** the specific policy guidance contained in the relevant IDIs.

In considering appeals against adverse decisions the appellate authorities attach much importance to the accurate assessment of the appropriate Immigration Rules applicable to the application and the exercise of any discretion under those Rules. Whilst there are procedures for amending notices of any adverse decisions in certain circumstances these are at best time-consuming and confusing to applicants and, at worst, can result in an appeal being allowed, with public criticism of the notice by the appellate authorities.

The preparation of the refusal notice should be seen as a continuing part of the decision making process and not just as a formality to be gone through after the decision has been made. Lists of refusal wordings are contained in the relevant chapters of these instructions. No list of refusals can be definitive and some adaptation may be necessary, but care should be taken when departing from it. When devising a new formula care should also be taken to ensure that the wording reflects the ***relevant Paragraph of the Rules***.

2. MAKING A DECISION

Making decisions in individual cases is the primary function of the Immigration and Nationality Directorate and everything we do focuses on this. The purpose of decision making is to ensure that each person obtains what he is entitled to under the Rules. This, however, is the culmination of a longer process of consideration. Some of the difficulties people have in making a decision or in selecting the right refusal wording stem from a failure to consider the case properly from the outset.

2.1. Key points

When considering a case, particularly where a refusal seems likely, it is necessary to:

- be clear about the person's immigration status;
- establish what the person is requesting and to be sure on what basis the person is seeking leave to enter or remain (it is better to clarify the position with him than risk refusing something that has never been applied for, particularly since this may trigger a right of appeal that might otherwise not have existed);
- identify the provisions of the Rules which are relevant to the circumstances of the case; and
- know what information you need to reach a decision in accordance with the Rules.

In general, the onus is on the applicant to demonstrate that he fulfils the qualifying requirements of the category of the Rules under which he is seeking leave to enter or remain. If he does not produce the evidence required, or if the evidence produced is inadequate, then refusal may well be appropriate. But if there are other reasons for refusing the application (eg past reliance on public funds, reason to believe no intention to leave) the onus is then usually on the immigration officer or the Secretary of State to show that refusal is justified. This distinction is important when considering what information is necessary and how best to go about obtaining it.

2.2. Standard of evidence

In all refusals the immigration officer or caseworker must be able to substantiate any assertion of fact, and he must be able to show reasonable grounds for not being satisfied on matters of opinion, such as the person's intentions. Even where the person concerned must "satisfy the immigration officer/Secretary of State" that he meets the requirements of the Rules and we consider that he has not discharged that burden, ***the refusal must show that the immigration officer or the Secretary of State was acting reasonably in deciding that he was not satisfied.*** This consideration should be recorded in the port file or the minute sheet of the Home Office file and any relevant documentation must be kept on file whenever the originals are returned.

It is difficult to be precise as to the standard of evidence required to justify any given decision, other than to state that an immigration officer or the Secretary of State only has to be satisfied that a requirement has or has not been met on the balance of probabilities, and that will usually be a question of judgement and experience. But, it must be emphasized that it will ***never*** be appropriate to refuse an application where there is no evidence to support the decision other than an officer's "suspicions".

A decision to refuse ***solely*** on the basis of information given to us "in confidence" or anonymously, for example, where the letter states:

" Please don't tell my fiancé I told you this, as he is likely to beat me up if he finds out, but he has made it quite clear he is only marrying me so that he can stay here and he wants to divorce me and import his real girl-friend as soon as it is safe to ..."; or

"There's a bloke working illegally in our factory name of ... who lives at ... I'm sorry I can't tell you who I am but I hope you can do something about it, yours faithfully, a concerned law abiding citizen of no given address"

will not be appropriate. Unless the authors of such letters are prepared to have their identity disclosed such letters cannot be used in evidence to justify a decision in any circumstances. It should also be borne in mind that such a letter may have been written in malice and bear no relation to reality.

If the information supplied is important to the case we may write to the author of the letter requesting permission to use it in the explanatory statement. If, however, any attempt is made to persuade a person to "go public", they must never be put at any further risk by our actions (ie you should never mention in a letter any information supplied "in confidence" and you should discuss such matters over the telephone ***only*** if you know exactly to whom you are speaking).

