

ILPA information sheet

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Steve Symonds ILPA Legal Officer 020-7490 1553 steve.symonds@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Settlement and Continuous Presence

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This information sheet provides information about how the UK Border Agency calculates continuous presence in the UK for the purposes of applications for settlement (indefinite leave to remain).

Settlement applications and continuous presence

The Immigration Rules allow certain migrants to apply for settlement after they have spent a specified period of time in the UK. For some of these migrants, the Rules require the person to have spent a continuous period of time (often 5 years in the case of migrant workers) in the UK in order to apply for settlement. However, not all applications for settlement are required to satisfy a continuous presence requirement. Generally, the requirement applies to applications for settlement by migrants permitted to come to the UK for the purpose of work or business. This includes:

- work permit holders
- representatives of overseas newspapers, news agencies or broadcasting organisations
- representatives of an overseas business
- private servants in diplomatic households (including under Tier 5 of the Points Based System)
- employees of overseas governments or international organisations (e.g. the United Nations)
- ministers of religion, missionaries and members of religious orders
- airport-based operational staff of overseas-owned airlines
- Commonwealth citizens with a grandparent born in the UK (UK ancestry)
- business persons
- innovators and entrepreneurs
- investors
- writers, composers and artists
- retired persons of independent means
- highly skilled migrants (under the Highly Skilled Migrant Programme, and under Tier 1 of the Points Based System, but not post-study workers)
- skilled migrants (under Tier 2 of the Points Based System, but not those on an intra-company transfer who applied to come to the UK on or after 6 April 2011)

Some of the categories in the above list were closed with the introduction of the Points Based System (see the August 2008 "Points Based System – General" information sheet). However, at that time, some migrants already in the UK were permitted to continue in the category that became closed to new applicants.

UK Border Agency guidance

The UK Border Agency guidance to its caseworkers (decision-makers) includes guidance on how to assess whether or not an applicant satisfies the continuous presence requirement. That guidance is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/ilr-calculating-continuous/ilr-calculating-continuous.pdf?view=Binary>

Periods out of the UK which may be treated as periods in the UK

The guidance sets out various periods of time when a migrant is out of the UK, which may be treated as periods in the UK. This is significant in two ways. Firstly, it means these periods of absence do not break the period of continuous presence. Secondly, these periods of absence count towards the calculation of the total time in the UK. Periods out of the UK which may be treated as periods in the UK include:

- a short holiday which falls within someone's annual leave entitlement
- a short business trip for the purpose of the work or business for which the migrant has been permitted to come to (or stay in) the UK
- up to three months from the date of a grant of entry clearance (under Tier 2 of the Points Based System) to the migrants arrival in the UK

Except for the last of these three examples, the period will ordinarily be treated as a period in the UK only if the migrant continued to have his or her home in the UK during the period he or she was out of the UK. Note that it is a matter of discretion whether these periods are treated as periods in the UK. However, the guidance suggests that ordinarily they should be treated as periods in the UK. What will happen in any individual's case will depend on the particular facts of his or her case, and legal advice may be necessary.

Periods out of the UK which may be ignored

The guidance also sets out various periods of time when a migrant is out of the UK, which may be ignored. This means these periods of absence do not break the period of continuous presence. However, these periods of absence do not count towards the calculation of total time in the UK. (The effect of this is to permit the period of time before the absence from the UK to be added to the period of time after the absence from the UK.) Periods out of the UK which may be ignored include:

- periods out of the UK due to compelling compassionate circumstances (e.g. where a migrant has had to return home to look after a very sick or dying relative) – provided no one period is of more than three months, and if there are more than one such period together these total no more than six months
- periods out of the UK for the purpose of the migrant's work or business in the UK (but note that short business trips abroad may in any case be treated as periods in the UK – see above) – provided no one period is of more than three months, and if there are more than one such period together these total no more than six months

Note that it is a matter of discretion whether these periods are ignored. The guidance suggests that ordinarily these periods will not be ignored. What will happen in any individual's case will depend on the particular facts of his or her case, and legal advice may be necessary.

General discretion

The UK Border Agency generally has discretion to waive requirements under the Rules. This could include in circumstances not covered by the guidance referred to here. However, the guidance suggests that it may be very unlikely that the continuous presence requirement is waived if absences from the UK do not fall within those covered by the guidance.