



information sheet

Further leave to remain

20th April 2009

This information sheet provides information about extending leave to enter or remain, and when an application to extend leave (i.e. an application for further leave) can be varied.

The Court of Appeal has recently considered this. Its judgment was given in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78. That judgment is available at:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/78.rtf>

Leave to remain

Background information on leave to remain (and leave to enter) is given in the December 2008 “Draft Bill – Permission” information sheet. As that information sheet indicates, the current intention of the Government is that leave will be replaced with ‘permission’ (and this may not operate in exactly the same way as a ‘leave’ operates now). Further information on when that might happen is given in the December 2008 “Borders, Immigration and Citizenship Bill” information sheet, which refers to the Government’s intention to introduce an Immigration Simplification Bill.

The relevant legislation

Currently, the relevant legislation is the Immigration Act 1971.

Section 3C of the 1971 Act applies where an application has been made to extend leave – i.e. where a person has leave for a limited period of time and applies when it is about to expire to extend the period of time he or she is permitted to be here. The section extends a person’s leave until such time as his or her application to extend leave is finally decided *provided* that the application is made before the person’s original leave expires.

A person who stays in the UK after his leave has expired becomes an overstayer at that point. A person who delays making an application to extend leave until after his original leave has expired, therefore, becomes an overstayer at the point the original leave expires. Overstaying is a criminal offence. Although the offence is often not prosecuted, an overstayer may be removed from the UK. If the overstayer is removed from the UK or leaves the UK voluntarily, he or she may face a ban on returning to the UK – see the information sheets on “Immigration Rules” of May, March and February 2008. If the overstayer makes an application for further leave to remain, the UK Border Agency may exercise its discretion to consider the application; but in some cases may refuse the application or treat it as invalid because the person is an overstayer. Even if the UK Border Agency makes a decision on the application, the person will have no right of appeal if the application is refused unless and until the UK Border Agency also makes a decision to remove him or her from the UK.

A person who needs to extend his or her leave can avoid all of these problems by ensuring that his or her application is made to the UK Border Agency before his or her original leave expires.

While the person’s leave is extended by section 3C, he or she cannot make a new application to extend leave and so is left to rely on the application for further leave that he or she has already made. However, section 3C does allow the person to vary the application he or she has made. There have been different views about the extent to which an application can be changed by a variation. The recent court judgment addresses this.

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JH (Zimbabwe) [2009] EWCA Civ 78

In this case, the Court of Appeal considered what a person was allowed to do by varying an outstanding application for leave to remain (i.e. an application made by someone in the UK to extend his or her leave).

The court decided that:

- an outstanding application (the original application) can be varied at any time up until to the point at which the UK Border Agency make a decision on it
- the variation can change the length of time for which the person is applying to remain in the UK
- the variation can change the reasons for which the person is applying to remain in the UK
- the variation can allow someone to reflect a relevant change of his or her circumstances since the original application
- a variation can be made even if this requires the application to be made on a different form to the one that was required for the original application

The Immigration Rules

Paragraphs 34E and 34F of the Immigration Rules are also relevant.

Paragraph 34E requires that a person, who wishes to vary an outstanding application for leave to remain in order to stay in the UK for a different purpose to that for which the application was originally made, must comply with paragraph 34A (which sets out some general requirements for making applications, including as to the form that must be used and the fee). This will apply where, for example, someone who has requested leave to remain as a student wishes to change that application (before it has been decided) so as to request leave to remain on the basis of marriage. A new form and fee may be required in order to vary an application, but not if the purpose for which leave to remain is sought is not changed by the variation.

Paragraph 34F states that if an application is varied, the UK Border Agency will decide the application in accordance with the Immigration Rules as they were at the time the variation was made. In some cases the Rules may have changed between the date of the original application and the date of the variation.