In any case of uncertainty in respect of standards of evidence it will be sensible to seek the advice of line managers and/or more experienced colleagues.

2.3. **Action once the evidence has been obtained**

Once you have obtained sufficient information to make a decision, it is then necessary to:

- consider this against the relevant Rules (with the additional aid of staff instructions);
- consider the exercise of discretion where appropriate;
- make a decision, referring the case to a senior officer when appropriate;
- issue a refusal notice which should normally bring together:
  - ***a description of the application*** ("You have asked/applied for ...")
  - ***the crucial facts*** ("... but in view of ...")
  - ***the relevant provisions of the rules*** ("I am/the Secretary of State is not satisfied that ...")
  - ***the decision*** ("I/the Secretary of State therefore refuses your request/application for leave to enter/remain")

Where an officer has difficulties with any of the points set out above it may be that the information is insufficient. Officers will need to consider whether it is worth making further enquiries or whether it would be prudent to concede the case. It may well be appropriate to concede the case if, for example, the case has already consumed scarce

resources - eg an interview - and there is no clear prospect of obtaining sufficient evidence to justify refusal within a reasonable timescale, or if it is unlikely that the person's departure would be enforced.

Where refusal is still considered viable and the onus is on the applicant to satisfy us, the points on which he has yet to satisfy us should be put to him either in person or in writing. If, after this he still fails to produce satisfactory evidence, refusal will be the appropriate course of action. Should an applicant in an after-entry case have already failed to provide evidence within a reasonable timescale it may be appropriate to refuse under Paragraph 322(9) of HC 395 without giving this additional opportunity.

Where the onus is on ***us***, it will normally be necessary to look for further information until there are sufficiently reliable facts to prove (on a balance of probabilities) that a refusal is justified, resources and the age of the case permitting.

2.4. Notices of refusal/adverse decision

If decision-making is the primary function of IND then the notice issued recording the decision is a tangible product. Because of the central importance of this notice, its form and its legal status are carefully laid down in the Immigration Act 1971 and the Immigration Appeals (Notices) Regulations 1984. Even the handling of such notices is carefully prescribed in the Immigration Appeals (Procedure) Rules 1984, and the appropriate sections of ***Chapter 12 "Appeals"*** explain the various aspects of this. For the present purposes it is sufficient to remind staff:

- that a notice of refusal is ***conclusive*** of the grounds for the decision (Section 18(2) of the 1971 Act);
- that a notice of refusal ***must*** include a statement of reasons for the decision (Paragraph 4(1)(a) of the Notices Regulations); and
- that an appeal ***must be allowed*** if the decision was not in accordance with the law or any immigration rules applicable to the case (Section 19(1)(a)(i) of the 1971 Act).

See ***Chapter 12, "Appeals"***, if the validity of the refusal notice is in doubt.

It is important to get the wording of a refusal notice right and to ensure that the reasons it gives correspond to provisions in the Acts/Rules on which the decision is based since appeals have in the past been allowed because the notice did not meet the statutory requirements. At the same time there have been justifiable requests for fuller notices of refusal so that a person is immediately aware of the case against him. ***All notices of refusal/adverse decisions should therefore include a brief statement of the main facts which, when set against the Rules, clearly explain the reasons for refusal***.
More detailed information on the recording of reasons for refusal is given below.

2.5. Description of the application or case

The wording should begin with a brief description of the application or case:

Entry clearance

"You have applied for entry clearance to the United Kingdom [for 2 weeks as a visitor/as a person of independent means/as the dependent son of ...(name)] ..."

Leave to enter

"You have asked for leave to enter the United Kingdom for [3 months as a visitor/as a student/as a returning resident] ..."

Limited leave to remain

"You have applied for [your leave to be varied/ further leave to remain] to enable you to work for ...(employer)/to extend your stay as a visitor for 2 weeks/on the basis of your marriage to ... (name)] ..."

Indefinite leave to remain

"You have applied for [the time limit on your stay to be removed/indefinite leave to remain in the United Kingdom] on the basis of ..."

Curtailment

"On ...(date) [you were granted leave to enter the United Kingdom [for ... (period)/until ...(date)]/ the time limit on your leave was varied so as to expire on ...(date)] ..."

