

ILPA information sheet

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Settlement and Unspent Convictions

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This information sheet provides information about a new requirement introduced into the Immigration Rules from 6 April 2011. This requirement affects applications for settlement (indefinite leave to enter or remain) made under the Immigration Rules.

The new requirement

From 6 April 2011, applications for settlement made under Parts 5, 6, 6A, 7 or 8 of the Immigration Rules have to satisfy a new requirement. That requirement is that:

“...the applicant does not have one or more unspent convictions within the meaning of the rehabilitation of offenders act 1974”

The Home Secretary continues to have discretion to grant settlement outside of the Immigration Rules. However, an application for settlement by someone with an unspent conviction would, under the Rules, have to be refused.

Alternative applications

Generally, where the Immigration Rules permit an application to be made for settlement, the Rules also permit applications for a further period of limited leave to remain. The new requirement is not to be introduced for these (limited leave) applications. Therefore, someone with an unspent conviction will ordinarily be able to apply for a period of limited leave to remain (or enter if he or she is outside the UK). If his or her conviction becomes spent, he or she may then be able to apply for settlement. The new requirement acts to delay the point at which someone can apply for settlement (and thereafter for naturalisation as a British citizen) to the point at which convictions are spent. However, the alternative of applying for limited leave under the Rules does not apply in all cases (see below).

Nonetheless, the Immigration Rules have, for many years, included a general discretion by which an application (whether for settlement or a period of limited leave) may be refused because of someone's character or conduct. This has not been changed, and the discretion to refuse remains.

Bereaved partners

The Immigration Rules make specific provision for certain bereaved partners (e.g. widows and widowers). Where someone is permitted to come to or stay in the UK to be with his or her partner, but before he or she can apply for settlement that partner dies, the bereaved partner can still apply under the Rules for settlement – i.e. the Rules allow the bereaved partner to make the application which he or she would have expected to make had the partner not died.

The Rules do not, however, make any provision for bereaved partners to apply for limited leave. Previously, there was no need to make any such provision. However, with the introduction of the requirement about unspent convictions, the Immigration Rules will penalise bereaved partners. The requirement will do more than merely delay when they can apply for settlement, but will leave them with no alternative application to make under the Rules.

Victims of domestic violence

The Immigration Rules make specific provision for certain victims of domestic violence. Where someone is permitted to come to or stay in the UK to be with his or her partner, but needs to escape that relationship (during the initial two years period of leave) because of abuse before he or she can apply for settlement, the victim of domestic violence can still apply under the Rules for settlement – i.e. the Rules allow the victim of domestic violence to make the application which he or she would have expected to make had the relationship not broken down because of abuse.

ILPA has protested at the imposition of the requirement to be free of unspent convictions for applications for settlement by this group. It directly undermines the intention of the Rules concerning victims of domestic violence, which is designed to ensure that someone does not remain in an abusive relationship because of his or her immigration status. As with bereaved spouses and partners, the Rules do not make any provision for victims of domestic violence to apply for limited leave.

Discretion outside the Rules

The Government has informed the Immigration Law Practitioners' Association that discretion may be used to grant applications for settlement or for limited leave to remain by victims of domestic violence outside the Immigration Rules. The Government is correct that the discretion exists, and the discretion could also be applied for bereaved partners.

However, there is a crucial difference between discretion which may be exercised outside the Rules and a provision in the Rules. This difference is especially important for victims of domestic violence. A provision in the Rules provides greater certainty. If the requirements of the provision are met, the applicant can ordinarily expect his or her application to be granted. Discretion, however, is far less certain. For a victim of domestic violence, who is worried about the immigration consequences of leaving his or her partner, clear provision in the Rules is far more helpful than a discretion outside the Rules. Indeed, this is the very reason that provision was made for victims of domestic violence in the Rules. Otherwise, some victims are compelled to stay in their relationship, despite ongoing abuse to them (and in some cases to their children), for fear of the immigration consequences of escaping the relationship.

Which convictions count and when do they become spent?

This is governed by the Rehabilitation of Offenders Act 1974. The key issues are the sentence that was imposed for the particular offence and the age of the person when convicted. Generally, the convictions of those convicted when under the age of 18 years become spent in half the time it takes for an adult's conviction to become spent. Convictions leading to a sentence of more than two and a half years never become spent. Lesser sentences of imprisonment may take ten or seven years to become spent. Non-custodial sentences (e.g. fines and community orders) generally take five years to become spent. More detailed information about when a conviction will be spent is provided at:

<http://www.yourrights.org.uk/yourrights/privacy/spent-convictions-and-the-rehabilitation-of-offenders/how-a-conviction-becomes-spent.html>

Convictions outside the UK (i.e. by non-UK courts) also count. These become spent after the same period that would apply if the conviction was in the UK.