



Seeking Refuge?
A handbook for asylum-seeking women
UPDATE 2014 FOLLOWING CHANGES TO THE IMMIGRATION RULES
ON FAMILY MIGRATION

What does this Update cover?

Please note that the law on asylum and the asylum application process is unchanged. The new Immigration Rules will affect you if you are applying (or could apply) for leave to remain on the basis of your right to private and family life (article 8 ECHR), if you are an overstayer and considering your options or if you want to apply for indefinite leave to remain under the 10 or 14 year 'long residence' rule. The new Rules also affect those who are applying for a spouse, civil partner or unmarried partner visa.

What do the new Immigration Rules change?

1. The new Immigration Rules¹ on family migration were introduced on 9/7/2012. The main changes relevant to this Handbook are:
 - a. Discretionary Leave to Remain has been abolished for most applications and replaced by a new **'10-year route' to settlement for those claiming a right to leave to remain on grounds of article 8 ECHR and/or the 'best interests of the child'** under the UN Rights of the Child and *section 55 Borders, Immigration and Citizenship Act 2009*. **Only those who can show they are destitute will have access to public funds.**
 - b. **The 14-year Long Residence rule has been abolished** and been replaced by a new 20-year rule, under which applicants will not be granted ILR, but will be admitted to the new '10-year route' to settlement.
 - c. **There are additional, complicated requirements on criminality** applying to those entering the 10-year route, and those challenging removal and deportation.
 - d. **A new, more difficult, English language requirement** has been introduced for all settlement (ILR) applications.
2. Changes in the law relating to criminal convictions

What sections of *Seeking Refuge?* are changed by these new Rules?

- **Seeking Refuge Chapter 6 Old Cases - Section 6.2 long residence**

¹ These new Rules were announced in the Statement of Changes in Immigration Rules HC 194, published 13/6/2012 and due to come into force on 9/7/2012, amending part 8 of the current Immigration Rules and introducing a new Appendix FM on family migration. All these changes are now in the consolidated Immigration Rules, on the UKVI website at <https://www.gov.uk/government/organisations/uk-visas-and-immigration>

The 14-year 'long residence' application has been abolished. **For those seeking to stay on the grounds of private life alone, the qualifying period for settlement is 20 years²** (with some exceptions for those under 18 who have spent at least 7 years in the UK, those under 25 who have spent more than half their life here, and those over 18 who have no social, cultural or family ties with their country of origin).

- ***Seeking Refuge Chapter 7 Successful Applications - Section 7.1 on Discretionary Leave to Remain***

Those who have already been granted Discretionary Leave will continue to be dealt with under that policy through to indefinite leave if they qualify (normally through 2 periods of 3 years Discretionary Leave). But anyone applying for ILR after October 2013 will need to show English language to level B1 and not have any unspent criminal convictions.

There will be no grants of Discretionary Leave to Remain after 9 July 2012 on the basis of family and private life. However, victims of trafficking may still be granted discretionary leave and anyone with children may be considered for Discretionary Leave if their case is exceptional. Anyone granted leave to remain on the basis of article 8 ECHR family or private life, or the 'best interests of the child' will be granted 30 months (2 ½ years) leave to remain under the new '10-year route' to settlement, and will have to make 3 further applications for 30 months leave to remain, on the correct form and paying the correct fee, before applying for indefinite leave to remain at 10 years.

Allowed appeals and further submissions on grounds of article 8 family/private life and/or 'best interests of the child'

A person who was refused and their appeal allowed on art 8 ECHR grounds, or whose further submissions on art 8 grounds were accepted, will enter the '10-year route' to settlement but without being required to pay a fee for the first application.

- ***Seeking Refuge Chapter 7 Successful Applications-Section 7.3 Children born after a grant of leave to remain***

A child born after leave to remain is granted to a parent, who can currently apply for leave in line with the parent, does not face any new requirements and continue to apply under para 305 of part 8 of the existing Rules. (see *Seeking Refuge Chapter 7 section 7.3*).

