IMMIGRATION TEAM UPDATE

Autumn 2018, Goldsmith Chambers

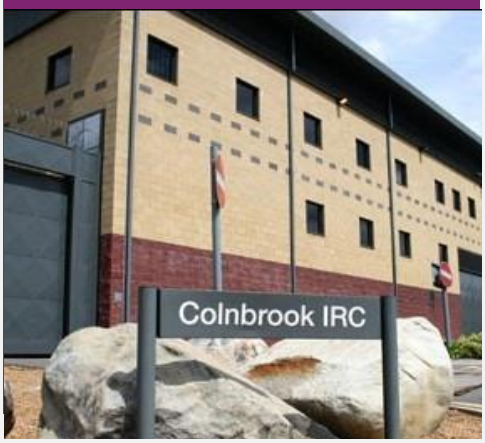
GOLDSMITH SEMINARS: UNLAWFUL DETENTION

What should you look for when faced with a client who may have been unlawfully detained? What are the first steps in litigating the claim? How will the High Court expect the claim to be presented? How do damages and costs work?

We at Goldsmith often hear such questions about what can be a confusing area of law. Even so, it is an area in which damages can be substantial and clients may be unaware that redress is even available.

For those reasons, Goldsmith's immigration and civil teams have come together to provide a series of seminars and Q&A sessions for practitioners in the field. Our aim is to shine the light on this area and provide a practical guide to identifying and litigating claims.

Further info on dates will follow shortly so listen out for details and make sure to book your places ASAP.



JUDICIAL APPOINTMENTS

Chambers are delighted to announce the following appointments:

- Anthony Metzer QC, who already sits as a fee-paid Judge in the FTT (IAC) has been assigned to the War Pensions & Armed Forces Compensation Chamber of the FTT. Most recently, Anthony has also been appointed a Deputy High Court Judge for England and Wales.
- Rita Sethi, who sits as a fee-paid Judge in the FTT (IAC), has been assigned to the Health, Education & Social Care Chamber.
- Samina Iqbal, who also sits as a fee-paid Judge in the FTT (IAC), has been assigned to the Social Entitlement Chamber.
- Guy Davison, who sits as a fee-paid Judge in the Social Entitlement Chamber, has been assigned to the Immigration & Asylum Chamber.

A RETURN TO THE DETAINED FAST-TRACK?

The Tribunal Procedure Committee is running a consultation on the re-introduction of accelerated appeals for detained appellants. This follows the MoJ's own consultation on the same subject last year. It appears that re-introducing a new form of fast-track procedural regime continues to be a top priority since the previous fast-track rules were quashed quite spectacularly by Nicol J in 2015 (upheld in the Court of Appeal).

The government's position is that the new regime should see a timeframe of 25-28 working days from lodging to determination in the FTT, with a further 20 working days allotted for both UT permission stages.

We at Goldsmith have seen a number of test cases recently which tribunal staff have categorized under a "Detained Immigration Appeals" rubric, with hearing dates as little as 4 weeks after a decision. It certainly seems the order is coming down from up high to pilot such a system, paving the way for the re-introduction of a new fast track procedural regime.

Bearing in mind the average time-frame for an appeal in the FTT stands presently at 49 weeks, one may well wonder whether already dwindling tribunal resources would be better served by addressing these systemic delays. Instead the focus seems to be on a policy of speedy removal and saving face after the government's 2015 defeat in the courts.

The justification given for the fast-track process is to limit the time migrants are forced to remain detained (at great cost to the taxpayer). Perhaps the biggest irony is that, if the HO used detention as a last resort (rather than as a matter of routine), there wouldn't be so many appellants in detention in the first place in need of a fast-track procedure at all.

Upcoming Goldsmith Events

- Chambers seminar on *Surinder Singh* post *Banger*: including talks by Counsel who represented Ms Banger in the CJEU – 26 Sep
- Book launch: 10th edition of the "Immigration Law Handbook" publication and new editing team event – date 23 Oct

MORE SCOPE FOR WASTED COSTS IN APPEALS

Presidential Guidance Note (No2 of 2018) deals exclusively with wasted costs orders (WCOs) in IAC appeals. Published on 1 August 2018, the note leans heavily on the guidance given by a Presidential Panel in a series of recent (unreported) FTT appeals cited as Awuah & Ors [2017] UKFtT 555 (IAC).