3. DISCRETION OUTSIDE THE RULES

Where a person specifically requests leave outside the Rules or that the Secretary of State depart from the Rules, or where a concession operates in respect of a category of applicants, consideration must be given to the Secretary of State's overriding discretion to depart from the Rules before an application can properly be refused under the Rules.

3.1. Out of time applications

It is not possible under Section 3(3) of the 1971 Act to vary the leave of a person who has overstayed, because he has no leave to vary. The Rules make no provision for the grant of leave to remain to an overstayer and therefore any such decision must involve the exercise of discretion outside the Rules. An overstayer has no right of appeal against a refusal to grant leave to remain and a formal notice of refusal is therefore not required

under the Notices Regulations. However, notice is usually given on form RON 110 or RON 111.

The wording of such a notice is still important because it can become an issue at the deportation stage or be the subject of MP's representations or judicial review. The relevant wording contained in the refusal formulae may be used to explain why discretion outside the Rules has not been exercised, but if the overstaying itself is the reason for refusal it will be appropriate to say no more than: "... but in view of the fact that you have remained in the United Kingdom without leave since ....(date), the Secretary of State is not prepared to exercise his discretion to grant you leave to remain in your favour. The Secretary of State therefore refuses your application."

3.2. **Applications for leave outside the Rules**

Applications for leave or variation of leave on an exceptional basis should be considered both under and outside the Rules. Where the applicant does not qualify under the Rules, and the exercise of discretion outside the Rules is inappropriate, refusal will be necessary.

It is important to note that where an application is made ***specifically*** for "exceptional" leave to remain, it is not appropriate to refuse solely for the reason that there is no provision within the Rules for leave to remain on that basis. Such applications are by definition a request to depart from the Rules and are made in recognition of the fact that the applicant fails to meet the requirements of the relevant Rule or Rules,
for example:

* applications for leave to remain here exceptionally with family members ***who are dependent on the applicant*** (and not vice versa); or

* applications for exceptional leave to remain because of temporary disturbance in the home country.

The first application falls under the dependent relative Rules but calls for careful consideration outside the Rules. The second application may on occasions fall to be considered under the visitor Rules, depending on the facts of the case (see paragraph 9.1 below), but otherwise will fall to be refused under Paragraph 322(1) of the Rules. Consideration should nevertheless be given to departing from the Rules.

3.3. **Notification of the decision**

The notice of an appealable decision must comply with the Notices Regulations and should reflect any applicable Rule(s). It is also important not to refer to the refusal to depart from the Rules in the formal notice as this is not reviewable by the appellate authorities. A covering letter should accompany the refusal notice including something to the effect of:

"Your application for a variation of leave has been refused in accordance with the Immigration Rules for the reasons given in the enclosed refusal notice. The Secretary of

State has nevertheless given consideration to the exercise of his discretion to depart from the Immigration Rules in the light of your particular circumstances but he is not persuaded that it would be appropriate to exercise this discretion in your favour".

Where the Secretary of State is requested to ***depart from the Rules,*** and the application is refused an indication must be given that ***the Secretary of State has considered the exercise of his discretion*** to depart from the Rules. If this is not done the appellate authorities are likely to find that the application remains outstanding.

3.4. Concessions

Although the appellate authorities do not have jurisdiction to consider the merits of a decision not to depart from the Rules by virtue of Section 19(2) of the 1971 Act, they can consider whether a decision was taken in accordance with the law (Section 19(1)(a)(i) refers), and the Court of Appeal have held this to include the Secretary of State's own published policies. Therefore if an adjudicator decides that a decision has been taken without proper consideration in line with an applicable concession, he may adjourn an appeal or allow it on the basis that the original application remains outstanding before the Secretary of State.

It is therefore appropriate, in after-entry cases, to explain in a covering letter why an applicant does not qualify under a relevant concession, or, if he does appear to qualify under it, why the Secretary of State is not prepared to operate the concession in the applicant's favour.

In on-entry cases, it is equally important, when serving the notice of refusal, to clearly explain to the passenger the reasons for deciding that he does not qualify for entry on a concessionary basis.

In the case of a request to depart from the Rules based on an applicant's individual circumstances, rather than on a concession operated generally by the Secretary of State, it will usually be sufficient for the covering letter to indicate that the matter has been considered but rejected (see example at the end of paragraph 3.3 above).

