

Immigration Status: The Points Based System

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The current changes taking place in the Immigration system in the UK are a cause for concern for people seeking to regularise their status in the UK. This is a brief discussion about important issues which have really taken many people by surprise particularly where the changes have not been anticipated by those who are obliged to regularise their immigration status in the UK. There are some key issues arising in practice with the implementation of the Points Based System (PBS) and how some of the issues could affect would be applicants. Some issues about this system rob applicants of the benefit of discretion and flexibility by the courts unless properly guided.

Five tiers have been developed. The writer shall deal with issues affecting these various tiers in a series of different articles. Highly skilled people who do not require sponsors fall into this category. This tier too has been broken down into various categories which are General, Entrepreneurs, Investors and Post study.

The Immigration rules set out the criteria and specify the evidence to be submitted. Documentary evidence is outlined in rule 245AA. The guidance is too specific. In post study applications one has to provide personal bank statements covering the three consecutive months prior to the application date. The most recent statement must be dated no more than one calendar month before the date of the application.

In almost all the categories, the maintenance (funds) requirement has caused much headache to applicants. Individuals seeking to regularise their stay have lost the crucial ten points required under this category solely because they have not been able to maintain the requisite £800 of funds in their bank accounts and have not been able to provide the specified documents as evidence.

Appeals which have come before the courts involve applicants for the tier 1 (post study Work) category who have been unable to produce evidence in the specified documentary form that they had at least £800 in the bank for a continuous period of three months prior to their application. There are times whereby an appellant has to acknowledge the absence of the £800 for the entire three months before the application, but one might have to show that one has now had the necessary £800 in his account for at least three months at the date of the hearing which would be relevant date for the judge to consider whether the appellant meets the requirements of the Immigration rules. This is in terms of section 85 (4) of the 2002 Act, as discussed in the case of (LS Gambia.)

It has also been argued that whilst an appellant acknowledges that the appellant did not have £800 in his account for the whole three months before the application, but argue that he was short of £800 by a small margin or for a few days and if one considers the circumstances as a whole it would become clear that he can maintain himself adequately. The courts would be implored to exercise their discretion sensibly by allowing the appeals of graduates who by and large fulfil the purpose of the rules. However, the rule is deemed substantive and inflexible, albeit arguable.

For those individuals seeking entry clearance they should show that they have £2800 in funds and provide the specified evidence. It is important to maintain the level of the required funds for at least three months prior to the date of application. Where the minimum bank balance has dipped below the required level on some occasions, an application will be refused. A number of people have been caught unaware of this requirement such that by the time they seek to submit an application, it is usually too late to rectify the account as required.

Ancillary to the maintenance (funds) issue, are the earnings of an individual particularly when dealing with a Tier 1 (General) applicant. Please note that earnings would not be taken into account if the applicant was in breach of the UK's immigration laws at the time those earnings were made. Furthermore, earnings should not include unearned sources of income such as allowances, expenses, dividends, interest, inheritance. The guidance has to be followed closely in this regard.

It is also an important requirement that an applicant must provide at least two different types of supporting documents for each source of earnings claimed. Each piece of supporting evidence must be from a separate source and support all the other evidence so that together they clearly prove the earnings. This is in terms of paragraph 139 of the tier 1 (General) of the points based system-policy Guidance.

Please note that there is important case law where the court has considered the impact of the Points based system. Of significance, is the case of NA and others (Tier 1 Post- Study Work Funds) [2009] UKAIT 00025. The court ruled that:

the requisite amount of £800 or over can be shown in the form of a personal or joint account and may be shown in the form of personal savings held in overseas accounts. The court ruled that because the provisions require applicants to show that they had the requisite amount of £800 during a three month period of time immediately before their application, it is not possible to apply s 85 (4) of the nationality, Immigration and Asylum Act 2002 so as to enable them to succeed on appeal by proving funds for a period of time (wholly or partly) subsequent to the date of the application.

The court in the case of NA further made it clear that :

until s85A of the 2002 Act is brought into force (presumably by section 19 of the Borders Act) subsection 85 (4) (a) of which stipulates that in respect of appeals in points based System cases the Tribunal may consider evidence adduced by the appellant only if it was submitted at the time of applying, it remains possible for appellants to satisfy the requirements of para 245Z (e) by providing on appeal evidence in specified form showing that they had £800 or over in personal savings for the period of three months immediately prior to the date of application.

The above cited decision is proving useful in dealing with a number of appeals which have since arisen with respect to the points based system which is yet to be fully grasped with both applicants and those doing Immigration matters. It is an area which is yet to be fully tested in courts as different scenarios arise with the implementation of the points based system.

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