

Note: 16th December 2020

Application for indefinite leave to remain under the 10 years long residence rule. The disregard of overstaying and continuous lawful residence

In *Ziaoul Hoque v SSHD* (2020) EWCA Civ 1357 the Court of Appeal considered the question of whether the disregard of overstaying under Paragraph 276 B (i) (v) is capable of converting periods of unlawful residence into lawful residence for the purpose an application for indefinite leave to remain under the 10 years long residence rule.

Introduction:

Paragraph 276 B of the Immigration Rules sets out the requirements to be met by an applicant for indefinite leave to remain on the ground of 10 years long residence in the UK.

Paragraph 276 B (i) (a) states that the applicant must have at least 10 years continuous lawful residence in the UK.

Paragraph 276 B (i) (v) states that:

- A) An applicant must not be in the UK in breach of immigration laws.
- B) Except that where paragraph 39 E applies, any current period of overstaying will be disregarded.
- C) Any previous periods of leave will also be disregarded where:

- a) The previous application was made before 24 November 2018 and within 28 days of the expiry of leave, or
- b) The further application was made on or after 24 November 2016 and paragraph 39 E applies.

Paragraph 39 E of the Immigration Rules is headed 'Exceptions for overstayers'. This provides for overstaying to be disregarded where the application is made within 14 days of the refusal of a previous in-time application for leave or the expiry of the time limit for bringing an administrative review or appeal or their conclusions.

Judgement:

1 Element A and B of Paragraph 276 B (i) (v) relate to current overstaying. Any disregard of current overstaying under Paragraph 39 E does not convert the period of overstaying into lawful residence under Paragraph 276 B (i) (a). The Court of Appeal calls this type of overstaying 'open-ended' overstaying. This typically applies to situations where the applicants have not acquired the 10 years continuous residence, but seek to rely on the 14 days grace period of overstaying to make a further application after the expiry of their leave, with the view of lengthening their stay in the UK and accumulating the 10 years continuous residence for the indefinite leave to remain application under the long residence rule.

2 Element C bears no relation to Element A or B and relates to 'book-ended' overstayers, namely those whose previous overstaying was disregarded under Paragraph 276 B (i) (v) and were granted leave. Element C qualifies the requirement of Paragraph 276 B (i) (v) and converts previous periods of unlawful residence, where leave was subsequently granted, into lawful residence.

3 The Court of Appeal does not regard it as unreasonable or disproportionate for 'book-ended' and 'open-ended' overstaying to be treated differently. In the case of 'book-ended' overstaying, the applicant had been granted further leave despite their previous overstaying, and has attained ten years continuous residence in the UK. They had made a well-founded application which in due course led to the grant of leave. In those circumstances, it is unsurprising that the Secretary of State should think it right to allow the period between the expiry of previous leave and the grant of further leave to count as continuous lawful residence.

The case of 'open-ended' overstaying is necessarily different because there will have been no grant of leave on the current application. The applicant in these circumstances has not achieved 10 years continuous residence, and is relying on making an application within the 14 days grace period of overstaying, with the view of lengthening their stay to achieve the 10 years continuous residence that they need to make an indefinite leave to remain application under the long residence rule. The situation is capable of being abused, since an applicant could in principle make a wholly unfounded application within the 14 days grace period, and count on the disregard of their current overstaying to achieve the 10 years lawful residence that they need.

Comments:

The judgement is significant. It overturns the previous Court of Appeal judgement in R (Masum Ahmed) v SSHD (2019) EWCA Civ 1070 that Paragraph 276 B (v) does not operate to cure any gaps in unlawful residence and convert previous periods of overstaying into lawful residence where leave was subsequently granted. The consequence of this judgement is that an application for indefinite

leave to remain under the 10 years long residence rule may still be granted where an applicant:

- i) Has gaps in lawful residence through making previous applications within 28 days of the expiry of leave, where those gaps end before 24 November 2016, and where leave was subsequently granted despite the overstaying, or
- ii) Has gaps in lawful residence on or after 24 November 2016 through making previous applications within 14 days of the refusal of any in-time application for an extension of stay or in accordance with Paragraph 39 E, where leave was subsequently granted despite the overstaying.

However, current periods of overstaying which are disregarded under Paragraph 39 E are incapable of 'curing' the unlawful residence and converting it into lawful residence which count towards the 10 years qualifying period for indefinite leave to remain.

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If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

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