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Indefinite Leave to Remain under the 10 year long residence rule: Permission To Remain as a Visitor Can Count Towards The 10 Year Period of Continuous Lawful Residence

This was considered by the Court of Appeal in ***R (on the application of Chandra Mungur) v SSHD [2021] EWCA Civ 1076***. In this case, the Court of Appeal concluded that permission to remain as a visitor can count towards the 10 year period of continuous lawful residence for the purpose of applying for indefinite leave to remain under the 10 year long residence rule. Further, leaving as a visitor and returning on another basis does not break the continuity of residence.

Background:

Paragraph 276B of the Immigration Rules (commonly known as the 10 year long residence rule) provides for indefinite leave to remain to be granted after at least 10 years continuous lawful residence in the UK. Continuous residence means residence in the UK for an unbroken period. Continuous residence will be considered to have been broken if the applicant left the UK in circumstances in which they could have had no reasonable expectation, at the time of leaving, of lawfully being able to return.

Facts:

The appellant was a citizen of Mauritius. He obtained a visitor visa valid from 22 March 2001 to 22 September 2001, which was stated to be for multiple visits. On 16 April 2001, he entered the UK as a visitor. He left the UK on 1 September 2001 and returned to Mauritius to apply for a Tier 4 student visa. His application to enter as a student was granted on 25 September 2001. He then returned to the UK as a student. After remaining in the UK for 10 years, he made an application for indefinite leave to remain under the 10 year long residence rule.

Issues:

- a) Can the appellant count his stay in the UK as a visitor towards the 10 years continuous lawful residence?

- b) Was the appellant's period of continuous residence in the UK broken on 1 September 2001 when he left the UK as a visitor and returned to Mauritius to apply for a student visa?

Outcome:

1. Neither party was able to identify any provision in the Rules or the policy guidance or any case law that excluded permission to stay as a visitor from being counted as part of the continuous period of lawful residence under the 10 year long residence rule. Indeed, the Secretary of State ultimately accepted in this case that time spent in the UK with visitor's permission could count towards the 10 year continuous period of lawful residence.

2. On the question of whether the appellant's period of continuous residence in the UK was broken on 1 September 2001 when he left the UK as a visitor and returned to Mauritius to apply for a student visa, the Secretary of State argued that it was. In the Secretary of State's view, visitors are allowed to enter the UK on a temporary basis and only if their intention is to leave the UK after a short visit. They are not allowed to remain in the UK in excess of 6 months. Therefore, the appellant could have had no reasonable expectation of being able to return to the UK when he left on 1 September 2001. The Court of Appeal disagreed. There is nothing in the long residence rule that says a person who has been present in the UK with the benefit of a visitor's visa cannot have a reasonable expectation that he would lawfully be able to return under another category of the Immigration Rules.

Comments:

At the heart of this case is the policy consideration that the Secretary of State cannot have intended residence as a visitor to count towards continuous residence for the purpose of obtaining indefinite leave to remain. The case was successful because there is no provision under the current 10 year long residence rule that excludes permission as a visitor from being counted towards the 10 years lawful residence or states that it affects the reasonableness of a person's return to the UK.

The Court of Appeal acknowledged the Secretary of State's policy concern. In its view, there is a qualitative difference between the nature of a person's presence with the benefit of a visitor's visa and other circumstances. In everyday language, one would not naturally refer to a person's presence in a country on a visit as residence or as living in that country.

The conclusion that can be drawn from the Court of Appeal decision is that at present permission to stay as a visitor can count towards the 10 year period of continuous lawful residence for the purpose of applying for indefinite leave to remain under the 10 year long residence rule. Further, continuity of residence is not broken if a person departs the UK as a visitor and returns under another category of the Immigration Rules provided the absence is not greater than 6 months. The rule may change but it remains to be seen what the Secretary of State will do.

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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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