

ILPA information sheet

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Discretionary Leave

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On 9 July 2012, the Immigration Rules (“the Rules”) changed. More information about these changes is provided by the “Family Migration – Change to Immigration Rules” information sheets [<http://tinyurl.com/blz7zg6>] and [<http://tinyurl.com/bluv mew>]. One of the intentions behind the changes was explained by the Home Office Statement of Intent published around the same time as these changes. At paragraph 15 of that statement, it said:

“A person who does not meet the requirements of the Immigration Rules will no longer be considered for Discretionary Leave outside the rules on Article 8 grounds. A grant of Discretionary Leave provides automatic access to public funds and places the person in a better position than those who meet the rules. In future, if they do not qualify for leave under the rules, or for leave outside the rules on a genuinely exceptional basis, they will not receive any form of leave and will be expected to leave the UK.”

This is important in making clear that those granted discretionary leave will continue to have access to public funds. The Statement of Intent is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf>

Since that Statement of Intent was published, the UK Border Agency has issued a new asylum policy instruction on discretionary leave. This sets out the circumstances in which discretionary leave may now be granted. This information sheet provides further information relating to this. The asylum policy instruction is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary>

When will Discretionary Leave now be granted?

The asylum policy instruction sets out the circumstances in which discretionary leave may now be granted. These circumstances include:

- where the return of a person to his or her country of origin would constitute inhuman or degrading treatment because of the severity of the person’s medical condition (the guidance makes clear that it is expected that only very exceptional cases will meet this criterion) – the “AIDS/HIV Cases and Removal” information sheet [<http://tinyurl.com/9ldobnw>] provides relevant information
- where return of the person to his or her country of origin would constitute a breach of his or her human rights (unless some more favourable form of leave to remain is granted) – the asylum process guidance on considering human rights provides further information: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/consideringhrclaims.pdf?view=Binary>

- where a separated child asylum-seeker cannot be returned to his or her country of origin because there are no adequate reception arrangements for him or her – see the “Discretionary Leave and Separated Children” information sheet [<http://tinyurl.com/c8vamq9>]
- where it is decided that paragraph 353B of the Immigration Rules applies (see below)
- where a victim of trafficking is pursuing a compensation claim against his or her trafficker or cooperating with an ongoing police investigation (unless some more favourable form of leave to remain is granted)

Paragraph 353B

If someone refused asylum (or whose human rights claim has been refused) makes further submissions, or if the UK Border Agency reviews such a person’s case, paragraph 353B of the Immigration Rules sets out factors that should be considered (unless the person is eligible for a more favourable grant of leave to remain):

- the person’s character, conduct and associations (including any criminal history)
- whether the person has complied with immigration conditions (e.g. reporting requirements, prohibition from working)
- the length of time the person has spent in the UK beyond his or her control after having made his or her human rights or asylum claim

Where paragraph 353B applies, the UK Border Agency will consider these factors in deciding whether removal of the person from the UK is no longer appropriate. Further guidance is given in Chapter 53 of the Enforcement Instructions and Guidance (particularly section 53.1.1):

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary>

Period for which Discretionary Leave is granted, and settlement

The asylum policy instruction states that discretionary leave will be granted for no more than 30 months; and that a person will be required to complete at least 10 years of discretionary leave to make an application for settlement (indefinite leave to remain). A separated child asylum-seeker granted discretionary leave because there are no adequate reception arrangements normally will be granted leave for the shorter period of either 30 months or until the child is 17½ years of age. A victim of trafficking granted discretionary leave because he or she is cooperating with an ongoing police investigation normally will be granted leave for only 12 months.

However, a person granted discretionary leave before 9 July 2012 can apply for further discretionary leave on the same basis that would have applied previously. This means, for example, that a person granted three years’ discretionary leave before that date may apply for a further period of three years, and if that is granted may after six years of discretionary leave apply for settlement. (A person granted only six months discretionary leave because of his or her criminal history normally will not be able to apply for settlement before 10 years have passed.) Where it is decided under paragraph 353B that a person should be granted leave to remain:

- if the UK Border Agency had made a written commitment to consider the case before 20 July 2011, indefinite leave to remain should be granted
- if the UK Border Agency had made a decision not to grant leave before 20 July 2011 and it is now decided (considering the same evidence as then) to grant leave, indefinite leave to remain should be granted
- if the UK Border Agency made a written commitment to consider the case before 9 July 2012, discretionary leave for three years should be granted
- if the UK Border Agency had made a decision not to grant leave before 9 July 2012 and it is now decided (considering the same evidence as then) to grant leave, discretionary leave for three years should be granted