How to make a change of conditions application and remove the 'no recourse to public funds' restriction

This article from *Free Movement* (reproduced with permission and edited down slightly) explains how to make a successful change of conditions application where a person needs to lift the no recourse to public funds restriction (NRPF) from their grant of leave. This article is written for applicants as well as for the lawyers and advisors who may be assisting in more complex cases.

Overview

The NRPF condition can be removed from a grant of leave via a change of conditions application. The application is free to make but can be complex.

This article assumes that readers already have a basic understanding of the legal basis and framework of the NRPF policy more broadly. If you would like an overview of this, including recent litigation history, we recommend you head first to this Free Movement explainer.

Key guidance

For the purposes of making a change of conditions application, the most comprehensive guidance at present is 'Permitting access to public funds' (currently version 2, published 15 March 2024) and we will mainly be referring to this document.

Advisors and applicants should however also be aware of various other sources of published guidance, notably including within the 'Family life and exceptional circumstances: caseworker guidance' and 'Public funds: caseworker guidance'.

Who can apply for a change of conditions?

For those with leave to remain on the basis of private or family life or as a Hong Kong BN(O) visa holder, the relevant immigration rules at GEN.1.11A for family cases made under Appendix FM; HK 65.1 for BNO visa holders and PL 10.5 for applications made under Appendix Private Life state that:

- '… if the decision maker is satisfied that:
    - (i) the applicant is destitute, as defined in section 95 of the Immigration and Asylum Act 1999, or is at risk of imminent destitution; or
    - (ii) there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing or maintaining the condition (treating the best interests of a relevant child as a primary consideration), or
    - (iii) the applicant is facing exceptional circumstances affecting their income or expenditure,
- then the applicant will not be subject to a condition of no access to public funds.'

The criteria are broad, which is appropriate given the range of reasons why someone might need access to public funds. You only have to meet one of these criteria. Below, we delve deeper into what all of these criteria may look like in practice.

For other immigration routes, there is no specific provision in the immigration rules for the NRPF condition to be lifted or not applied. As emphasised by recent litigation and updated policy guidance, this does not necessarily exclude others, such as students, skilled workers or graduates.

However, for those who do not have leave to remain on the basis of private or family life or in the Hong Kong BN(O) route, a change of conditions application is likely to be complex and risky. There is more detail about this in Free Movement's write up of the case and those affected should seek legal advice before making an application.

What does it mean to be 'destitute'?

It is important to understand that you do not have to be homeless or without income to be considered 'destitute'. The definition is actually quite broad.

The immigration rules refer to section 95 of the Immigration and Asylum Act 1999. According to section 95(3) of the Immigration and Asylum Act 1999, 'a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.'

Note the 'or' – you do not have to meet both parts of this definition to be considered 'destitute'.

In a nutshell, you can be considered destitute if you cannot afford rent/housing costs alongside your other living essentials. This is of course the case for tens of thousands of people in the UK today.

The Home Office provides only very limited guidance about what 'adequate' and 'essential' could mean. Regulation 8 of The Asylum Support Regulations 2000 may be useful here. The Home Office should consider your reasoning if you explain and evidence why you think that either is true in your case.

What does it mean to be 'at risk of imminent destitution'?

The guidance implies that 'imminent' means in three months' time but is not prescriptive, so it is possible to imagine and argue cases where the time frame is longer (for example a single parent in early pregnancy).

This can be useful in some cases, but it is often unnecessary to make speculative arguments about the possible future if one of the other criteria apply more straightforwardly.

The welfare of children

As we have seen above, the immigration rules state that you can apply for access to public funds if 'there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing or maintaining the condition (treating the best interests of a relevant child as a primary consideration)'.

If applicants can show that having recourse to public funds will have a positive (or prevent a negative) impact on a child, then it is difficult to see how the Home Office will be able to lawfully avoid granting recourse.

Until 2022, the Home Office required 'particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income'. This was deemed far too restrictive. There has been subsequent litigation which successfully argued that the guidance and Home Office approach to welfare of children remains unlawful. This remains the case despite subsequent guidance updates. Particularly here therefore, there is scope to apply the criteria as per the immigration rules more broadly than the policy guidance suggests.

Deighton Pierce Glynn, the law firm that brought this and other litigation, produced a briefing note following the most recent litigation on this point in June 2022 which may be of interest. This highlights that the key test when considering a change of conditions application involving a child is still as set out at paragraph 54 of the judgment of June 2022.

Where the application to lift the NRPF condition involves a child, the case law is clear that an examination of that child's position is necessary. It is here that the significance of paragraph 10 of Zoumbas becomes manifest. The caseworker needs, first, to consider what the effects on the child are likely to be of (here) maintaining the NRPF condition. That will generate an answer to the question of whether maintaining the condition would be in the best interests of the child. Although, as Mr Holborn points out, in the present context the answer to that question is almost always likely to be "yes", in the sense that it would generally be in the best interests of the child for there to be access, if necessary, to public funds, what the caseworker needs to know is whether and, if so, to what extent, maintaining the condition would affect the welfare of the child.