3.5. Second or subsequent applications

Caseworkers need to be wary of refusing an application under the Rules, when the Secretary of State's discretion to depart from the Rules has ***previously*** been exercised. The Secretary of State is perfectly entitled to apply the relevant Rules to a subsequent application and of course it will also depend on the original reason for departing from the Rules.

However, it would be unreasonable to refuse a subsequent application submitted on the same basis as the first, for example, because the applicant was not admitted with the required entry clearance. As this requirement was waived originally it would not be considered fair or in accordance with the law, although the Rules allow for such a refusal. Requirements such as "no switching" should only be applied to first time applications.

4. DISCRETION WITHIN THE RULES

Generally speaking the Rules provide that an application in any given category will fall for ***mandatory*** refusal whenever an immigration officer or the Secretary of State is not satisfied that ***all*** of the stated requirements for leave in the relevant category of the Rules have been met. There are, however, a number of exceptions to this, for example, Paragraph 19 provides that a person may still be admitted as a returning resident even though he does not satisfy the requirement of Paragraph 18 (ii) that he has not been away from the United Kingdom for more than 2 years, if the circumstances warrant the exercise of discretion, say because he has lived here all his life. If having considered an exercise of discretion within the Rules refusal is still considered to be the correct course, then it is essential that such consideration be referred to in the refusal notice. The appeals statement should also refer to it and the file should be minuted accordingly. Not to do so, will most likely result in the appeal being adjourned, or worse allowed because the decision is not in accordance with the law or the Rules.

NB. ***It is of course important to remember that an application should not automatically be granted simply because all the category requirements have been met. The Rules only provide that an application may be granted as the general grounds for refusal contained in Part 9 of HC 395 should also be taken into consideration.***

5. REASONS FOR REFUSAL

5.1. The crucial facts/expanded reasons

In order to make sense of the reasons for refusal, the notice should set out the most important facts of the particular case and should relate them to the provisions of the Rules on which the refusal is based. ***Refusal is inappropriate unless it is clear why it is appropriate***.

Where an applicant is not entitled to appeal against a decision to refuse by virtue of the provisions of the Asylum and Immigration Act 1993 (see ***Chapter 12, Section 1 "Rights of Appeal"***), the notice must nevertheless comply with the requirements of the Notices Regulations and, bearing in mind that he will not subsequently have the benefit of an explanatory statement, it is just as important that he be provided with valid and meaningful reasons for the decision taken.

The facts justifying curtailment of leave should be set out in the same way.

5.2. The wording

Although it is not possible to give set wordings for the expanded reasons because they must obviously reflect the facts of the particular case the refusal formulae (at the end of the Rules based sections of these instructions) do seek to give some suggestions which may often be helpful. The parts in square brackets "[]" and preceded by a question mark "?" will need to be set out in a way which fits the facts of the case and should be replaced by alternative phrases if appropriate. It is important to ensure that the reason for refusal follows logically from the facts. Other words in square brackets may be alternatives or optional and their use again depends upon the factors of the individual case.

In some cases the provisions of the Rules are very specific (eg. working holiday makers must be aged 17-27) and there should be no difficulty in referring to the crucial facts which necessitate refusal. In other cases the provisions of the Rules are less specific, or depend on imprecise matters such as a person's intentions

In these more difficult cases it should often still be possible to pick out the most important facts (eg. a direct statement by the applicant) but where "general discrepancies" or "lack of credibility" are all there is to go on it would be sufficient to say something like: "... in view of the discrepancies between your account of your family circumstances and that of your spouse, the Secretary of State is not satisfied ..." or "... in view of your personal circumstances in (country) and the absence of any credible reasons for your proposed visit, ..."

The general rule is that where ***particular*** facts can be quoted, they should be, but these facts must be ***accurately*** stated (eg. dates, events) and supported by reliable evidence. An example of an expanded refusal wording would be:

> "You have applied for entry clearance to the United Kingdom as the fiancé of Miss Susan Jones but, in view of your statement at interview with the entry clearance officer that you wished to marry Miss Jones because opportunities for employment would be better in the United Kingdom, the Secretary of State is not satisfied that it is not the primary purpose of the intended marriage to obtain admission to the United Kingdom." (Paragraph 290(ii) of HC 395).

