

## **Article 8 now extended to Points Based cases**

The Upper Tribunal has confirmed in a recent case called **CDS (PBS "available" Article 8) Brazil** [2010] UKUT 305 that Article 8 (the human right to a family and private life in the UK) is applicable in Points Based cases. To be fair, the proposition was first made in the now famous case of **Secretary of State for the Home Department v Pankina** [2010] EWCA Civ 719, although the CDS case is the first case that gives clear guidance on how to apply Article 8 in a Points Based case.

CDS was a Brazilian national who had entered the UK as a student in July 2007 and had been granted extensions until 2009. During this period she had been financially supported by two sponsors who between them had funds in excess of £300,000.00.

On 26 October 2009, CDS applied to extend her stay in the UK as a Tier 4 (General) Student Migrant under the Points Based System. The application was refused by the Home Office who concluded that she did not have sufficient funds available to meet her maintenance requirements. She had provided a sponsorship letter from her two sponsors. However, under the applicable Policy Guidance, a student could only rely on money held in a bank account in another person's name if the account was in the name of a parent or legal guardian and there was evidence to prove the relationship as well as the fact that permission to use the money had been given. Because of this requirement, CDS's application was refused by the Home Office.

Her appeal to the Tribunal was also dismissed. She went to the Upper Tribunal by permission.

On the question of the sponsorship by her 2 sponsors, the Upper Tribunal ruled that the two sponsors had the necessary resources at the relevant time and were willing to transfer the funds that she needed to meet the maintenance requirements of the Immigration Rules. The Tribunal concluded that the funds were available to her and the appellant therefore satisfied the maintenance requirements.

This means that third party support maintenance is now allowed in certain circumstances in Points Based cases. Circumstances that should succeed include those where the sponsor in question has always sponsored the applicant from the beginning

More importantly, the Upper Tribunal agreed that Article 8 was applicable in the particular circumstances of the appellant.

The court agreed that there is generally no human right to come to the United Kingdom for education or other purposes of voluntary migration. However, the appellant had come to the UK for higher education and had made progress and obtained various extensions of stay as a student. The court therefore went on to say;

*“This in itself did not give her the right or expectation of extension of stay, but people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as mis-representation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay”.*

In the present case a change in the sponsorship rules during her course had a serious effect on her ability to conclude her course of study. She however still had the same sponsors who continued to be willing to sponsor her and she should therefore not suffer prejudice because of the sudden changes in the rules.

The court also noted that the changes to the sponsorship rules had taken place in the Guidance Policy, not the Immigration Rules. Just as in the Pankina case, therefore, the Policy Guidance changes did not have the same status as the Immigration Rules since they did not enjoy the same Parliamentary authority as the Immigration Rules do.

More importantly, CDS had continued to meet the other requirements of the Rules and make appropriate progress in her course of studies. Therefore, her Article 8 right to a private life had to be respected. Her appeal was allowed.

What does this judgement mean?

Article 8 has traditionally succeeded a lot more in situations where an applicant is linked to the UK through a relative who is permanently settled in the UK and has therefore been more commonly associated with family life situations.

With Pankina and now the CDS case, Article 8 with respect to a private life has now fully emerged, and has become a viable and formidable argument to make in cases where someone fails to extend their stay in the UK due to the harsh and demanding rules under the new Points Based system, but still has his, or his family's ongoing career or studies which would be unreasonably disrupted by removal from the UK.

Taffi Nyawanza is the principal of Genesis Law Associates, a specialist immigration and asylum law firm in Birmingham. He can be contacted on [tnyawanza@genesislaw.co.uk](mailto:tnyawanza@genesislaw.co.uk) or ph. 0121 222 2370 or visit Genesis Law Associates' website at [www.genesislaw.co.uk](http://www.genesislaw.co.uk).

*Disclaimer: This article only provides general information and guidance on immigration law. It is not intended to replace the advice or services of a lawyer. The specific facts that apply to your matter may make the outcome different than would be anticipated by you. The writer will not accept any liability for any claims or inconvenience as a result of the use of this information.*