Most intriguing is the clarification of what might amount to "unreasonable conduct" in an appeal. According to para 2.7(ix) of the Note, it will:

> *as a strong general rule, be unreasonable to defend- or continue to defend- an appeal which is, objectively assessed, irresistible or obviously meritorious.*

Those reading will often have cases where the conduct of the Home Office leaves a lot to be desired. From taking positions that have previously been conceded, failing to consider evidence lodged post-decision or leaving it to the day of the hearing to withdraw, such conduct is all too familiar.

Thankfully now it seems we may have a remedy, and one which clients are likely to be extremely grateful for. In theory a WCO would cover all legal expenses following the point at which the behaviour became "unreasonable", including the costs of securing legal representation for the appeal.

It remains to be seen how the guidance will be applied in practice, but the Note certainly appears to widen the scope in what has often been seen as a very difficult application to make.

We at Goldsmith have made a number of applications in light of the new guidance and we hope to have an update on how the process is working in practice in due course. If you have any questions about the merits of a WCO in any particular case then don't hesitate to contact us to talk through the options.

RECENT PUBLICATIONS

Sarah Pinder has published with Law Brief Publishing a specialist guide on Tier 1 Entrepreneur applications: ***'A Practical Guide to Immigration Law and Tier 1 Entrepreneur Applications'***.

The Immigration Rules for Tier 1 Entrepreneur applicants have become a real minefield to work through. From numerous changes to incredibly precise and complex substantive and evidential requirements, preparing successful applications and challenging refusals can often be very difficult.

This guide will help practitioners navigate through the relevant rules and the Home Office guidance. It also includes an analysis of the 'genuineness' test, which is applied at all levels of Tier 1 Entrepreneur applications as well as an overview of how practitioners may be able to make use of the 'evidential flexibility' provisions when seeking to challenge refusals by the Home Office. Where relevant, the guide also cross-refers to applicable case-law and features short case-studies as examples.

Readers can access a free chapter from the guide by following this link.

NOTABLE CASES & UPDATES

Banger: CJEU follows A-G's opinion and widens scope of *Surinder Singh* principle

A number of hugely important questions relating to whether the principles in *Surinder Singh* apply to unmarried partners as they do to spouses have now been answered by the Court of Justice (C-89/17 Secretary of State for the Home Department v Banger).

Following the hearing in March, in which Ms Banger was represented by Anthony Metzer QC and Sanaz Saifolahi of Goldsmith Chambers, Advocate General Bobek's Opinion has now been followed by the Court. The applicant's argument that the principles apply equally in respect of those in a durable relationship was accepted, widening the route to include unmarried partners for the first time.

The final question referred by the UT, whether in such cases JR is an adequate remedy or a right of appeal is required, was confirmed to be a matter for the domestic courts, although it should enable judicial assessment of both fact and law (for which we would say JR is not traditionally suited). It is unlikely to be the last time that such a question is raised following the changes to the appeal regime in the 2016 Regulations. Following the reference now being determined, the UT has listed the case for a CMR Hearing on 19th September 2018.

Retaining rights in EEA cases under Regulation 10(5)

In order to retain a right to reside in the UK under Regulation 10(5), the SSHD now accepts that third country nationals only need to demonstrate that the former EEA spouse exercised their Treaty rights up to the point that divorce proceedings were **initiated**, not (as was previously the case) until the date of decree absolute. This was considered by the Court of Appeal in *Baigazieva v SSHD* [2018] EWCA Civ 1088 and applies to both the new 2016 Immigration (EEA) Regulations and the old 2006 Regulations (as amended).

We at Goldsmith have used this more generous interpretation successfully for clients in a number of recent appeals in the FTT and UT.

New Country Guidance: Iraqi Kurds

In AAH (Iraqi Kurds - internal relocation) (CG) [2018] UKUT 212 (IAC), the UT has issued updated country guidance for Iraqi Kurds, supplementing and in part replacing that given in *AA (Iraq) v SSHD* [2017] EWCA Civ 944. The update reflects the fact that there are no longer any international flights into the Iraqi Kurdish Region (IKR), such that all returns are now to Baghdad.

The feasibility of internal relocation to the IKR for Iraqis of Kurdish origin is found to turn largely on whether he or she has a CSID or valid passport. Without such documentation, flying will not be possible and travelling by land will carry a real risk of being detained at security checkpoints. In addition, returnees cannot work within the IKR without a CSID. The guidance also considers the possibility of returnees obtaining a CSID, with relevant factors being whether they hold any other documentation, the location of the relevant civil registry office and the availability of male family members to assist.

