

RECENT UK IMMIGRATION CHANGES

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The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

ILPA does not give immigration advice on individual cases but maintains on its website www.ilpa.org.uk a directory of members who give immigration law advice. ILPA's *Information Service* on its website provides short (two sides) information sheets about developments in immigration law, policy and practice, designed to be of interest to non-lawyers.

The information herein is accurate as of 20 March 2015. Immigration law changes very rapidly and it is always necessary to check for updates.

A hierarchy of entitlements

- People exercising rights under
European law
- British citizen
 - Settled person (with Indefinite Leave to Remain)
 - Person with temporary, time-limited leave in a category leading to settlement (e.g. worker, spouse)
 - Person with temporary, time-limited leave in a category not leading to settlement, but in which they can extend their leave (e.g. student)
 - Person with temporary, time-limited leave in a category in which they cannot extend their leave (e.g. a visitor)
 - Person awaiting a decision on whether they will be given leave (on temporary admission – most people in this category are seeking asylum)
 - Person with no leave and no temporary admission -those who have entered in a clandestine manner and never come into contact with the immigration authorities or who entered on false documents, or who entered with leave but have remained longer than their leave allowed ('overstayers')

Some important points:

- Not all British nationals are British citizens – other British nationals can be anywhere else on the list above in terms of immigration rights.

- The picture is complicated by the ability to ‘switch’ - i.e. to change from one category to another. There are complicated rules on who can switch – it depends on the categories from which and to which a person is switching.
- There is always the chance that a person may be allowed to stay on a discretionary basis (‘outside the rules’).
- People exercising rights under European law may be nationals of States in the European Economic Area or the “third country” (i.e. non EEA) national family members of such people.

Changes affecting Jamaican nationals

It is helpful to think of different types of person and consider recent changes affecting them.

Visitors

Extensive changes to the rules on visitors take effect from 24 April 2015. These will affect those coming as tourists, to visit family, or for business or medical visits. From that date there will be a standalone book of visitor rules, separate from the main immigration rules. While the intention is to make things simpler, this is unlikely to be achieved at once.

Students, workers and business persons

These categories of person are affected by changes to appeal rights and also some of the changes to these categories. They will also be affected by increased application fees from 6 April 2015. They are also affected by the requirement that they now pay a levy to access the National Health Service, although this is still likely to prove much cheaper than private health insurance.

Those wishing permanently to join/remain with spouses, partners etc. in the UK

Everyone in the UK, whether a British citizen or not, is affected by changes to the law on marriage and civil partnership effected by the Immigration Act 2014. This means that we all have to give 28 not 14 days’ notice of a marriage or civil partnership. But for those marrying a non EEA national there is the prospect of the Secretary of State deciding that she has reason to investigate whether the marriage or civil partnership is a scam, in which case the notice period extends to 72 days.

These categories of persons have been steadily affected since July 2012 by changes to the family immigration rules which have made it more difficult to remain with a spouse or partner, with an emphasis on meeting financial requirements. Those who cannot meet these requirements have to rely on claims that a refusal to allow them to stay would breach their rights to private and family life under Article 8 of the European Convention on Human Rights (e.g. by splitting the family). The Immigration Act 2014 is designed to make it more difficult for such claims to succeed.

Changes to nationality law

Section 65 of the Immigration Act 2014 introduces changes to nationality law from 6 April 2015 that permit a person born to a British father not married to his mother, who would today be British or have an entitlement to register as British but for having been born to unmarried parents, to register as British.

Asylum

Jamaicans claiming asylum on the basis that they will face persecution for their sexual orientation benefit from the judgment of the Supreme Court in *R (Brown (Jamaica)) v Secretary of State for the Home Department* [2015] UKSC 8 (4 March 2015). The Supreme Court held that the risk attaches to all who are homosexual, lesbian, bisexual or transsexual in Jamaica. Jamaica could not be designated as a generally safe country for asylum purposes because of this general risk there.

Some of those who have been recognised as refugees are affected by changes requiring anyone who was declared an illegal entrant to wait 10 years before naturalising.