5.3. Provisions of the Rules

After the expanded reasons have been given, the Notice must return to and quote the relevant part of the Act or Rules, or the decision could be overturned at appeal. The way to ensure this is to end by quoting the words from the Rules themselves or keep to them as closely as possible. A suitable refusal wording should be contained in the refusal formulae given at the end of each Rules based section. It should not normally be necessary to depart from these.

Words in square brackets either provide alternatives or are optional. ***In referred entry clearance cases, the reason for refusal must always be preceded by a reference to the Secretary of State.***

The Paragraph number(s) of the relevant Rule(s) should be quoted in the space provided on the APP form. If you are unable to locate an appropriate rule or Section of the Act to quote, it could be that your decision is not in accordance with the law or Immigration Rules.

The refusal formulae in the Rules based sections detail the relevant Paragraph(s) of the Rules under the refusal wordings.

5.4. The decision

The decision itself (eg. to vary or to refuse to vary), is normally printed on the APP form ("The Secretary of State therefore [refuses your application/grants you leave to remain until ...]" and will only require amendment if it does not reflect the decision actually being taken, such as when an APP 102 form is used to notify a decision to curtail leave, eg. The wording "The Secretary of State therefore grants you leave to remain until ....(date)" should be amended to "The Secretary of State therefore curtails your leave to [enter/remain] so as to expire on ....(date)".

6. INAPPROPRIATE APPLICATIONS

It is not unusual for someone to ask for variation of leave which is not provided for by the Rules simply because they are ignorant of our requirements. For example, an applicant who marries a British woman may ask for "permanent residence" because he does not know about the probationary year.

Where it is obvious that the person would be entitled to leave under the Rules, but to less than he has requested, leave for the appropriate period should be granted and an APP 102 should be sent. It will be appropriate in such cases to send a brief covering letter explaining the relevant provisions of the Rules. Apart from politeness, such a letter may discourage an unnecessary appeal.

If there is any ambiguity in the application, it must be clarified with the applicant before a decision is made, particularly if it casts doubt under which Rule or Rules the application should be considered. When seeking clarification, it is good practice to

inform the applicant of how the Home Office interprets and intends to treat their application as it stands. In the event that they do not respond, providing them with a full opportunity to correct any misunderstanding on our part should avoid any later claim that we have acted unfairly, or that the application was improperly considered. For example:

"I refer to your application to remain in the United Kingdom with your girl-friend who is settled here. Although you state that you are both very much in love with each other, you have provided no other details about your relationship or for how long you wish to remain. As it stands your application appears to constitute a request to remain in the United Kingdom indefinitely with Miss X as her boy-friend, which I must tell you would fall to be refused, as the Immigration Rules do not provide for indefinite leave to remain to be granted for such a purpose. However, to enable you to correct any possible misunderstanding on our part, or if you wish to submit any further information, the Secretary of State will delay any further consideration of your application for 28 days from the date of this letter."

7. JOINT APPLICATIONS

When family members apply together care should be taken, as dependants may not share the same immigration status. A joint refusal notice should only be used if all those named therein are refused under precisely the same provision of the Rules and for precisely the same reason. Thus a work permit holder and his wife should be refused on separate forms; a spouse and her child coming for settlement should be refused on separate forms (even if both are refused because we are not satisfied that they are related as claimed to the sponsor - different Rules apply), but children all being refused for the same reason may be dealt with on one form. Care should be taken not to treat the wife and children of an applicant as 'dependants' if the application requests that their leave be varied on another basis in their own right, eg. asylum applicants etc.

8. MORE THAN ONE RULE APPLICABLE

It is often the case that more than one Rule is applicable to a case. This may be because there are both qualifying requirements and general considerations which are relevant. The general position is that if one of the grounds for refusal no longer entitles an unsuccessful applicant to appeal, by virtue of Section 11 of the 1993 Act, ***only that one ground for refusal should be quoted.***

In all other cases a discretionary ground for refusal - eg. a failure to disclose a material fact for the purpose of obtaining a previous variation of leave under Paragraph 322(2), etc - should be avoided in favour of grounds under the substantive rule that leave no room for discretion - eg. the refusal of a student who is not enrolled on a full time course of study under paragraph 62 with reference to 60(iii), etc - as there will be less to argue at appeal, but otherwise all applicable grounds for refusal can be used. Separate grounds for refusal can be joined by the words "Moreover ..." or "Furthermore ..." etc.

