

ILPA information sheet

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Overstayers

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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 1” information sheet [<http://tinyurl.com/blz7zg6>].

The Statement of Changes (HC 194) which introduced the changes to family migration also included changes relating to overstayers. Some of the changes relating to overstayers came into effect on 9 July 2012 and others are to come into effect on 1 October 2012. This information sheet provides information about overstayers and the changes relating to them.

General

An overstayer is someone who had leave to enter or remain in the UK and stayed in the UK after that leave had expired – i.e. a person who stayed longer than (overstayed) the period for which he or she was permitted to be in the UK. A person who wishes to remain in the UK can avoid becoming an overstayer by applying for further leave to remain before his or her leave expires. If he or she does this, he or she will not be an overstayer. His or her leave will be extended on the same conditions on which it had been granted for any period after it was due to expire:

- during which his or her application for further leave is yet to be decided; and
- if the application is refused, during which an in-time appeal to the First-tier Tribunal (Immigration and Asylum Chamber) can be lodged, if that application is refused; and
- if an in-time appeal is brought, during which that appeal continues (i.e. has not been finally decided).

Overstaying is a criminal offence. However, overstayers are very rarely prosecuted. Overstayers can be and often are removed from the UK (and they may be detained for the purpose of their removal). After an overstayer leaves the UK (whether voluntarily or involuntarily) he or she may be barred from lawfully returning to the UK for a fixed period (a re-entry ban). The changes to the Rules will affect this (see below).

Overstayers and immigration applications

Some applications for leave to remain under the Rules do not require that a person has leave at the time of his or her application – i.e. an overstayer who is still in the UK may be able to apply successfully under the Rules (e.g. long residence applications – see the “Long Residence Rules 2” information sheet [<http://tinyurl.com/d7jz34y>]). However, in a number of categories of the Rules it is a requirement that the person does have leave at the time of making his or her application. An overstayer could not meet the requirements of the Rules relating to those applications. The changes to the Rules will affect this situation (see below).

A person who applies (whether under the Rules or outside the Rules) for leave to remain and is refused has no right of appeal against that refusal. Overstayers are not permitted to work or to access public funds. If an overstayer does not leave the UK voluntarily, the UK Border Agency may make a decision to remove him or her. An appeal can be brought against that decision, but in many cases an appeal against a decision to remove will only be permitted after the person has left the UK (there are exceptions to this). The changes to the Rules will not affect these matters.

Note: Appeal rights in immigration cases are highly complex and there have been many examples where the UK Border Agency has issued documents giving incorrect information about whether a person has a right of appeal and/or whether any appeal can be exercised without the person leaving the UK. Those who have received a negative decision from the UK Border Agency should seek legal advice about how that decision may be challenged.

Changes affecting applications for leave to remain made by overstayers

From 9 July 2012, the Rules have been changed so that those, who have overstayed for a period of no more than 28 days, may apply for leave to remain (including for settlement) as family members in the same way as a person who has leave. From 1 October 2012, the Rules will be changed to produce the same effect for other types of applications (e.g. those applying for leave to remain as workers or students) under the Rules.

Paragraph 7.18 of the Explanatory Memorandum to Statement of Changes (HC 194) states that where an applicant applies for leave to remain before becoming an overstayer, but his or her application is rejected as invalid (e.g. because it was made on the wrong form or without the appropriate fee), the 28 days during which an application can be made within the Rules (despite the person being an overstayer) will start to run from the time of that rejection. This would give someone a period of time to sort out whatever has caused his or her application to be rejected as invalid (e.g. by applying on the right form or correcting a payment error). The Home Office has informed ILPA in meetings that this is the intention, and has acknowledged that there may be errors in the way the Rules are drafted. The Explanatory Memorandum is a short statement explaining the rules. It is not legally binding.

The Explanatory Memorandum also states that UK Border Agency caseworkers will continue to have discretion to disregard overstaying of more than 28 days. Where an applicant has been unable to apply before overstaying for more than 28 days, that person should normally provide evidence of why he or she has been unable to make the application earlier. Additionally, overstaying of more than 28 days should not of itself be a reason to refuse an application for leave to remain if:

- the applicant has a dependent child in the UK, who is a British citizen or has lived in the UK for at least seven years, and it would be unreasonable to expect the child to leave the UK; or
- the applicant has lived in the UK for more than 20 years; or
- the application is for leave to remain on the basis that the applicant is a victim of domestic violence or bereaved partner.

Changes affecting whether overstayers who leave the UK can lawfully return to the UK

Changes relating to how overstaying can affect a person who leaves the UK and later makes an application to return to the UK are incorporated in the information provided by this month's "General Grounds for Refusal – Update" information sheet [<http://tinyurl.com/bwidwtm>].

A key change, which will take effect on 1 October 2012, is that a person who has overstayed for no more than 90 days before leaving the UK voluntarily and at his or her own expense will no longer be subject to any re-entry ban. Currently, overstaying for more than 28 days will lead to a re-entry ban of 12 months where the person leaves voluntarily and at his or her own expense.