



# Indefinite Leave to Remain on Long Residence Grounds under para 276B: What to do after the Court of Appeal case of Ahmed

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# Paragraph 276B of the Rules



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276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

**(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.**

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

- (a) age; and
- (b) strength of connections in the United Kingdom; and
- (c) personal history, including character, conduct, associations and employment record; and
- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KOLL.

**(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –**

**(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or**

**(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.**

# What did we used to understand?



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**“(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –**

- (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or**
- (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.”**

There was a consensus, both in law and in practice, that para 276(v) related to both :

1. current application of indefinite leave to remain; and
2. Any previous period of overstaying so as to ‘cure’ it and satisfy para 276B(i)(a).
  - ▶ Eg. Gap in the middle of lawful residence – if application is made within 28 days (or 14 days after 24 November 2016) of leave expiring and that application was subsequently approved.

# Ahmed v SSHD [2019] EWCA Civ 1070 (21 June 2019)



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- ▶ An appeal against the decision of Upper Tribunal Judge Gleeson who had refused permission to bring JR proceedings on the papers and had certified it as ‘totally without merit’.
- ▶ A decision on an application for permission to appeal to the Court of Appeal.
- ▶ Not a substantive Court of Appeal decision.

# Ahmed v SSHD [2019] EWCA Civ 1070 (21 June 2019)

“15. In our view, the wording of paragraph 276B is clear:

- (1) First, the provisions of paragraph 276B(i)-(v) are **separate, freestanding provisions** each of which has to be met in order to for an applicant to be entitled claim “10 years continuous lawful residence” under paragraph 276B (see paragraph 276C).
- (2) Second, sub-paragraph (v) is not drafted as an exception to sub-paragraph (i)(a) and makes no reference to it. There are **no words which cross-refer** or link sub-paragraph (v) to sub-paragraph (i)(a), or vice-versa, whether expressly or inferentially.
- (3) Third, there is no difficulty in giving sub-paragraph (v) a **self-contained meaning**. It makes use of the provisions of paragraph 39E of the Rules. Paragraph 39E is the 'exceptions for overstayers provision' which, in effect, grants a 14-day period of 'grace' in respect of the lodging of LTR applications in certain circumstances. Under sub-paragraph (v), where paragraph 39E applies, any current period of overstaying as well as any previous period of overstaying after the advent of the amendment to the rules on 24<sup>th</sup> November 2016 will be “disregarded”. In addition, periods of overstaying of less than 28 days before that date are also disregarded. The reference to previous periods means that, **in requiring that the applicant should not “be in the United Kingdom in breach of immigration laws”, the sub-paragraph is not looking simply at the applicant’s status at the date of the application, but also looks back in time to his previous immigration status**. Mr Sarker confirmed that the sub-paragraph referred to all previous periods of overstaying. This is, of course, subject to the SSHD’s residual discretion.

# Ahmed v SSHD [2019] EWCA Civ 1070 (21 June 2019)



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- (4) The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) **does not convert such periods into periods of lawful LTR**; still less are such periods to be "disregarded" when it comes to considering whether an applicant has fulfilled the separate requirement of establishing "10 years continuous lawful residence" under sub-paragraph (i)(a).
- (5) Fourth, there is a marked **contrast** in the drafting of the definitions of "continuous residence" and "lawful residence" in paragraph 276A sub-paragraphs (a) and (b) respectively. In respect of continuous residence, in addition to defining it as an unbroken period, the sub-paragraph goes on to deem that it "shall not be considered to be broken" by certain periods of absence from the UK. Lawful residence, on the other hand, is simply required to be continuous residence (i.e. unbroken) pursuant to certain types of leave, temporary admission, immigration bail or exemption from immigration control. Unlike sub-paragraph (a), in sub-paragraph (b) **there is no corresponding provision which allows residence which is not continuously lawful to be deemed unbroken. It is here that one would expect to find the saving which the Applicant incorrectly contends is created by paragraph 276B(v), and one does not. We consider that to be a clear indication that the lawfulness of continuous residence must be unbroken.**

# Ahmed v SSHD [2019] EWCA Civ 1070 (21 June 2019)



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[...]

(8) If and insofar as reliance is placed on the SSHD's **"Long Residence" Guidance (Version 15.0) published on 3<sup>rd</sup> April 2017, this does not avail the Appellant.** We note that "Example 1" and "Example 2" on page 16 of the Guidance say that "gaps in lawful residence" can be disregarded because "the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016". This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a policy adopted by the SSHD. However, it is axiomatic that the **intention of the Rules is to be discerned "objectively from the language used"** not from e.g. guidance documents (per Lord Brown in *Mahad (Ethiopia) v. Entry Clearance Officer* [2010] 1 WLR 48 (2009) at paragraph 10). **The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.**"

# Cases after Ahmed? (21 June 2019)



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Two cases in the Scottish Court of Sessions (Outer House)

- ▶ **Mbomson v Secretary of State for the Home Department** [2019] CSOH 81 (24 October 2019)
- ▶ **Sowdager v Secretary of State for the Home Department** [2020] CSOH 32 (11 March 2020)

Both were not bound by **Ahmed** but nevertheless agreed with it and followed it.





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So what do we do?





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# RELY ON HOME OFFICE GUIDANCE

# Relying on Home Office guidance



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**Ahmed** at §15...

“(8) If and insofar as reliance is placed on the SSHD’s **“Long Residence” Guidance (Version 15.0) published on 3<sup>rd</sup> April 2017, this does not avail the Appellant.** We note that “Example 1” and “Example 2” on page 16 of the Guidance say that “gaps in lawful residence” can be disregarded because “the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016”. This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a **policy adopted by the SSHD.** However, it is axiomatic that the intention of the Rules is to be discerned “objectively from the language used” not from e.g. guidance documents (per Lord Brown in *Mahad (Ethiopia) v. Entry Clearance Officer [2010] 1 WLR 48 (2009)* at paragraph 10). **The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.**”

- ▶ This paragraph is concerned with using the Home Office guidance to interpret the Rules. The Court of Appeal correctly stated that the intention of the Rules cannot be discerned from the use of Home Office guidance.