What does it mean for someone to be 'facing exceptional circumstances affecting their income or expenditure'?

This means that an applicant does **not** need to be destitute, or imminently destitute, or have children in order to successfully apply for access to public funds. This is critically important, and sometimes forgotten.

The guidance states that 'A decision on whether there are exceptional circumstances affecting income or expenditure… must be made on a case-by-case basis, taking into account the applicant's individual circumstances, those of any dependant family members and all the information and evidence the applicant has provided.'

Again, it might be helpful to know that prior to recent litigation, the formulation in the immigration rules was 'the applicant is facing exceptional financial circumstances relating to a very low income'. As with other criteria outlined above for children, this was judged to be too restrictive.

In many cases, but not exclusively, the 'exceptional circumstances' arise in relation to a disability or health condition.

Disabilities, health conditions and 'exceptional circumstances'

The litigation about 'exceptional circumstances' referred to above related to families with disabilities, and the Home Office guidance and its decision-making approach to date focuses on disabilities in its interpretation of what might constitute an 'exceptional circumstance'. While 'exceptional circumstances' do not have to relate to disabilities/health, it is clearly important that the Home Office considers the impact of disabilities and health conditions.

The guidance prompts caseworkers to carefully consider some of the potential impacts of a disability, such as 'increased expenditure'. Applicants are likely to be able to present several further impacts.

Notably, the guidance states very clearly that in such cases, caseworkers '**must** consider applying evidential flexibility' (emphasis added); it is easy to imagine cases where medical evidence will suffice in order to evidence the need for recourse to public funds, rendering bank statements and other financial documents immaterial. The guidance also helpfully clarifies that disability benefits 'should not generally be regarded as relevant income for the purposes of an income/expenditure assessment of the household'.

How do I apply for a change of conditions?

The change of conditions application form

This is a free application. The change of conditions online application form is long (unnecessarily long, we would argue, and have argued) but thankfully many of the questions are straightforward. We advise applicants to take it step-by-step. You can save and return to the form if it is not possible to complete in one sitting.

Many of the questions on the form will be familiar from other immigration applications. You can also download a draft of the form before submission, so that you or others can review it.

There is limited free-text space on the form, so a concise cover letter may be necessary in order to explain transactions on the bank statements provided, and/or in complex cases. This cover letter can be uploaded with the evidence (see below).

The application form is the standard procedure in order to ensure a decision. However, it does not appear to be a legal requirement according to paragraph 34(1) of the immigration rules and the Immigration (Leave to Remain) (Prescribed Form and Processes) Regulations 2007.

What evidence do I need to submit?

There is a suggested list of evidence online but once you have completed the application form you will be given a more tailored list of evidence to submit.

If you cannot submit the required evidence, there is a textbox at the end of the form where you can and should explain this.

The guidance states that 'evidential flexibility' should be applied where 'the additional missing evidence is unnecessary because the other evidence provided is clear and compelling [or] there is a compelling reason why the evidence cannot be provided'. This can be successfully argued in many cases, for example, where somebody is in receipt of section 17 support, or has a severe and terminal medical condition as in the example above

Bank statements

You will usually be asked to submit bank statements covering six months for every account you have. This includes any of your children's accounts, savings accounts and any accounts that you do not currently use. The Home Office routinely performs credit checks, will write to applicants and potentially ultimately refuse applications if any bank statements are missing without explanation.

When you provide statements, the transactions usually need to be explained. The gov.uk webpage notes state that statements 'should include an explanation of any significant/regular transactions'. The guidance does not currently elaborate on this, but the Home Office sometimes does so in correspondence, where they may ask:

Alongside your statements, please provide an explanation for all major incoming and outgoing payments… including where you:

- made a cash withdrawal of over £100
- transferred funds to someone else
- transferred money to another account in your name – please also provide statements for that account
- received funds of over £100 into your account or were paid in cash

- purchased something over £100
- transferred money overseas

This list is not exhaustive. Please provide an explanation for all significant incoming and outgoing payments.

Bank statements and their explanations usually amount to several pages and can be complex to explain. It is always better and possible to explain things fully, clearly and carefully when the application is first submitted rather than to have to provide further explanations or statements after the Home Office have run a credit check and scrutinised the statements. In most cases it will save time and issues in the long run to spend time on this before submission.

How do I submit the evidence?

You will receive instructions about how to submit evidence when you have completed the online form, but essentially this is done via an online portal, or else could be done via recorded delivery. Evidence must usually be submitted within 10 days of form submission, which allows applicants some additional time to gather documents.

Can change of conditions applications be submitted by non-lawyers?

There are some situations where it is advisable to seek immigration advice before submitting a change of conditions application, some of which are outlined above. However, you can make a change of conditions application without a lawyer.