The Upper Tribubal reiterates *Hamid* type-jurisdiction

In *R (Shrestha & Ors) v SSHD (Hamid jurisdiction: nature and purposes)* [2018] UKUT 242 (IAC), the President stresses the need for immigration lawyers to comply with their professional responsibilities. The official headnote in full is as follows:

(1) The "Hamid" jurisdiction of the High Court and the Upper Tribunal exists to ensure that lawyers conduct themselves according to proper standards of behaviour. The bringing of hopeless applications for judicial review wastes judicial time and risks delaying the prompt examination of other cases, which may have merit. In many cases, the only tangible result of such an application is that the applicant incurs significant expense.

(2) Solicitors who practise in the difficult and demanding area of immigration law and who are properly discharging their professional responsibilities can only safely enjoy the recognition they deserve if the public is confident appropriate steps are being taken to deal with the minority who are failing in their professional responsibilities.

Dr Anton van Dellen represented solicitor *Vay Ip* in his appeal to the High Court ([2018] EWHC 957 (Admin)) against an order striking him off the roll of Solicitors. The striking off related to without notice applications for injunctions to prevent deportation. The High Court dismissed the appeal, which is now being appealed to the Court of Appeal.

Previous poor advice from immigration advisers: relevance in an article 8 context

In *Mansur (Immigration adviser's failings, Article 8)* [2018] UKUT 274 (IAC), President Lane considered how to approach cases where the Appellant received poor advice or services from their previous immigration advisers. The judgment makes clear that poor advice will not give an appellant a stronger form of protected family or private life than they otherwise would have had. However, it can be relevant to the question of the weight to be placed on the public interest in maintaining firm and effective immigration control because it potentially goes to the Appellant's 'lack of culpability'; such cases will be rare though.

One such rare case will exist where, as here, the immigration adviser had blatantly failed to follow their client's instructions, this having been found by the relevant professional regulator, leading directly to an application being invalid where it would otherwise likely have been granted. President Lane noted that this is *"far removed from that which we frequently see in this jurisdiction, where legal advisers are belatedly blamed but where there has been no admission of guilt and no finding of culpability by a relevant professional regulator."* It is important therefore that if an applicant has a complaint against a previous representative, to see this through and lodge a complaint following the relevant procedures.

Deprivation appeals: no need to consider article 8 (*Delialisi* considered)

In Aziz & Ors v SSHD [2018] EWCA Civ 1884 (8 August 2018), the Court of Appeal considered the scope of appeals against deprivation brought under s.40A of the BNA 1981. This is a separate statutory appeal framework from that under the NIAA 2002, which precedes any immigration decision (such as a decision to revoke status or remove) and the appeal against that latter decision.

The Court considered the question whether article 8 considerations can be raised and found that, in most cases, they can not. The logic is that only the "reasonably foreseeable consequences" of deprivation fall to be considered, which apparently in most cases does not include removal. This changes the emphasis from the *Delialisi* approach and, somewhat counter-intuitively, holds that the stronger an article 8 claim appears to be, the less likely article 8 will be relevant, as a removal decision is (in theory) less likely to follow. The Court left open the question how a court is expected to determine the merits of an article 8 claim in practice without first undertaking a full analysis.

It must be said that a case with facts as difficult as *Aziz* was always unlikely to make for good law, but it seems the Court of Appeal's decision raises more questions than it answers. We can expect a good deal of uncertainty in forthcoming FTT appeals against deprivation.

BNA 1981: decisions purporting to "nullify" British citizenship post *Hysaj*

Following on from the above, we at Goldsmith have seen cases recently where the SSHD has previously sought to "nullify" citizenship (rather than making a decision ro deprive under s.40). This tends to arise where there has been a historic deception as to identity in order to obtain that citizenship. And it often only comes out of the woodwork during later HR/protection appeal proceedings.

The Supreme Court's landmark decision of *Hysaj* [2017] UKSC 82 was handed down on 21 December 2017 and can provide a basis for arguing that a purported decision to nullify was never valid, and that the client is still in law a British citizen unless and until deprived of it under s.40. This can obviously cause all wonders of confusion to the other side and even lead to the withdrawal of appeal proceedings while they consider their next move.

Given the potential implications of *Hysaj*, those who come across clients previously given a nullity decision are urged to seek the advice of Counsel at an early stage and consider the merits of raising the issue, whether in pending appeal proceedings or by way of JR.

