

Immigration: Long residence applications and Gaps in lawful stay

By Vitalis Madanhi

As people settle in the UK, others may wish to consider the long residence route to attain indefinite leave. This may be so for people who may have been students for a long time in the UK doing various courses. Others may have been in the UK in various lawful capacities and eventually they decide to seek indefinite leave to remain in the UK. This is provided for in the Immigration rules contained in paragraph 276 of the Immigration Rules HC395. In essence continuous residence means residence in the UK for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the UK for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return...

Furthermore, lawful residence means residence which is continuous residence pursuant to, existing leave to enter or remain or temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted. Of importance is the requirement to be met by an applicant for indefinite leave to remain on the ground of long residence in the UK is that: he has had at least ten years continuous lawful residence in the UK...

In the premises where a person has completed 10 years continuous lawful residence he should normally be granted indefinite leave to remain without inquiry. In a recent case of MD Jamaica and GE Canada v The Secretary of State for the Home Department, the Court of Appeal has dismissed two appeals against refusals under the long residence immigration rules. In both cases the immigrants had short gaps in their lawful residence and had been refused under the ten years rule. One of them had a gap of 38 days on one occasion. The Court of Appeal followed a strict interpretation of the rules and also dismissed the appeals under article 8, upholding the decisions of the Tribunal below. The court ruled that the rules mean what they say and to succeed under the rules the residence must be continuous and lawful.

The brief facts were: In the case of MD Jamaica a Jamaican national came to the UK from Jamaica in 1996 and was granted 6 months leave to remain as a visitor. She made a number of applications as a student culminating with an application for indefinite leave to remain under the long residence rules in January 2008. The Secretary of State refused her application on the grounds that she had not been in continuous lawful residence in the UK for a period of at least 10 years. There had been two interruptions of the continuity of her lawful residence solely by delaying to apply for further leave to remain twice. The intervals between the expiry of her existing leave to remain and the date on which she applied for further leave to remain were 2 and 7 weeks respectively. The other one was a national of both Canada and Jamaica who arrived in the UK in 1997 and was granted leave as a student from time to time over the years. In August 2008 he applied for indefinite leave to remain and his application was refused on the grounds that he had not been in continuous lawful residence for ten years. The interval between the expiry of the leave on the 30th January 2007 and his application for further leave on the 9th March 2007 was only 38 days. In the both cases the Court of appeal has emphasised that the rules mean what they say.

However there are limited circumstances in which these strict requirements will be waived particularly having regard to the UK Border Agency instructions (IDIs). Some breaks in the

lawful residence are dealt with by way of discretion. Discretion can always be applied where an applicant has acted lawfully throughout the entire period and has made every attempt to comply with immigration rules. If an applicant has a single short gap in lawful residence through making one single previous application out of time by a few days (not usually more than ten calendar days out of time) the UK Border Agency may exercise discretion granting ILR as long as the application meets all the other requirements. It would not usually be appropriate to exercise discretion when an applicant has more than one gap in their lawful residence due to submitting more than one of their previous applications out of time, as they would not have shown the necessary commitment to ensuring that they have maintained lawful leave throughout their time in the UK. Discretion can also be exercised taking into account extenuating circumstances such as postal strikes, hospitalisation, administrative error and many other justifiable reasons. Each case is always assessed on its merits.

It is significant to note that long residence may constitute a basis of private life in terms of article 8 which can be sufficient by itself to render removal from the UK disproportionate in various immigration matters. In a number of deportation cases long residence has played a pivotal role. Investigations and conclusions must therefore be pursued and reached after assessing the relevant criteria such as (length of residence, age, links with the host country, etc). Long residence is plainly a weighty consideration in all removal and deportation cases. Needless to mention that if a person has remained in the UK for 14 years unlawfully one may also submit an application for indefinite leave to remain in the UK on the basis of long residence provided there were no removal directions set at any one time during that person's long stay. (the clock should not stop ticking!)

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