- ***Seeking Refuge Chapter 11 Fresh Claims - Section 11.6 Other new information, Section 11.7 the 'best interests of the child'***

New UKVI guidance published with the new Rules suggests that a person who makes further submissions *only* on the basis of article 8 ECHR and/or 'best interests of the child' (i.e. *not* including any new asylum grounds) will be expected to make a formal application on an appropriate application form and pay the relevant fee or apply for a fee waiver (on form Appendix 1 FLR(O) FLR(FP)). The only exceptions are:

- a. Where an Article 8 claim is raised as part of an asylum claim or as part of a further submission in person after the asylum claim has been refused
- b. Where a migrant is in immigration detention and/or where removal directions [S151D] have been set pending an imminent removal
- c. Where Article 8 is raised in an appeal
- d. Where Article 8 is raised in response to a section 120 (one-stop) notice.

See the discussion under Old Cases above for details about the new '10-year route' to settlement.

² See Long Residence in part 7 of the Rules, at <https://www.gov.uk/government/collections/immigration-rules>

- **Seeking Refuge Chapter 7 Successful Applications section 7.2 and Chapter 11 Fresh Claims sections 11.6 and 11.7**

These sections in Chapters 7 and 11 are all affected by the new rules on criminality (see below at 2. Important new rules on criminality for explanation).

What are the new Immigration Rules that I have to comply with now?

1. New Immigration Rules on family migration from 9 July 2012

From 9 July 2012, most of the Immigration Rules dealing with family migration have been changed. There are now 2 main 'routes' to settlement – the '5 year route' and the '10 year route'.

Very Important: if you have already been granted Refugee Leave, Humanitarian Protection or Discretionary Leave, OR if in the future you are granted Refugee Leave, Humanitarian Protection or an extension of your existing Discretionary Leave, this section does NOT apply to you. You will NOT be put in either the '5-year route' or the '10-year route'. People with Refugee Leave and Humanitarian Protection are in the 'protection route' (see *Seeking Refuge Chapter 7 section 7.4*). People who already have Discretionary Leave will be allowed to continue on that Discretionary Leave route (see *Seeking Refuge Chapter 7 section 7.4*).

Anyone with Refugee Leave, Humanitarian Protection or Discretionary Leave should go straight to 2. Important new rules on criminality, below.

The '5 year route'

Those making family migration applications (spouse, partner, child, elderly dependent relative) who comply with all the requirements of the new family migration Rules will be granted leave to remain in the **'5 year route'**. New 'eligibility' requirements include very specific requirements about income for partners, as well as a list of 'suitability' requirements which are summarised below. Applicants will be given leave to remain for 30 months (2 ½ years) with no recourse to public funds. They will then have to apply for a further period of 30 months' leave. After 5 years they will be eligible to apply for indefinite leave to remain.

The '10 year route'

Those who do not meet the requirements of the '5-year route' to settlement, but who may have a basis for remaining in the UK under article 8 ECHR or the 'best interests of the child' may be granted 30 months leave to remain in the '10-year route' to settlement.

This applies to those who cannot satisfy all the 'eligibility' requirements of the 5-year family migration route but whose rights to family or private life under art 8 ECHR are strong, or where the 'best interests of their children' clearly support the children and the migrant parent being allowed to stay in the UK.

However, to be granted leave in the '10-year route', an applicant must:

- Complete an appropriate form for further leave to remain, and
- Pay an application fee (or complete a fee waiver, and
- Meet the 'suitability' requirements (see below) and
- Meet the 'exceptional' requirements contained in para EX.1 of Appendix FM (see below).

They will then have to apply for a further 3 periods of 30 months' leave to remain, each time on a formal application form.

People who have no leave to remain (overstayers, failed asylum-seekers) will in some circumstances be allowed to start on the '10-year route'. Those people will be granted leave to remain for 30 months. But if a person already on the '10-year-route' overstays again for more than 28 days, **they would have to start the '10-year-route' all over again.**

The 'suitability' requirements³

The suitability rules for *in-country applications* for variation of leave and indefinite leave to remain state that the Home Office may decide to exclude someone from the UK on the basis that their exclusion 'is conducive to the public good' (in other words, British society is better off without that person) if:

- they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years (.S-LTR.1.3)
- they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months. (S-LTR.1.4)
- in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.(S-LTR.1.5)
- their conduct (including convictions of less than 12 months, or which have not in themselves caused serious harm) , character, associations, or other reasons, make it undesirable to allow them to remain in the UK. (S-LTR.1.6.).

