

Discussion Paper on Foreign Convictions Certificates

The Current Policy

The current policy is to require a criminal convictions certificate form all applicants who have spent more than 6 months abroad (at any time) to cover that period spent outwith the UK.

The procedure is for applicants to obtain a certificate to produce with their application. An application can be accepted without a required certificate but a licence cannot be granted without the required certificate.

The Aim

The legitimate aim is the protection of the public. That is, in fact, the whole aim of licensing.

In alcohol licensing there are specific licensing objectives of securing public safety, preventing public nuisance and protecting children / young people / vulnerable people from harm. The civic licensing regime is based around older legislation but would likely have similar licensing objectives if phrased now.

The policy is designed to plug a gap in the assessment of an individual's fitness to hold a licence of a specific type.

At present only those residing in the UK are checked for convictions by Police Scotland. Police Scotland are unable to check for convictions from jurisdictions outwith the UK within the timescales required by licensing legislation (21 days). So, in the absence of a policy on criminal records checks, applicants who have resided abroad for any length of time will not have convictions checks for that period(s).

Applying a policy of requiring applicants to produce foreign convictions certificates also addresses the inequality faced by UK residents, who may be less likely to achieve their aim of obtaining a licence by virtue of having to pass checks that others residing outwith the UK don't.

The Problem Raised

Applying a policy to all applicants means that some applicants who come from or who have lived in certain jurisdictions outwith the UK may be disadvantaged by a reduced ability to comply with the policy. That may be because of a lack of record keeping by the relevant authority and/or the lack of a clear and reliable system of accessing records.

For example the UK Government's system of checking has this to say about Saudi Arabia: "The UK is not currently aware of a process for obtaining criminal record certificates from the Saudi Arabian authorities."

In some cases, there may also be an element of inconvenience to applicants who may have to travel to embassies to access records and obtain certificates. Therefore there is potential for the policy to be indirectly discriminatory.

However the policy is one that is well established, very widely used and is a proportionate means of achieving a legitimate aim.

If it is considered to be a proportionate means of achieving a legitimate aim then indirect discrimination can be justified in pursuit of that aim.

The Current View

The policy and the system of licensing as a whole are there to reduce risks to the public. So it is generally held to be a legitimate aim (pursuant to the aim of licensing as a whole).

The issue then is one of proportionality i.e. is it appropriate and necessary?

It is certainly appropriate. The Institute of Licensing has this to say on the appropriateness of checking convictions:

"The licensing process places a duty on the local authority to protect the public. Given the nature of the role, it is paramount that those seeking a living in the trades meet the required standards. As the previous offending behaviour can be considered as a predictor in determining future behaviour as well as culpability, it is essential that the decision maker considers all relevant factors including previous convictions, cautions and complaints and the time elapsed since these were committed."...

"Static factors are historical and do not change such as age, previous convictions and gender. They can be used as a basis for actuarial assessments and are fundamental in considering an individual's potential to reoffend in future. For example, recent published statistics revealed that 44% of adults are reconvicted within one year of release. For those serving sentences of less than twelve months this increased to 59%. It is also widely accepted that generally persons with a large number of previous offences have a higher rate of proven reoffending than those with fewer previous offences."

In order to examine necessity it is helpful to examine some of the alternatives:

Removing all convictions checks could be an option. However licensing regimes are roundly criticised for not undertaking criminal records checks and thus allowing criminals into the system. Just about every licence issued by every council in the UK is subject to consultation with the police and as part of their consultation the police will undertake UK criminal records checks. It is directly relevant to the applicant's fitness to hold a licence. Removing the requirement for all criminal records checks

makes a nonsense of a large number of legislative provisions and the licensing process as a whole.

It is not possible to filter convictions checks to only require applicants to disclose more serious offences. There is either disclosure of offences or there is not. It is achieved by legislation, to an extent, through the Rehabilitation of Offenders Act 1974 and subsequent legislation amending and supplementing the same, particularly legislation providing for exclusions and exceptions.

