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Victory for Points Based Applicants: The Court of Appeal expresses its concern

The Court of Appeal in a judgment delivered on the 23rd June 2010 has hopefully laid to rest the problems experienced by many applicants under the Points Based System. Numerous applicant have been refused leave to enter or remain on the basis of criteria laid down in the UK Border Agency's guidance often for trivial reasons.

The regulations made by the Secretary of State for the Home Department are in the form of Immigration Rules which are laid before Parliament for approval. These Rules have the force of law. The UKBA issued a separate set of guidance notes which supplemented these Rules and in doing so introduced additional criteria. One of these was the requirement that a person has to have sufficient funds (£800) for at least 3 months.

Lord Justice Sedley stated the force of law requires such rules to be certain. The Secretary of State must lay the rules by which she proposes to manage immigration and the courts will expect such rules to be those that have Parliament's approval. The objection is that this hybrid guidance is placed outside Parliament's scrutiny and in the words of the judge "left to the unfettered judgment of the rule maker".

On the fact of it Lord Justice Sedley acknowledged that it appeared to be a trivial point but in view of the fact that

the use of such "guidance" which has not been put before Parliament is of constitutional importance. Such hybrid provisions can be introduced through the back door without sufficient scrutiny and abandon a constitutional principle "which for four centuries has stood as a pillar of the separation of powers in what is today a democracy under the rule of law."

This case decided that it was sufficient to have funds of £800 at the date of the application as this was within the contemplation of the Rules but that the 3 month period was an additional requirement and was unlawful. He also expressly re-iterated that the extent and quality of private and family life under Article 8 of the European Convention on Human Rights must be evaluated by the Secretary of State and suggested that the Home Office has to exercise common sense to avoid disproportionately denying rights to those who are settled in every way. His parting shot was to remind the Home Secretary that if she "wishes the rules to be black letter law [their phrase] she needs to achieve this by an established legislative route."

Maria Fernandes is a principal of Fernandes Vaz solicitors who specialise in immigration and nationality law. She has substantial experience of immigration and is an accredited member of the Immigration Law Panel.