

Key issues: post study work scheme

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THE Tier 1 Post Study Work (PSW) scheme is one part of a 5 Tier system introduced in August 2007 by the UK Home Office. Its stated aim is to attract skilled and talented people to contribute to the UK's economy.

The scheme is very popular because it allows foreign students to stay in the UK for a further 2 years after completion of their degree or PGCE studies (or Scottish HND), and more importantly, to do any type of work for unlimited hours, including running a business.

At the end of the 2 years, it is possible to switch to the sponsored work visa, the Highly Skilled visa, or back to the student visa, from inside the UK.

The PSW scheme replaced the International Graduate Scheme (IGS) and the Scottish Fresh Talent Scheme. Those currently on a valid IGS visa can apply on the PSW scheme for an extra 1 year.

Because this is a points system, a number of attributes are mandatory. There are 3 categories in which the applicant must score points, most of which are fairly straight-forward.

The one category, however, where a lot of applicants under the scheme have come to grief is the rigid requirement that applicants applying from within the UK should demonstrate that they can maintain themselves adequately by producing proof that they have maintained a minimum amount of £800 in their bank account continuously for a period of three months prior to the date of application.

The amount goes up by an extra £533 for each dependant that the applicant may have. The balance should not have fallen below the required minimum at any time during the relevant period.

For those applying from abroad, they must demonstrate that they have a whopping £2,800 available to them. A further £1,600 will be needed for each dependant accompanying the applicant.

For in-country applications specifically, the Home Office can, and have indeed been refusing applications, even where the amount of £800 may be in the applicant's bank account, but was not held for the required 3 months, or where the amount fell below that threshold.

To demonstrate how absolutely ridiculous this requirement is, if the balance falls even £1 below £800, even for 1 day during the relevant period, that would be enough for the Home Office to refuse the application. There is no discretion, and therefore a common sense approach, under the scheme.

The other ridiculous requirement is that the £800 held for 3 months must be in the applicant's personal bank account, not another's. Not even the applicant's family account.

To make matters worse, those that have been appealing these ridiculous Home Office refusals, have been met with a Tribunal which has no clear guidance on the matter. This is because the scheme is still new, and the Tribunal has not yet come up with a guidance case on this issue.

Decisions have therefore been very varied. Some Immigration Judges have been open to persuasion and have interpreted the requirements of the rules liberally. The more conservative ones, and there is a frightening number of them across the breadth and width of the UK, have toed the line and agreed with the Home Office that there is no room for discretion where Points Based System applications are concerned.

The most attractive argument to deploy in a PSW appeal is as follows:

The Act that addresses this point directly is the UK Borders Act of 2007. Section 19 of the Act in particular states that in all Points-based applications, no new evidence will be allowed on appeal. This means for instance, that under this section, it will no longer be possible to argue that an appeal should be allowed on the basis that the applicant can at the time of his appeal hearing demonstrate that he now has access to £800 which he did not have at the time of the application.

Section 19 will, therefore, close the argument that generally in in-country appeals, the appeal Tribunal may consider evidence about any matter which is relevant to the substance of the decision, including evidence that arises after the date of the decision.

The key thing to emphasise, however, is that this very section has not yet come into force. Until it does, it should be open to allow new evidence of the availability of funds that may not have been available at the time of the initial application to the Home Office.

In an appeal, it should also be possible to deploy the argument that it would be a breach of the right to a private and family life under Article 8 to remove someone whose application under the Post-Study Work Scheme fails. Indeed, there are decisions in which the Tribunal have recognised that the right to develop full potential through a good education arguably comes within the right to private life.

Perhaps what is more heartening is that there may be light at the end of the tunnel on this issue. The Home Office recently conceded at a Judicial Review hearing that with respect to the maintenance requirements under the Points Based System (PBS), there should be discretion in certain circumstances.

That decision is likely to lead to new guidance, either by the Home Office, or the courts, as to when and in what circumstances that discretion should be exercised.

I am more hopeful that the courts will come out in favour of a more liberal interpretation of the rules on this one. I am especially emboldened by the remarks of Mr Justice Sullivan in a recent High Court decision where he said with regards to another equally rigid Home Office policy:

“This is a classic example of a thoroughly unreasonable and disproportionate, inflexible, application of a policy, without the slightest regard for the facts of the case, or indeed elementary common sense and humanity. Such an approach diminishes, rather than encourages, respect for the policy in question.”

What now?

Where PSW applications have been refused by the Home Office on these points, and the appeals dismissed by the Tribunal, it is important that a further appeal, called a reconsideration appeal, is lodged in time to preserve appeal rights. The Tribunal has been granting orders for reconsideration in most of these appeals, mainly because this is new territory and guidance is inevitable.

A point that may typically be raised could be that the appellant may have failed to meet the requirements at the time of application, but he currently has a good and regular income and has not previously claimed public funds. The Judicial Review decision referred to above was won on that point.

Emphasis should also be placed on the spirit of the PSW scheme which is to encourage international graduates who have studied in the UK to stay on and do skilled work.

I suspect that it may also be conceivable that a race-related argument could be made, especially in entry-clearance appeals, on the basis that the strict requirement to have such high amounts in a personal bank account is perhaps an unintended return to schemes that can only attract applicants from certain countries and not others.

Without a doubt, certain nationalities will be disproportionately under-represented in the scheme, and this will certainly be confirmed by the Independent Monitor’s report which should be available in a year’s time.