# Home Office Guidance “Long residence” version 16.0

Page 16 of the guidance

- ▶ Expressly accepts ‘breaks’ in lawful residence
- ▶ Accepts short gaps in lawful residence prior to 24 November 2016
- ▶ After 24 November 2016, short gaps accepted **if** leave was granted pursuant to para 39E of the Rules

## Breaks in lawful residence

This page tells you about circumstances that break lawful residence for long residence applications and when you can use discretion for short breaks in lawful residence.

**Time spent outside the UK**  Ignore this

### Gaps in lawful residence

You may grant the application if an applicant:

- has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps end before 24 November 2016
- has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules
- meets all the other requirements for lawful residence

# Home Office Guidance “Long residence” version 16.0

Page 17 of the guidance

- ▶ These examples clearly show that the Home Office continues to accept a continuous period of 10-years lawful residence under para 276B(1)(i) of the Rules, even if there are gaps in the middle.
- ▶ Contrary to what was held in Ahmed

## Examples of gaps in lawful residence

The examples below show some instances when it may or may not be appropriate to grant the application. This is not a complete list and you must judge each application on the information it contains and discuss this with a senior caseworker.

### Example 1

An applicant has a single gap in their lawful residence due to submitting an application 17 days out of time. All other applications have been submitted in time, throughout the 10 years period.

<b>Question</b>	Would you grant the application in this case?
<b>Answer</b>	Grant the application as the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016.

### Example 2

An applicant has 3 gaps in their lawful residence due to submitting 3 separate applications out of time. These were 9, 17 and 24 days out of time.

<b>Question</b>	Would you grant the application in this case?
<b>Answer</b>	Yes. Grant the application as the rules allow for periods of overstaying of 28 days or less when that period ends before 24 November 2016.

# Relying on Home Office guidance



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- ▶ The first step, both in an application or in an appeal, should be to acknowledge the Court of Appeal decision of **Ahmed**.
- ▶ Professionally obliged to bring it to the attention of the Court (in an appeal)
- ▶ There is no utility in ignoring it

# How do we rely on Home Office guidance?

- ▶ Trite that Home Office guidance, whilst cannot be more restrictive, can be more generous than the Immigration Rules (see **Alvi, R (on the application of) v Secretary of State for the Home Department** [2012] UKSC 33 and **Pokhriyal v The Secretary of State for the Home Department** [2013] EWCA Civ 1568);
- ▶ The law requires the Home Office to honour and follow her own published policy unless there are good reasons for not doing so (see **Mandalia v Secretary of State for the Home Department** [2015] UKSC 59);
- ▶ The Home Office's latest "Long residence" version 16.0 was published on 28 October 2019. 5 months after **Ahmed**.



## What if the overstay is at the end of the 10 year period?

- ▶ There is no room to argue that if an ILR application is made within 14 days of leave expiring (under para 39E) then the period awaiting a decision on the ILR application thereafter can be considered a period counting towards lawful residence.
  - ▶ The Guidance makes clear that the application has to be approved for that to be a 'gap' that will be disregarded.
- ▶ A potential argument would apply only to an extremely narrow set of facts.



## Extremely narrow set of facts

- ▶ Within 28 days of leave expiring
- ▶ The LTR application was made before 24 November 2016
- ▶ That outstanding LTR application was subsequently varied to an ILR application on long residence grounds
- ▶ The variation application was made after 24 November 2016

# Extremely narrow set of facts



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## Out of time applications

This page tells you about 'out-of-time' applications submitted for 10 years long residence applications.

An applicant applying for an extension of stay or indefinite leave to remain (ILR) on the basis of long residence must not be in breach of the Immigration Rules.

### Applications made before 24 November 2016

Where the application was made before 24 November 2016 a period of overstaying of 28 days or less on the date of application will be disregarded.

The 28 day period of overstaying is calculated from the latest of the:

- end of the last period of leave to enter or remain granted (including where an in-time application was submitted but the application was considered invalid)
- end of any extension of leave under sections 3C or 3D of the Immigration Act 1971
- the point that a migrant is deemed to have received a written notice of invalidity, in relation to an in-time application for further leave to remain where that application was deemed invalid due to the failure by the applicant to provide biometrics

Page 18 of "Applications for leave to remain: validation, variation and withdrawal Version 2.0 (30 November 2018)"

### Date of application: application to vary

Where an application is varied, the application date remains the date of the original application. This is relevant to whether an applicant has, or will have, section 3C leave. For further information see: Leave extended by section 3C (and leave extended by section 3D in transitional cases).



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# FINAL THOUGHTS



# FINAL TIPS

- ▶ Rely on the length of residence in the UK even if not accrued continuous period of lawful residence;
- ▶ Highlight the client's mindset during those 10 years
- ▶ Particularly if the client was close to satisfying the ILR requirement
- ▶ For example §53 of **Agyarko v Secretary of State for the Home Department** [2017] UKSC 11, the Supreme Court observed in relation to precarious family life the following:
  - ▶ “53. Finally, in relation to this matter, the reference in the instruction to “full knowledge that their stay here is unlawful or precarious” is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.”
- ▶ Try to draw a parallel with your client being under a reasonable misapprehension that his/her life might take a more permanent form as he/she inched closer to satisfying the ILR requirement
- ▶ This can be relevant under s.117B(5) of the 2002 Act and the ‘little weight’ provision on Private life in the UK.



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# THANK YOU

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