



Guidance on Fitness (Advisers)

Office of the Immigration Services Commissioner

Regulating Immigration Advice

2016



Guidance on How the Commissioner Determines Fitness (Advisers)

Section 83 (5) of Part V of the Immigration and Asylum Act 1999 (the Act) places a statutory duty on the Immigration Services Commissioner to exercise her functions so as to secure, so far as reasonably practicable, that those who provide immigration advice or immigration services –

- a. are 'fit' and 'competent' to do so;
- b. act in the best interests of their clients;
- c. do not knowingly mislead any court, tribunal or adjudicator in the United Kingdom;
- d. do not seek to abuse any procedure operating in the United Kingdom in connection with immigration or asylum (including any appellate or other judicial procedure);
- e. do not advise any person to do something which would amount to such an abuse.

Section 83 applies to both individual advisers and advice organisations.

This Guidance concerns her duty to ensure that advisers and those owning and/or running an organisation are 'fit', and how the Commissioner fulfils that duty. The latter are referred to in the Commissioner's *Guidance on Fitness for Owners*.

For the Office of the Immigration Services Commissioner's (OISC) purposes a person is considered an owner of the business if they own at least 40% of that business. A person is considered to be involved in running an immigration advice organisation if they occupy one or more of the following roles: (Private Firms) Self-employed sole trader; Partner; a Company Director (executive or non-executive) Company Treasurer or Secretary or (Charities) Chief Executive Officer, Chairperson or a Trustee.

Fitness Assessment Criteria

The OISC criteria for assessing fitness are:

- the likelihood of compliance with the OISC's Regulatory Scheme;
- a history of honesty and legal compliance; and
- a history of financial probity

What the Commissioner takes into account when assessing the fitness of those who will be providing advice

While not exhaustive, the following are illustrative of the evidence that the Commissioner will take into account when determining the fitness of advisers.

1. Criminal convictions in the UK or abroad regardless of whether or not they are spent included under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975¹.

Particular consideration is given to offences relating to immigration (including offences under section 91 or 92 of the Immigration and Asylum Act 1999), dishonesty, fraud, financial crime, violence, people trafficking, drug dealing and sexual offences.

No one convicted of an offence under section 25 or 26(1) (d) or (g) of the Immigration Act 1971 will be allowed entry into the regulatory scheme².

2. The person has accepted a caution, received a local warning, Penalty Notice for Disorder, final warning or reprimand from the police
3. Any adverse finding or any settlement in civil proceedings, particularly if the matter relates to the provision of inadequate advice
4. If the person has been, or is currently, the subject of any investigation or disciplinary proceedings or any potential proceedings or investigation which might lead to such proceedings by the OISC or by other regulatory authorities, professional bodies or government bodies or agencies in the UK or abroad
5. If the person has committed serious, several or repeated breaches of the OISC's regulations or the equivalent standards or requirements of other regulatory authorities, professional bodies, or government bodies or agencies
6. If the person has been the subject of any substantiated complaint relating to regulated activities³
7. If the person has been refused the right to carry out a trade, business or profession requiring a licence, registration or other authority, or has had their authorisation revoked, withdrawn or terminated, or has been expelled by a regulatory or government body
8. If the person or any business with which they have been involved has been investigated, criticised, disciplined, censured or suspended by a regulatory or professional body, a court or Tribunal, whether publicly or privately

¹ The OISC's policy on applications from ex-offenders can be found here <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=150>

² Paragraph 4 Sch. 6 Immigration and Asylum Act 1999

³ Complaints not determined from a prior period of OISC regulation may be re-opened and investigated. Where a complaint investigation by another regulator was closed because the person ceased to be regulated by them, the OISC will seek to establish the reasons for this decision. Where there is evidence that the person may have deliberately left that body's regulatory scheme to avoid possible disciplinary action, this will be taken into account.

9. If the person has been dismissed or asked to resign and has resigned from employment or from a position of trust or fiduciary appointment.
10. Any evidence that the person has not been candid or truthful in their dealings with any regulatory body or has failed to demonstrate a readiness and willingness to comply with the requirements and standards of the OISC regulatory system or with any other legal, regulatory and professional requirements and standards.

The assessment of fitness

The Commissioner obtains the information she needs to assess the fitness of advisers from a number of sources.

- i. Information supplied with the application for regulation, especially self-declarations made on competence statements

When a person initially applies to the Commissioner for admittance to the regulatory scheme or, if they are already regulated, permission to raise their advice level or for continued regulation, they will have to complete the relevant application form and provide the Commissioner with certain specified information and documentation. This includes a list of declarations in relation to their fitness.

The Commissioner will consider the contents of the application form submitted together with the supporting documentation. During the application process further information and/or supporting evidence may be requested.

- ii. DBS Checks

All applicants for admission to the regulatory scheme as an immigration adviser must undergo a Disclosure and Barring Service (DBS) Check⁴. Please see the separate guidance on DBS Checks here http://oisc.homeoffice.gov.uk/how_to_become_a_regulated_immigration_adviser/disclosure_and_barring_service_check/

- iii. References

The Commissioner may request (and take up) references from an applicant's previous employers.

- iv. Audits

Audits are one of the OISC's main tools for assessing fitness. Typically these involve inspecting manual

⁴ Existing advisers who are moving to a new organisation (with less than a three months' break), and those increasing their level or categories are not normally required to provide a DBS certificate. However, the Commissioner reserves the right to request a new DBS check any at time.

and computerised records (such as the organisation's case files or case management system); financial records; supervision arrangements and records (where applicable); and other systems and processes, including computerised systems. An audit may include interviewing staff and also observing them working, as appropriate.

v Pre-regulation Audits

Prior to admitting an organisation into the regulatory scheme, a pre-registration audit may be arranged to the organisation's premises to inspect these and the organisation's systems and to discuss the application. Such an audit may include interviewing staff.

vi Obtaining Information from other sources

Section 93 of the Act confirms that no enactment or rule of law prohibiting or restricting the disclosure of information prevents a person from giving the Commissioner information which is necessary for the discharge of her functions.

The OISC has specific information-sharing arrangements with various bodies including the Home Office, the Police, the Solicitors Regulation Authority, the Bar Standards Board and CILEX. The OISC may also obtain information from such sources as the Charities Commission and Companies House. The OISC can also be given information in confidence by a member of the public or another adviser. The Commissioner will only rely on information received from such sources if it can be independently corroborated.

Please note that this list is not exhaustive

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