Home Office shifts goalposts

The Home Office have amended the Immigration Rules in what appears to be a desperate scramble to stay ahead of the outcome in **Secretary of State for the Home Department v Pankina** [2010] EWCA Civ 719. Pankina is the Court of Appeal decision which said that an applicant under the Points Based Scheme will now only need to demonstrate that they had £800 at the time of their application for purposes of proving adequate maintenance, and not for three months as previously required by the Immigration Rules.

This requirement of £800 for 3 months was contained in the Policy Guidance, not the actual Immigration Rules. That is why Pankina succeeded. The Court of Appeal said that because the maintenance requirements were contained in the Policy Guidance, and not in the actual Immigration Rules, they did not meet the same critical test by which Immigration Rules come into existence, whereby a minister lays them before Parliament for scrutiny. As a result, they do not have the same status as the Immigration Rules since they do not enjoy Parliamentary authority.

The Home Office have now simply tweaked the Immigration Rules so that they now contain the £800 for 3 months requirement. This is almost with immediate effect so that anyone applying after 22nd July 2010 will be faced with these new rules.

The Home Office have however issued new Policy Guidance to give effect to the Pankina decision. What they say in this Guidance is that all those who applied under the Points Based scheme between the date that Pankina was decided on 23rd June 2010 and the date of the new rules being 22nd July 2010, will benefit from the Pankina ruling. This means that if they held the required funds only at the time of application, and not for 3 months, they should succeed in their applications, appeals or Judicial Reviews.

The Home Office have given migrants until 22 June 2011 to take advantage of this concession by writing in and requesting a reconsideration of their cases.

Both those who applied from abroad and from within the UK are covered.

There are certain aspects of the Pankina decision that the Home Office will not be able to take away, mainly because they did not appeal the decision. These include the impact of Article 8 (right to a family life in the UK) in PBS applications. Pankina's position was that there will be cases where the private and family lives of graduates who have lived in the UK for years must be considered and respected. This remains untouched.

In addition, and perhaps more importantly, Pankina re-introduced common sense and took away the rigidity in decision making in PBS cases. This also remains the position, especially in all areas where there is inter-play between the Policy Guidance and the Immigration Rules.

A very important aspect of this concession is that the Home Office have accepted that where appropriate and upon request, they will withdraw the immigration decision that gave rise to the appeal, or judicial review claim with the effect that people who were refused and who proceeded to lodge completely new applications will now have no breaks in their leave. This is vital for future settlement applications which require continuous, un-interrupted legal residence.

One other observation to make is that the Home Office seem to be in panic mode. These changes have not been put before Parliament for scrutiny for the required period before coming into effect. To be precise, they were laid before Parliament on 22nd July 2010 and they came into effect on 23rd July 2010.

The Home Office are clearly aware that Pankina has shot to pieces the Points Based Scheme. They have not challenged Pankina itself but merely attempted a shoddy repair job which appears vulnerable to further legal challenges.

Anyone who thinks that their immigration status may be affected by this opinion should seek professional legal advice. At Genesis Law Associates, we specialise in all areas of immigration, asylum and nationality law.

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