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Immigration Rules – Paragraph 395C

25th January 2012

On 13 February 2012, paragraph 395C of the Immigration Rules is to be deleted and replaced by a new paragraph – paragraph 353B. This information sheet provides information about this change.

Paragraph 395C

Paragraph 395C of the Immigration Rules sets out certain factors that the UK Border Agency should consider before making a decision to remove someone from the UK. Those factors are:

- the person's age
- how long he or she has been living in the UK
- any ties he or she may have to the UK (e.g. family, work and other associations)
- his or her personal history (including character, conduct and employment record)
- his or her domestic circumstances
- any criminal record
- any compassionate circumstances
- any representations made to the UK Border Agency on the person's behalf

The factors are wide-ranging, and are not intended as an exhaustive list. Paragraph 395C directs the UK Border Agency to consider these matters before making a decision to remove. Although paragraph 395C does not say so explicitly, it provides one reason why the UK Border Agency should provide an opportunity for someone to inform it of any relevant factors in his or her case before making a decision to remove.

Paragraph 353B

Paragraph 353B of the Immigration Rules provides:

Exceptional Circumstances

353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:

- (i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;*
- (ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;*

(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused; in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate.

There are several differences between this new paragraph and paragraph 395C, which it will replace on 13 February 2012:

- Paragraph 353B is triggered by a person (or his or her representative) making submissions (representations) to the UK Border Agency; or by the UK Border Agency reviewing the person's case after any appeal rights have been exhausted (i.e. when there is no appeal that can be brought or any appeal has been finally refused). It is intended that any migrant, who wishes the UK Border Agency to consider their circumstances, should make representations to the UK Border Agency; rather than relying upon the UK Border Agency to consider the migrant's circumstances at the point at which it considers making a removal decision.
- Paragraph 353B takes "*further submissions*" as its particular focus, and refers to migrants who have made an asylum or human rights claim. By contrast, paragraph 395C is simply concerned with migrants facing removal decisions, whether or not they have sought asylum or made a human rights claim. (More information on further submissions, is available from the October 2009 "Making Asylum Claims and Further Submissions" information sheet – see <http://tinyurl.com/7zq6ld3>.)
- Although paragraph 353B has a shorter list than paragraph 395C of factors to be considered, there is no practical difference as to what the UK Border Agency should consider when the paragraph applies.

What will be the effect of replacing paragraph 395C with paragraph 353B?

The UK Border Agency has published an impact assessment setting out why it says it is necessary to make the change, and what it says the effect of the change will be. The impact assessment refers to the need, following judgments of the Court of Appeal, to consider removal (and make any removal decision) at the same time as refusing an application for further leave to remain that has been made in time (i.e. before the applicant becomes an overstayer). The impact assessment states that certain of the UK Border Agency caseworkers (particularly those making Points Based System decisions – relating to students, workers, investors etc.) are not capable of assessing the factors set out in paragraph 395C because they are of too low a grade and have insufficient training.

This indicates one effect of the change will be that, from 13 February 2012, when someone receives a decision from the UK Border Agency to refuse his or her application for further leave, he or she should also expect to receive a decision to remove him or her from the UK. This should be the case, unless the person's application for further leave was made after his or her previous leave to enter or remain had expired. Where a person receives a refusal of further leave and a removal decision at the same time, he or she can expect that the UK Border Agency will likely not have considered any of the factors currently set out in paragraph 395C. If the person appeals against the decision to refuse his or her application for further leave, he or she will not be able to rely upon any failure to consider the factors in paragraph 395C. However, in cases where those factors would have been sufficiently strong to indicate a good reason to permit the person to remain in the UK, the person should be able to rely upon Article 8 (the right to respect for private and family life) in his or her appeal. In relying upon any Article 8 ground of appeal, the person will be able to rely upon evidence that had not previously been considered by the UK Border Agency. Moreover, even without paragraph 395C, the UK Border Agency ought not to be making a decision to remove if the information that is available to it shows that removal would be unlawful – whether because removal would be contrary to Article 8 or for some other reason.

The impact assessment is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ia/removing-factors1/>