It is not possible to rely on self disclosure. It has been shown by a great many applications in the past that applicants fail to disclose relevant convictions on their applications forms. Convictions that are then disclosed through criminal records checks by the police. Whether the failure to disclose is deliberate or inadvertent, there is no doubt a consistent failure to disclose.

The only argument that the policy is not proportionate comes from the difficulties in obtaining a certificate for certain applicants. However it is considered that some inconvenience in obtaining a certificate does not make the system as a whole disproportionate. Convenience may be relevant to proportionality but certainly less so when it is clear that people go to great lengths visiting embassies to get visas / passports just for holidays. In difficult cases the problem lies with the jurisdiction in question and not the policy. Many jurisdictions have perfectly good, quick, easy and cheap methods of obtaining a certificate.

Examples of Similar Policies

Glasgow

<https://www.glasgow.gov.uk/CHttpHandler.ashx?id=5315&p=0>

Edinburgh

[http://www.edinburgh.gov.uk/downloads/file/1948/taxi -
new driver application form](http://www.edinburgh.gov.uk/downloads/file/1948/taxi-_new_driver_application_form)

Both of the councils have requirement for taxi / PH drivers to criminal records certificates for all countries where the applicant has spent more than 6 months.

The SIA introduced the same checks many years ago.

<https://www.sia.homeoffice.gov.uk/Pages/licensing-overseas-checks.aspx>

So did the CAA

<https://www.caa.co.uk/Commercial-industry/Security/Regulation/Overseas-criminal-record-checks/>

The GTCS

<http://www.gtcs.org.uk/registration/pvg-scheme-overseas-checks.aspx>

The NHS

<http://www.nhsemployers.org/news/2017/01/overseas-criminal-record-certificates-for-tier-2-visa-applicants>

Universities

<https://www.exeter.ac.uk/dbs/policechecks/>

The list is almost endless.

There are also many jobs where there are enhanced criminal records checks undertaken by employers.

Criminal records checks for EU and non EU applicants have been part of the best practice guidance for taxi licensing since 2012 at least. It is also part of the Scottish Government's stated aim to produce guidance that extends across all 1982 licence types regimes requiring local authorities to establish the criminal history of people who have spent time outside the UK.

The existing Scheme

The existing checking system is provided by the UK Government at:

<https://www.gov.uk/government/publications/criminal-records-checks-for-overseas-applicants>

The Institute of Licensing has developed a scheme for determining taxi / PH driver licence applications in England & Wales available here:

<https://www.instituteoflicensing.org/Resources.aspx>

Owing to the wide variety of offences it has necessitated an approach based around the nature of the offence.

Analysis of Other Policies

The SIA and CAA suggest two tweaks in that they cover the previous 5 years and they might accept an oath and character reference where official sources are unavailable.

The 5 years maybe relates to the UK rehabilitation period for certain offences and is in line with the PVG scheme.

The GTCS require checks for the prior 10 years, if someone has spent 3 or more months in another country – twice as onerous as the SIA and CAA in both respects.

The NHS asks for checks for 10 years but only for places where applicants have lived for more than 12 months.

These examples demonstrate the almost arbitrary nature of selection criteria. However they may provide useful examples as to how the current policy might be tweaked so as to make it more proportionate.

Options

1. Continue to apply the requirement to all licence types

The reason is as stated above. Irrespective of licence type, licensing is for the protection of the public. Different offences may be relevant to different licence types. For example driving offences may be relevant to the applicant for a taxi driver's licence but not necessarily to a window cleaner. However a conviction for an offence of dishonesty may be relevant to both.

It is not the case that licence types other than taxi driver licences present no risk.