9. NO PROVISION IN THE RULES

The Tribunal have previously held that where no applicable Rule exists the appellate authorities have jurisdiction to review the merits of the decision (by virtue of Section 19(1)(a)(ii) of the 1971 Act). However Paragraphs 320(1) and 322(1) of HC 395 now provide for the mandatory refusal under the Rules of all applications when either entry or variation of leave is sought for a purpose not covered by the Immigration Rules. Consequently, any application not provided for elsewhere in the Rules will fall for mandatory refusal under one of these two rules and the jurisdiction of the appellate authorities will be restricted by virtue of section 19(2).

However, it is surprisingly rare that there really is no relevant provision in the Rules which apply to a case. Such "impossible" applications should not be confused with "inappropriate" ones (see paragraph 6 above). The fact that a person does not seemingly qualify under any Rule does not mean there is no Rule applicable. A dependent cousin falls to be considered under Paragraph 317 because that is the Rule which applies to dependent relatives. He does not qualify because he is not related to the sponsor in any of the ways set out in Paragraph 317(i).

9.1. Applications which may be considered under the Rules relating to visitors

Similarly, although they may not be couched in terms of "visit" applications, many requests to remain for purposes seemingly not covered by the Rules will in fact fall to be considered under the "visit" Rules. For instance, although it might initially appear to constitute a request to remain for a purpose not covered by the Rules, the Tribunal held in the case of KELADA [1991] Imm AR 400 that an application from a mother, for leave to remain in the United Kingdom for the purpose of looking after her two young children who were "students" here, was in fact an application to remain as a "visitor".

Apart from "medical treatment" and "transit to third countries", the Rules do not expressly mention what the purpose of a visit might be and it is important not to refuse an application on the ground that it is for a purpose not covered by the Rules, if the purpose can reasonably be considered to come within the ambit of the "visit" category of the Rules. Even if it would fall for mandatory refusal under the visit Rules, an application that has not been properly considered under the correct category of the Rules will remain outstanding: see paragraph 14 below.

A simple test which will usually establish whether an application might properly be considered under the visit Rules is to ask the question: "if an applicant wished to remain for this purpose for a period of up to 6 months, and intended to leave at the end of it, would he likely be granted leave as a visitor?" If the answer to this question is "yes" the visit Rules will be appropriate.

9.2. Where there is no provision

When we are satisfied that an application for entry clearance or leave to enter is not one for a purpose covered by the Rules it will fall for mandatory refusal under Paragraph 320(1). An after entry application to remain for a purpose which we are satisfied it is not appropriate to consider as a visitor, or under any other category of the Rules, will fall for mandatory refusal under Paragraph 322(1). For example, in the case of a man seeking settlement on the basis of a homosexual relationship:

"You have applied for the time limit on your stay to be removed on the basis of your relationship with Mr X. However, the Immigration Rules could only provide for the time limit on your stay to be removed on the basis of a relationship if you were the spouse, child, grandparent, parent, sibling, aunt or uncle of a person settled in the United Kingdom. Since you are not related to Mr X in any of these ways the Secretary of State is not satisfied that variation of leave to enter or remain is being sought for a purpose covered by the Immigration Rules." (Paragraph 322(1) with reference to Part 8 of HC 395).

If the application specifically requests exceptional treatment outside the Rules (see paragraph 3.2 above), or if it is nevertheless appropriate to give consideration to departing from the Rules in the light of particular compassionate circumstances that have been put forward, an explanation should be given to the passenger, or, in entry clearance or after entry applications, a covering letter will need to be sent which should include something to the effect of:

"Your application for entry clearance to the United Kingdom has been refused in accordance with the Immigration Rules for the reason(s) given on the enclosed refusal notice. The Secretary of State has nevertheless given consideration to the exercise of his discretion to depart from the Immigration Rules in the light of your particular circumstances but he is not persuaded that it would be appropriate to exercise this discretion in your favour."