BNA 1981: claiming British citizenship based on old colonial links or ancestry

In a flurry of recent JRs, the High Court has ruled on a number of separate claims for British (and British Overseas) citizenship arising out of links to territories previously part of the UK's colonies and islands. In the separate cases of Nooh, Taher and Suleiman, all heard in 2018, Lang J considered claims linked to the former Crown colony of Aden. In what is unusual for JR proceedings, a claim for a declaration (per Harrison) is a factual dispute which the court decides for itself on the balance of probabilities. In other words, there is no place for any deference or margin of appreciation to the SSHD. Such claims therefore require as much evidence as possible before JR is considered.

Goldsmith members have been involved in a number of such claims. For example, Pierre Georget is currently awaiting judgment in the High Court in a similar claim based on links to the Federation of Malaya (in what later became Malaysia).

High Court holds BNA 1981 discriminatory against children born outside of wedlock

In R (K (a child)) v SSHD [2018] EWHC 1834, K was born in the UK to a Pakistani mother and a British father and obtained a British passport on the basis of her father's nationality. However, Her Majesty's Passport Office subsequently revoked the passport because, at the time of her birth K's mother was married to a Pakistani national. Under s.50(9A) of the British Nationality Act 1981, a child's father is deemed to be the husband of the child's mother at the time of the child's birth, with the child's biological father only deemed to be their father for these purposes where the mother is not married at the time of birth. As such, K was deemed unable to acquire her biological father's British nationality.

K argued that this discriminated against her on the basis that she had been born out of wedlock, in violation of her rights under Articles 8 and 14. The Court (Helen Mountfield QC) accepted that s.50(9A) breached K's ECHR rights but found that it was not possible to read down the provision, instead issuing a declaration of incompatibility.

This will likely trigger a review of the legislation and possible future amendment. But for the time being s50(9A) remains in force in its current form. Pierre Georget of Goldsmith assisted Alex Burrett, K's counsel, from the early stages of the proceedings. There has also been some media coverage in a similar case, which we hope will add momentum to this issue gaining the Court's and the government's attention – see The Telegraph article of 5th September 2018.

Female Genital Mutilation Protection Orders in the Family court & immigration proceedings

In *BA & Anor v JA & Ors (female genital mutilation protection orders and immigration appeals)* [2018] EWHC 1754 (Fam), Dr Charlotte Proudman represented the parents of two girls at risk of being cut in Nigeria by family members at an ex-parte FGM Protection Order (FGMPO) hearing.

Holman J gave guidance as to when FGMPOs should be applied for in circumstances where there are ongoing immigration proceedings. Where there is a risk of FGM in another jurisdiction *only* and there are competing immigration proceedings, family courts shall decline to make FGMPOs until immigration proceedings have concluded. It is not for the family courts to intervene in decisions that shall be taken by the immigration tribunals. Moreover, there is no "immediate" risk of FGM in cases where the risk is present overseas and there is no foreseeable risk of the children residing overseas.

Only when immigration appeal rights have been exhausted and the SSHD has issued removal directions can an FGMPO be considered by the family courts. However, this will give rise to (a) complex issues of extraterritoriality; and (b) questions regarding how the family courts will approach findings of immigration tribunals and/or the SSHD that there is no risk of FGM upon return.

Tier 1 (Entrepreneur) applications: using evidential flexibility and the common law principle of fairness

Samina Iqbal has been granted permission to apply for JR in a Tier 1 (Entrepreneur) case following an oral renewal hearing before UTJ Perkins on 6th September 2018. Permission was granted on the basis that the SSHD's failure to request missing documents, which the Applicant had clearly evidenced in his application, fell foul of the common law principles of fairness.Only when immigration appeal rights have been exhausted and the SSHD has issued removal directions, can an FGMPO be considered by the family courts. However, this will give rise to (a) complex issues of extraterritoriality; and (b) questions regarding how the family courts will approach findings of immigration tribunals and/or the Secretary of State for Home Department that there is no risk of FGM upon return.

Another success in a 322(5) tax case for Goldsmith Chambers

Frances Allen was recently successful in a 322(5) Judicial Review case before the Upper Tribunal. The substantive hearing in R (on the application of Umar Farooq Faisal) v SSHD (JR/6941/17) took place on 18th July 2018 at Field House before Mr Justice Lewis. The challenge was brought to the decision of the SSHD to refuse the applicant indefinite leave to remain as a Tier 1 (General) Migrant with reference to Paragraph 322(5) of the Immigration Rules. The application for Judicial Review was granted with an ex tempore judgment delivered on the day and the SSHD's decision to refuse indefinite leave to remain was quashed. The SSHD was also ordered to pay the applicant's costs.

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