Those whose claims for asylum and all appeals against refusal have failed, who now wish to claim asylum on a fresh basis, will from 30 March 2015 have to trek to Liverpool to submit their claim. Prior to that date this requirement applies only to those who made their initial claim for asylum before March 2007.

Detention

Many of those who claim asylum find that their claims are dealt with in the detained fast track, an accelerated procedure that offers little prospect of a fair hearing.

Person in the UK without leave

Persons with no lawful status in the UK are affected by a number of fairly recent changes to immigration law and policy. They are affected by the changes to appeal rights described below and some may find themselves in a better position. They are affected by the related changes to removal. Those with criminal records will be affected by changes to deportation.

Changes designed to create an “hostile environment” are aimed at those without leave, although they affect all of us. These include:

- A pilot in Birmingham etc. requiring landlords and landladies to check the immigration status of their tenants. Concerns about this include that it will result in discrimination in the rented sector.
- New requirements from 12 December 2014 to prevent those with no lawful status in the UK from opening current bank accounts
- Requirements requiring persons to have lawful status in the UK to hold a driving licence made law.

Work is ongoing to limit the access of such persons to free health services.

Appeal rights and removal

The appeal provisions of the Immigration Act 2014 and the way in which they have been commenced could not be more complicated and we are still trying to work out what they mean. This represents my current understanding, not my last word.

Under the new appeals regime you only have a right of appeal if you have made a claim on protection (broadly asylum) grounds or a claim on human rights grounds and it has been refused. If you have made such a claim, then you have a right of appeal.

The persons who particularly benefit from this are those in the UK without lawful leave who at the moment, if they make a human rights claim, have no right of appeal when it is refused and live in limbo waiting for the Home Office to take enforcement action against them. If they make a human rights claim and it is refused, then under the new provisions they will have the opportunity to challenge the refusal by an appeal to the First-tier Tribunal (Immigration and Asylum chamber).

It is however important to be aware that a claim that is considered clearly unfounded can be certified and the result of this is that the person will have to leave the UK and pursue any appeal from overseas. The Immigration Act 2014 introduces a new certification regime whereby the Secretary of State can certify that it would not breach a person's human rights to force them to leave the UK and pursue their appeal from overseas, to be brought back at the expense of the State if the appeal succeeds. For example, it might be said that while a person's claim to be allowed to stay with a family member is not "clearly unfounded"; a temporary separation pending resolution of the appeal will not breach human rights.

Making certain types of application under the immigration rules means that you are treated as having made a human rights claim (normally a claim that removal/refusal of entry would breach your rights under Article 8 of the European Convention on Human Rights, rights to private and family life). These are for the most part applications to be allowed to remain in the UK with family members/

Where an application is not treated as encompassing a human rights claim, for example in the case of a student or worker, the person will have no right of appeal but may in certain circumstances apply to the Home Office

Provided an appeal or request for administrative review is made in time, leave continues on the same terms and conditions until the appeal (or appeals) or the review is finally determined.

Whether you are subject to the new or the old regime depends on the date upon which you made your application, except for human rights/protection claims where it depends on the date of the decision on your application. A (very simplified version) is:

Apply under Tier 4 (student) in the UK as a principal or dependant on or after 20 October 2014: new regime

Apply under Tiers 1, 2 or 5 in the UK as a principal or dependant on or after 2 March 2014: new regime

All other applications under the rules (including applications under the Points-based system under Tiers 1, 2, 4, and 5 from outside the country), apply on or after 6 April new regime.

Applications from person subject to a decision to make a deportation order, to refuse to revoke a deportation order or in an "automatic deportation" case, or an application from the family member of such a person facing deportation, where the decision on the application is made on or after 10 November 2014 in respect of "foreign criminals" as defined. Certain "foreign criminals" are also subject to the new regime when the decision was made after 20 October 2014 but this category is particularly complicated. "Foreign criminals" in the unhappy language of the Act are defined as persons who are not British citizens, who have been convicted in the UK of an offence and who have been sentenced to at least 12 months, or convicted of an offence that has caused serious harm or are "persistent offenders". There are other limitations on the definition.

Human rights/protection only applications on which you have a decision on or after 6 April 2015, new regime.