It has been highlighted by previous cases like Rotherham that licensing has an important part to play in the protection of the public and children/young people in particular. Predators can use places where young people congregate e.g. outside takeaways on a weekend as 'hotspots' to take advantage of the social situation at the time for that child/young person. They often find this a viable way to both introduce and get to know that child/young person. Taxis were and are being used to ferry vulnerable young people into dangerous and exploitative situations, often entering hotels alone at night. These instances are all indicators that there may be increased vulnerability. A fit and proper licence holder (late hours catering / taxi driver / alcohol personal licence holder) should be able to spot these signs and take action to protect young people from harm. A licence holder who is not properly checked for a criminal history and who is not a fit and proper person may choose not to do so.

2. Allow for different requirements for different licence types

Taxi / PH drivers may present a higher level of risk than other licence holders. Taxi / PH drivers are in charge of the vehicle and so determine where the vehicle and the occupant(s) go. This almost one-to-one closeness, the lack of control for the customer and often the vulnerable nature of the customer (e.g. intoxication) are all increased risk factors. For this reason taxi/PH drivers in Scotland are subject to a higher level of criminal records check than most licence applicants. The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (as amended by the 2018 Order) provides that even convictions that are ordinarily considered spent (Under the Rehabilitation of Offenders Act 1974) may be considered by licensing authorities when determining an application for a taxi/PH

driver's licence, if certain criteria are met. The criteria depend on the type of offence, the age of the offender at the time and the time that has passed.

On the generally accepted view that taxi / PH drivers should be more stringently controlled it is recommended that checks are undertaken by the applicant and a certificate required from the applicant (on application) to cover any period of 6 months or more spent outwith the UK in the 10 years prior to application.

In relation to all other licence types administered by the Licensing Committee it is recommended that checks are undertaken by the applicant and a certificate required from the applicant (on application) to cover any period of 6 months or more spent outwith the UK in the 5 years prior to application.

It should be recognised that there is still a risk in modifying the requirements in any way. Requiring an applicant to only produce a certificate for offences in the last 5 years could miss a very serious offence 6 years ago. A certificate requiring applicants to disclose details of convictions in the last 5 years may not provide details of a serious offence 6 years ago. The offence may not be spent but it does not fit the certificate criteria. It is impossible to know how different jurisdictions will deal with such a request.

3. Allow for Other Evidence or Checks

In line with schemes operated by the SIA and CAA allow applicants to demonstrate their fitness to hold a licence in other ways for example by an oath made before a notary / solicitor and/or character reference(s) and to delegate to officers to determine whether alternative evidence is sufficient to process the application on the basis that in cases of doubt officers will refer the case to the Committee for a decision.

4. Allow for Individual Decisions

As is the case with every policy of the licensing authority, the licensing authority can choose to disapply the policy in the light of an individual's circumstances.

So in the event that an applicant experiences difficulty in obtaining the required certificate or other suitable evidence the applicant can apply to the Licensing Committee to disapply the policy in their case, having regard to their circumstances.

5. Allow for Special Cases

Refugees

Note a refugee has a right to seek work in the UK. If they have sought asylum in the UK because of a real fear of prosecution, they cannot get a certificate of good behaviour from their home country. In addition it may prove impossible to obtain

alternative evidence. In those cases an individual decision will have to be made depending on the circumstances.

Behaviour that May be Criminal Outwith the UK but is Not Unlawful in the UK

Applicants should not be disadvantaged on the basis of foreign convictions for behaviour that isn't against the law in this country, for example: being gay is a criminal offence in certain, overseas jurisdictions; or being a member of a political party that has been banned for reasons that are in contravention of international law. In such cases it is not possible to know or list/filter all offences that need not be disclosed. To an extent people will also be at the mercy of the foreign jurisdiction as to what is disclosed and they should obviously not be encouraged to try and redact the certificate themselves. On this basis each case has to be considered on its merits and obviously offences that are not relevant e.g. a woman being convicted of driving in Saudi will not be taken into account when determining the licence application. It is recommended that in clear cases officers should have delegated power to ignore such convictions when processing applications. If doubt should arise at any time then officers will refer the case to the Committee for a decision.