An applicant will also normally be refused if:

- they have failed to comply with a UKVI requirement (such as attending an interview) (S-LTR 1.7); provided false information (whether knowingly or not (S-LTR 2.2); have unpaid NHS bills of over £1000 (S-LTR 2.3) or failed to provide a maintenance and accommodation undertaking where requested (S-LTR2.4)

The 'exceptional' requirements⁴

For people applying for leave to remain because they have a child in the UK, that person must have a 'genuine and subsisting parental relationship' with the child, who must be under 18. The child must either be a British citizen or have lived in the UK continuously for over 7 years. And it must not be 'reasonable' to expect the child to leave the UK.

For people wishing to stay in the UK on the basis of a relationship with a partner, they must have a 'genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK'.

What if I have strong family and private life, or a strong claim under the 'best interests of the child' but I don't fit these new rules?

³ Section S-LTR: Suitability – leave to remain, in the 'partner' section of Appendix FM
<https://www.gov.uk/government/publications/immigration-rules-appendix-fm>

⁴ Para EX.1 of Appendix FM at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300961/Appendix_FM.pdf

It is clear from para EX.1 that not everyone who would have been granted Discretionary Leave in the past would qualify *under these Rules* for this 10-year route. This is because of the very precise way the Home Office have tried to define how strong a person's art 8 ECHR rights must be before they will grant leave. **In relation to children**, the new rules require that 'it would not be reasonable to expect the child to leave the UK'. **In relation to adults in relationships**, the new rules require that there must be 'insurmountable obstacles' to family life continuing outside the UK.

Neither of these requirements fit with how the UK House of Lords and Supreme Court have analysed family life or the 'best interests of the child'⁵. This means that people with art 8 ECHR claims, and claims based on having a British child or child with ILR here in the UK, may have a right under art 8 ECHR and/or the 'best interests of the child' which has been upheld in the UK or European Court judgments⁶, but may have to take legal action (either an appeal to the First-tier tribunal or a judicial review) to be granted leave to remain. This may be difficult as there is no legal aid for Article 8 cases.

If I am granted leave in the '10-year route' will I be able to claim benefits?

Not everyone admitted to the '10-year route' on grounds of art 8 ECHR or 'best interests of the child' will be allowed access to public funds. The Guidance from the UKVI⁷ states that someone will be granted access to public funds only if they show that they are destitute. The legal test for whether someone is destitute is:

- They do not have adequate accommodation or any means of obtaining it (whether or not their essential living needs are met); or
- They have adequate accommodation or means of obtaining it but cannot meet their other essential living needs.

If you have children, then the case-worker will look at whether there are any compelling circumstances which relate to the welfare of your children if you are in receipt of a low income.

If you are receiving financial support from the Local Authority, this may show that you are destitute, but the case-worker making a decision on whether to grant you funds will conduct their own assessment of your means. This includes looking at whether you may be able to work when granted immigration status.

The applicant will have to show destitution as part of her application for leave to remain. **This is likely to be very difficult..** This is because people granted leave under the 10-year route will have permission to work. If they are granted leave to remain as a partner their partner will be expected to support them, and the partner will already have access to public funds. The Guidance states that an applicant claiming to be destitute 'will need to provide evidence, including of their financial position and employment prospects. If you are granted leave on the basis of your relationship with a partner, they are expected to support you financially, and if the other parent of your child is in the UK then you are expected to obtain child maintenance money from them.

Other important requirements

⁵ The legal test for family life with a child in the UK was set out in *ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4*, which stated that the best interest of the child must be a primary consideration, which meant that the best interests of the child had to be determined *before* considering whether it was proportional to remove the applicant. The legal test for family life between adults was set out in *Chikwamba v Secretary of State for the Home Department [2008] UKHL 40*, and the House of Lords judges explicitly disapproved of any legal test based on 'insurmountable obstacles'.