Tied up with the new appeals regime is a new removals regime whereby a person who requires leave and does not have it is immediately liable to removal. There are still arguments about what if any notice of removal that person must receive.

Fees

For Home Office policy papers on the April 2015 fee changes see:

<https://www.gov.uk/government/publications/indicative-visa-charges-for-2015-to-2016>

These change levels of fees but also the range of services for which charges can be levied.

Legal aid

For those of limited means, the availability of legal aid is an important part of securing access to justice. Legal aid availability in immigration and asylum has been severely restricted since April 2013. Legal aid is still available for asylum cases. It is available for initial advice on asylum support. It is still available for challenges to detention and for bail detention. It is still available for judicial review: challenges to a decision of the Home Office against which there is no other remedy. It is still available in cases involving domestic violence and cases of persons who have been subject to human trafficking and it is still available in national security cases. Determining eligibility for legal aid involves a means test (there is a maximum threshold for assets and income) and a merits test – are the prospects of success good enough. Subject to these tests a person can also apply for legal aid on an exceptional basis in an area that would otherwise be excluded.

Legal Advice

Advice in the area of immigration is a heavily regulated area. People who are not barristers or solicitors, or members of the Institute of Legal Executives and who are giving immigration advice in the course of a business (whether or not for profit) must be regulated by the Office of the Immigration Services Commissioner (OISC) if they wish to give advice on immigration or provide immigration services. A person who gives advice in the UK in the course of a business, whether or not for profit, who is not so regulated, commits a criminal offence.

The OISC regulates advisors at different levels and in different areas of practice whereas practising solicitors and barristers can advise at any level. The solicitor or barrister should hold a current practising certificate. That or the OISC regulation certificate should be displayed on the premises – do not be afraid to ask to see it.

There is a further regulatory scheme whereby a person, although they may be a solicitor, must be accredited by the Law Society before they will be allowed to provide advice on immigration funded by legal aid.

In addition to the criminal offence of giving immigration advice described above, there are also a number of criminal offences designed to support measures for immigration control. For example, under s.25 of the Immigration Act 1971 as amended it is a criminal offence to do something that facilitates the commission of a breach of immigration law of a member State of the European

Union. This could include helping a person to continue to live in the UK without seeking to regularise their position. Remaining in the UK without leave is itself a criminal offence, although often people are removed or deported rather than prosecuted.

Some key points to bear in mind when thinking about the quality of legal representation:

- Have people with limited means been told that they may qualify for free legal advice? Even if they chose to pay they should have been informed of the availability of free advice.
- Have people who have been denied free legal advice because it is said that their case is not strong enough been told of their rights to appeal against this decision and given a form CW4 from the Legal Services Commission? This should be done in all cases.
- Do people understand what their legal representative is doing for them and, if they are paying, how much this will cost? People should receive a client care letter when they first make an arrangement with a legal representative, and at each stage should be advised of what is happening, and what the lawyer is doing. Do ask to see the documents they have received from their lawyer. Some people will think that they have a legal representative when they have only attended a one-off advice session – get the situation clear.
- Are attempts being made to secure bail or temporary admission for a person who is detained? Given that the decision to detain is discretionary, a good lawyer will always be making efforts to secure release.

If in doubt, suggest that the person needs to talk to another legal representative or go to an advice session run by a law centre. Note that changes to the Legal Aid system have meant an end to legal aid funding of general advice sessions by law centres and have resulted in some of these services being cut. It is always worth sending persons affected by this to see their MP – if only to describe the problems they are having.

Some local law centres and NGOs will hold list of legal representatives to whom they refer cases, as will organisations working to assist people under immigration control, using resources by the Law Society, the Office of the Immigration Services Commissioner and the gov.uk website. Other sources of information about legal representatives include:

- Lawyers named as representing in leading cases
- Authors of leading textbooks and materials used by lawyers
- Those who have given evidence/been advisors to parliamentary Committees.
- Commercial publications such as the Legal 500 www.legal500.com and Chambers (www.chambersandpartners.com)
- Public meetings conferences and trainings
- Lawyers mentioned in briefings on new legislation