9.3. **Categories which should be considered under the Rules**

There are a number of other categories of application which have hitherto been refused on the basis of "no provisions" when the application does in fact fall for consideration under the Rules. These are:

* Domestic servants and other employment allowed exceptionally outside the rules - Although admitted exceptionally outside the Rules as a concession, applications for leave to remain in changed employment can be refused within the Rules since a work permit is a mandatory requirement of Paragraph 131. On-entry applications can be refused "under the Rules" for lack of a work permit under Paragraph 130 with reference to 128(i).

* Limited leave on the basis of marriage - an applicant who has completed 12 months on the basis of marriage is not de-barred from applying for further limited leave rather than indefinite leave to remain. If the application is for a further 6 months leave to sort out marriage difficulties but it seems these problems are irreconcilable the application may be refused under Paragraph 286 with

reference to 284(vii). A covering letter should explain why the Secretary of State is not prepared to exercise discretion outside the Rules.

Applications for leave to remain on the basis of "common law" relationships should be considered under the provision of the unmarried partners concession. Guidance may be found in ***Chapter 8 Section 7***. Should the application fall to be refused, this should be under Paragraph 322(1). However, where there is a clearly stated intention to marry on a date in the near future, the fiancé(e) rules will be applicable. If the "spouse" is in the United Kingdom with limited leave in a temporary capacity (for example as a student or work permit holder), the application falls to be refused under the appropriate dependant rule. If only a defined period is requested, because there is no long term intention to settle (usually where both parties intend to live abroad), the visitor rules should be considered.

The duty to be fair should always be borne in mind, although this applies only to the application which has been made and there is no obligation to invite additional submissions as to any compassionate or other circumstances that might persuade the Secretary of State to step outside the Rules and grant an application that would otherwise fall for refusal.

10. OTHER CASES

10.1. Persons no longer exempt from control

See ***Chapter 14, "Persons exempt from control"***.

10.2. Transitional cases

Some cases fall to be considered under 'old' rules by virtue of transitional provisions or savings. Consideration should follow exactly the same course as all other cases but the reference to Paragraph numbers should include the transitional provision.

10.3. European Economic Area Nationals

After entry - refer to ED.
On entry - see ***Chapter 7, Section 3*** (refer to PCS in cases of difficulty).

10.4. Asylum/refugee cases

After-entry - see ***Chapter 11 "Asylum"***. Refer to Asylum Policy Unit.
On entry - See ***"Port Instructions for on-entry asylum applications".***

10.5. Conducive refusal at Secretary of State direction

Refer to Asylum Directorate (AD).

10.6. **Applicants benefiting under Section 1(5) of the Immigration Act 1971**

Where the applicant benefits from Section 1(5) and it is decided after consideration of the relevant provisions in the appropriate rules to refuse the application, the refusal notice should state in the usual way that the applicant does not qualify under the relevant rules but the following sentence should also be added:

"Consideration has also been given under the relevant Rules in the pre-1973 Command papers, but the Secretary of State is not prepared to exercise the wider discretion available under those Rules in your favour because ..."

11. VARIATION OF CONDITIONS

There is a right of appeal against variation of conditions (police registration or employment restrictions) and if such conditions are imposed against a person's wishes, an APP 101 or 102 should be used, even if an extension of stay is granted. Where an application is silent on the question of conditions, no notice of appealable decision needs to be given.

12. MINUTING FILES

At the time a case is refused, the file should be minuted clearly to show why the decision has been taken, especially where it is not possible to put all the relevant facts in the refusal notice. Where the Rules allow for exceptional discretion to be exercised in special circumstances, the minute must refer to the consideration given.

13. COVERING LETTERS

Where a written notice is unlikely to give an applicant a clear picture of exactly why he has been refused (eg. no "switching" cases) it will be appropriate to send a covering letter to explain the provision of the Rules more fully. Such a courtesy can deter unnecessary appeals and MP's cases, but should be used sparingly. The RON 140 and RON 141 series of draft covering letters in ***Chapter 12 Section 1, "Rights of Appeal"*** should provide useful examples.

14. CHANGING THE WORDING OF NOTICES

If this instruction is followed carefully, the right refusal wording should result and there should be no need to change the notice. However, where this does become necessary it may be possible to make changes. Our present understanding of the law is that provided the notice of refusal addresses itself to the application made, and gives at least one

ground and one reason, it is possible to amend both the grounds as well as the reasons for refusal.

