

Victory in Points Based System appeal

On 23rd June 2010, the Court of Appeal handed down a hugely important and long awaited decision regarding Points Based System (PBS) cases. In [Secretary of State for the Home Department v Pankina](#) [2010] EWCA Civ 719, the Court of Appeal eliminated the requirement that in order to prove adequate maintenance, an applicant under the Tier 1 (Post-Study Work) Migrant scheme must show that they have kept £800 in savings for at least three months prior to the date of application.

This decision means that from now on, an applicant under the PBS need only demonstrate that they have £800 at the time of application, not longer.

The reasons given by the Court for this generous and common sense decision are steeped in complex constitutional questions and the doctrine of separation of powers. Simply put, Parliament makes law, and the executive enforces that law. In limited and clearly defined cases, Parliament sometimes delegates to the executive the authority to make law. For instance, this delegated power allows the Secretary for the Home Department to make the Immigration Rules. However, in PBS cases, there is, in addition to the Immigration Rules, something called Policy Guidance, which contain detailed requirements regarding the making of an application. In the Tier 1 (Post-Study Work) Migrant scheme, the requirement to keep £800 for three months in savings is contained in the Policy Guidance.

The Court of Appeal considered that as these 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, where 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.

And so in the PBS appeals, the only requirement specified in the Immigration Rules was that the applicant must have held £800 at the time of application. All the other requirements set out in the Guidance, for example the requirement that the funds

should have been kept in savings for three months, were merely guidance. They do not have the force of law.

Additionally, the Court of Appeal agreed that Article 8 arguments can be made in PBS applications. In other words, there will be cases where the private and family lives of university graduates who have lived in the UK for years must be considered and respected. Article 8 cases are always case-specific. Each case is decided on its own facts.

This therefore is a very important decision which in effect reverses the extremely harsh and rigid outcome in **NA and Others** [2009] UKAIT 00025, a decision which had established that the PBS Policy Guidance had to be strictly followed and applied with no room for discretion.

The main practical implication of the Pankina decision is that it re-introduces common sense in decision-making in PBS cases. Policy Guidance remains just that; guidance – to be applied *“without rigidity and to be used and adapted in the interests of fairness and good sense”*.

The Pankina decision also re-introduces the applicability of Article 8 in PBS cases.

This decision may also be of use to people who have not been able to re-apply to the Home Office for the Post-Study Worker visa after a refusal because they are now outside the 12 months period of the date of graduation as required by the Immigration Rules. They should now be able to obtain a reconsideration of their matters on the basis of the Pankina decision.

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