⁶ *ZH Tanzania* and *Chikwamba*, see previous footnote

⁷ The Guidance on public funds is at part 8 <https://www.gov.uk/government/publications/chapter-8-appendix-fm-family-members>

For all applicants admitted to the '10-year route', their applications for indefinite leave to remain (ILR) must show that they have passed the relevant English language test and have no unspent criminal convictions (*see 2. Important new rules on criminality, below*).

However, if someone still has unspent convictions, or cannot pass the language test, they may be granted a further 30 months leave to remain.

Your legal rights under article 8 ECHR and 'best interests of the child'

The Home Office has accepted that the Immigration Rules are a "complete code" for deciding Article 8 family and private life cases where there is room for a case-worker to exercise discretion.⁸ They do not change the law, or the fact that each case must be considered individually. It is **very important** to note that the rights protected by art 8 ECHR and the UN Convention on the Rights of the Child must be considered *in each individual case and in accordance with the law*.

2. Important new rules on criminality

Most applicants for further leave to remain, and all applicants for indefinite leave to remain, must satisfy the new 'suitability' test (to be found in para S-LTR in the new Appendix FM to the Rules).

It is important to note that these requirements are harder to meet than the previous simple requirement not to have any unspent criminal convictions⁹. Depending on what crime was committed, the new rules could potentially be used to exclude anyone *even if no crimes have been committed* (for example, if a person has on several occasions been arrested but not charged, or tried for an offence and acquitted on technical grounds, or simply been a person of interest to the police).

Very important: these rules apply to everyone. So anyone with limited leave to remain should stay out of trouble. It is important that anyone with teenage children takes time to explain this to them, as any conviction will make it very difficult for them to get further leave to remain, Indefinite leave or British citizenship.

Very Important: the 'suitability' rules (above) state that the Home Office may decide to exclude someone from the UK on the basis that their exclusion 'is conducive to the public good' (in other words, British society is better off without that person) if they have been convicted of criminal offences (S-LTR1.3 and 1.4); or if, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law (S-LTR 1.5), or if their conduct (including convictions of less than 12 months, or which have not in themselves caused serious harm), character, associations, or other reasons, make it undesirable to allow them to remain in the UK. (S-LTR.1.6)

If a person cannot satisfy the suitability requirements but may wish to stay in the UK on the basis of family or private life, and/or the best interests of a child, it is **very important** to remember that they may nevertheless be able to apply or be admitted to the 'ten-year route' to settlement. In particular, if the only reason a person cannot meet the 'suitability' requirements is that they have an unspent criminal conviction, they may be granted a further 30 months' leave to remain and be able to apply for indefinite leave to remain after the conviction becomes spent.

What is a conviction?

⁸ MF (Nigeria – New Rules) v SSHD [2014] EWCA Civ 1192

⁹ Section 139 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* reduced all rehabilitation periods (periods after which a conviction becomes spent) for criminal offences. But section 140 of the same Act provides that immigration and nationality applications are excluded from the rehabilitation scheme, though some Rules continue to require applicants to have no unspent convictions.

For any official application, including any application to the Home Office, applicants are required to reveal any criminal convictions against them. Remember that this applies to all criminal convictions and cautions. This means any crime for which you were arrested and cautioned or charged, or summonsed to a magistrates court by letter, and for which you either pleaded guilty or were found guilty after a trial. This also applies to driving offences.

The Home Office states:

You must give details of all unspent criminal convictions. This includes road traffic offences but not fixed penalty notices (such as speeding or parking tickets) unless they were given in court. [In other words, even speeding and parking offences would be included if you had been taken to court about them].

Remember that this applies to offences committed as a young person under 18. For these, the rehabilitation period (time after which the conviction becomes 'spent') is half the adult rehabilitation period*. So, if you were found guilty of shoplifting at the age of 16 and the sentence was a fine, your rehabilitation period would be 6 months from the date of conviction (see below).