Advising on 'Change of Conditions' applications constitutes 'immigration advice' and is 'Level 1' regulated work under the OISC regulatory scheme (see OISC Guidance on Competence). For this reason, if you are not a registered immigration adviser or exempt from that requirement it is a criminal offence to advise on these applications.

Home Office decision-making

Requests for further information
In our experience the Home Office's practice is to request further information before refusing an application and caseworkers are advised that they 'can reject the application if they [the applicant] have failed to provide the information after 2 further information requests have been made'.

The Home Office has been known to request information or evidence that has already been provided, or explained to be unobtainable. In these cases, applicants can refer back to previous submissions.

Decision timeframes
There is no service standard for change of conditions applications. Approximate decision time frames can be ascertained through published statistics (within 'Immigration and protection data' in the collection 'Migration transparency data'). There are means to chase up unreasonably long delays, including pre-action protocol (PAP) letters where necessary.

If an application is granted
If an application is successful, the applicant will be able to apply for all welfare benefits and housing assistance for the remaining period of their current leave.

Please note, even if you have already had the NRPF condition removed, if you still need recourse to public funds when you apply to extend your leave, you need to make this clear in your renewal

application. The guidance makes this clear under the heading 'Subsequent leave to remain applications', i.e. 'A previous grant of leave without the NRPF condition can be a strong indicator of ongoing need for access to public funds. However, this must not be automatic, and you must be satisfied on each occasion that the criteria are met.'

If an application is refused

If the application is unsuccessful, you may be able to make a new 'change of conditions' application. Alternatively, you may be able to challenge the Home Office's decision by highlighting a caseworking error or providing additional information via administrative review, a process which should be clearly outlined in the decision letter.

If this is unsuccessful, it may be possible to challenge the decision via judicial review, which has been a successful approach in numerous cases over the past few years. Judicial reviews must be done promptly, and in any event within three months of the decision under challenge, so it is very important to seek legal advice quickly following a negative decision.

As we have shown above, the law – if not the policy – instructs the Home Office to allow access to public funds in a huge variety of cases. It is therefore extremely surprising that the NRPF condition is imposed on almost everyone granted limited leave to remain, and that change of conditions success rates have recently hovered around 60-70%. Based on the above and years of casework experience, a refusal of a change of conditions application is probably challengeable.

Could this negatively impact my current leave to remain?

Many people are concerned that making a change of conditions application will negatively impact their current leave to remain or future immigration applications.

It is not unlawful or in breach of the conditions of your leave to remain to make the change of conditions application for recourse to public funds. If the application is successful and you are granted recourse to public funds, it is not unlawful or in breach of the conditions of your leave to remain to claim them.

To qualify for limited or indefinite leave to remain, applicants must meet certain criteria, which are stipulated in the immigration rules.

For those on the '10-year route' on the basis of private and family life, the requirements do not exclude people on the basis that they have claimed public funds. Please note, however, that there are other criteria that you must continue to meet, such as relationship requirements. If you no longer meet the other criteria (for example, if you have leave to remain as a partner but your relationship has broken down), you should therefore seek immigration advice about other immigration routes before making a change of conditions application.

For those on the '5-year route' on the basis of private and family life, the change of conditions application should not have any impact in and of itself – this is detailed below.

For those on other routes, there may be significant risks and so legal advice should be sought before making the application.

I am on the '5-year route' – can I make a change of conditions application?

Yes. Following advocacy and campaigning, the Change of Conditions (CoC) webpage now makes clear: 'If your request is successful. Your conditions of stay will be amended to allow you to receive public funds. You can only change the conditions attached to your permission with this request. If

you currently have permission to stay under the five year partner or parent route and you are granted access to public funds, you will remain on the five year route. **Your circumstances will be reassessed when you apply for further permission** and, to remain on the five year route, you will need to meet all requirements of the relevant rules at the time you apply, including any financial requirements.' (emphasis added).

If you are in the first half of the five year route (i.e. if you have not yet renewed your leave to remain), please note that you may be switched onto the 10 year route when you apply for renewal, regardless of whether you make a change of conditions application, if you cannot meet the requirements when you apply.

My application for a renewal is pending, and I need access to public funds now – can I make a change of conditions application?

Yes. However, you should ensure that the submissions in the change of conditions application are consistent with the submissions in the pending applications, or else that any discrepancies are carefully explained. You may wish to seek advice about this. It will probably be necessary to refer to a copy of the pending application to ensure consistency.

Please also note that if you have already made clear that you need access to public funds via a fee waiver application or a further leave to remain application, it may be sufficient to highlight and refer back to these submissions, rather than submit a change of conditions application form.

In these cases, the change of conditions application form is likely to only duplicate the fee waiver or further leave submissions and thereby create unnecessary delay and administrative burden for applicants as well as the Home Office. This approach may, however, require a pre-action letter in order to ensure a (timely) response.

With thanks to Rahath Abdar, Adam Hundt, Sonia Lenegan and Alice Ongaro for their assistance. See The Unity Project for further information and assistance.