However, if it is decided that the wording does not address the actual application made, the procedure outlined in 14.2 below should be followed. Where a caseworker is uncertain about adding to or amending the grounds for refusal, the advice of Appeals and Judicial Review Unit should be sought. Every effort should be made to be fair to the appellant in this respect and he should be given ample opportunity to contest the change or to amend or amplify the grounds of appeal.

14.1. Grounds and reasons

A notice of refusal must contain both a ground and a related reason, or reasons, for the refusal. A person may make an application on more than one ground, in which case a reason must be given for the refusal on each ground.

- The ***ground*** for refusal is the legal basis for the decision.

- The ***reason*** is the reason for a person not qualifying on that basis.

For example in a case where a would-be student who has failed to provide evidence of adequate funds is refused on the ***ground*** that he has not satisfied the Secretary of State he is able to maintain and accommodate himself and any dependants without working and without recourse to public funds (as he is required to do under Paragraph 60(ii) with reference to 57(vi) of HC 395), and the ***reason*** is that he has only produced evidence of having (say) £50 and has produced no verifiable evidence that he will receive sufficient funds from his own country. The refusal wording should be:

"You have applied for further leave to remain in the UK as a student but in view of the fact you have only provided evidence of having funds of £50, and have not provided any evidence in support of your claim that your father will be sending you funds from home, the Secretary of State is not satisfied that you will be able to meet the costs of your course and accommodation and the maintenance of yourself without taking employment, engaging in business or having recourse to public funds."

It should be noted that "reasons" cannot be amended if the amendment would refer to facts not ***in existence*** on the date of the original notice. However facts ***in existence on the date of the original decision*** can be introduced by an amendment ***even if they only subsequently become known to the Secretary of State.***

14.2. Mistaken grounds

Where an application is made on one basis but is mistakenly refused on another (eg. a person applies for further leave to remain as an au pair but, for whatever reason, is erroneously refused leave as a student), the application remains outstanding and, in the case of an "in time" application for variation of leave, leave under "VOLO" will continue to run. Since it is not appropriate to amend such a notice by letter a fresh notice of

decision (refusing leave as an au pair) has to be issued together with a suitable explanation which should include a formal withdrawal of the erroneous decision.

Although an applicant (such as the au pair in the above example) may not have applied for leave in any other category, a notice refusing to vary leave in another category will nevertheless constitute a valid notice of "refusal to vary leave" for the purposes of Section 14(1) of the 1971 Act. Although the decision should be withdrawn at the earliest opportunity, following the Tribunal's determination in ABOLO (9087), any valid notice of appeal lodged against it will remain outstanding until either withdrawn or finally determined by the appellate authorities.

Consequently, in cases where such an appeal has been lodged, it will also be appropriate to request its withdrawal when formally withdrawing the refusal decision. In the event that the appeal is ***not*** withdrawn, and in order to avoid the appellant being protected from enforcement action by virtue of an outstanding Section 14(1) appeal, it will be necessary for the appeals section in ICD to put the matter to the appellate authorities to determine either with a subsequent appeal or without a hearing under Paragraph 12(1)(f) of the 1984 Procedure Rules.
NB. Guidance on amending refusals should be sought from AJRU.

15. REFUSALS OVERTURNED AT APPEAL

A refusal which is overturned on appeal may occasionally show that the decision was thoroughly ill-conceived. But far more often it shows that the appellate system is working properly and reviewing cases where there is room for argument. If no cases were overturned at appeal it would suggest that we were erring too much on the side of caution and probably giving leave to a lot of people who do not qualify for it. Caseworkers should not therefore be unduly concerned about the possibility that their decisions may be overturned on appeal. It is important however to take care to ensure that the wording of the refusal notice is correct and that the decision has a proper basis in the Rules as it is annoying when an appeal is allowed on a "technicality". The message therefore is to take ***care*** with refusals, but not to be unduly ***cautious*** about the outcome.

16. INDECS CODES

The appropriate INDECS codes have been included in the refusal formulae of each section. If more than one Rule is quoted when refusing the INDECS code to be used is the one which is appropriate to the first quoted Rule.