Remember that failing to declare a criminal offence to the UKVI amounts to deception, even if you had just forgotten the incident or did not realise it was a criminal matter. Any application can be refused on that basis alone. So if you have ever been in trouble with the police, including the British Transport Police (e.g. for non-payment of train, bus or tube fares) make sure you find all the paperwork and identify exactly how your case finished, to make sure you do not have any unspent conviction arising from that event.

What is an 'unspent conviction'?

The *Rehabilitation of Offenders Act 1974* as amended¹⁰ provides that certain criminal offences would be regarded as 'spent' after a specified number of years from the date of conviction. This means that the conviction no longer has to be declared, and cannot any longer count against the applicant.

Whether any particular conviction is to be regarded as 'spent' is not based on the type of offence. It is calculated by looking at the length and type of sentence (punishment) imposed on conviction for the offence. The details are now set out in section 139 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*:-

- **A sentence of over 48 months' (4 years') imprisonment is excluded from rehabilitation.** This means it can never be spent.
- **A sentence of more than 30 months (2 ½ years) and up to, or consisting of, 48 months (4 years) has a rehabilitation period of 7 years.** This means that convictions leading to these sentences become spent after 7 years from the date of completion of the sentence (including any licence period).
- **A sentence of imprisonment of more than 6 months but less than 30 months has a rehabilitation period of 48 months.** This means that convictions leading to these sentences become spent after 48 months (4 years) from the date of completion of the sentence (including any licence period).
- **Any sentence of 6 months' imprisonment or less has a rehabilitation period of 24 months (2 years).** This means that convictions leading to these sentences become spent after 2 years from the date of completion of the sentence. *NB for offences

¹⁰ Now amended by the *Legal Aid Sentencing and Punishment of Offenders Act 2012 s139*, which has increased the length of sentence which can never be spent to 48 months (4 years)

1. shortened all the rehabilitation periods for sentences lower than that
2. inserted a new section 56A into the *UK Borders Act 2007*, stating that there is no rehabilitation for certain immigration and nationality applications.

committed while under 18 years for which a sentence of 6 months or less is received, the rehabilitation period is 18 months, not half the adult rehabilitation period.

- **A fine has a rehabilitation period of 12 months.** This means that convictions leading to these sentences become spent after 12 months from the date of conviction.
- **A community order** (such as probation or unpaid work) **has a rehabilitation period of 12 months.** This means a community order becomes 'spent' after 12 months from the last day on which the order is to have effect.
- **'relevant orders' including a conditional discharge or a bind-over to keep the peace** or be of good behaviour **have a rehabilitation period ending on the last day on which the order is to have effect.** Such convictions become spent after that date. **NB for offences committed while under 18 years which receive a 'relevant order', the rehabilitation period is the same as for adults.*
- **There is no rehabilitation period for an absolute discharge.** This means that it becomes spent straight away.

Therefore, an unspent conviction is a conviction which:-

- Either, because of the length of sentence, cannot ever be spent. Any offence for which the sentence was for more than 48 months (4 years) can never be spent.
- Or, is a conviction which can be spent but for which the rehabilitation period is not yet completed. So, for example, if you were convicted on 1 July 2012 and ordered to pay a fine (which has a rehabilitation period of 12 months), that would not become spent until 1 July 2013, 12 months later.

If you are unsure as to whether you have an unspent criminal conviction or not and want to apply for leave to remain, you can contact our immigration law advice line, the details of which are at the end of this update. You can also check with the lawyer that represented you when you were convicted (if you had one) or an immigration lawyer.

If you need advice:

Remember **that you can telephone the Rights of Women's immigration and asylum legal advice line** to discuss your application on 020 7490 7689 (telephone) or 020 7490 2562 (textphone) on Mondays between 12pm-3pm and Thursdays between 10am-1pm.

The law explained in this legal guide update is as it stood at the date of publication. The law may have changed since then so you are advised to take up to date legal advice. Rights of Women cannot accept responsibility for any reliance placed on the legal information contained in this legal guide update. This legal guide update is designed to give general information only.

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