IMMIGRATION LAW UPDATE

Summer & Autumn 2019, Goldsmith Chambers

UPCOMING SEMINARS

Goldsmith barristers will be speaking at a number of forthcoming events:

AstenJ Immigration Law Conference (6 hour CPD)

- *Sat 12 Oct 2019, 9.45 – 5.15 @ BPP London*

Immigration Law Friends Essential Updates (7 CPD)

- *Thurs 10 Oct 2019, 9 – 4:30 @ Manchester University*
- *Thurs 17 Oct 2019, 9 – 4:30 @ Birmingham Priory Rooms*
- *Thurs 24 Oct 2019, 9 – 4:30 @ London Conway Hall*

The following members of chambers will be speaking:

Anthony Metzer QC
Samina Iqbal
Jane Heybroek
Sarah Pinder
Anton Van Dellen
Bronwen Jones
Pierre Georget

Please follow the links above for more information.

RETURN OF THE POST STUDY WORK VISA?

The Prime Minister has unveiled plans to re-introduce a new visa allowing students who successfully complete their degree courses to remain in the UK and work for up to 2 years post qualification.

Although no precise details have yet emerged of the new visa route and its requirements, this is a welcome change in tack from the previous policy of the Home Office, which led to the scrapping of the Tier 1 (Post Study Work) visa by Theresa May in 2012 amidst (largely unfounded) suspicions that large numbers of students were subsequently overstaying unlawfully in the UK.

> *"Britain has a proud history of putting itself at the heart of international collaboration and discovery… Breakthroughs of this kind wouldn't be possible without being open to the brightest and the best from across the globe to study and work in the UK."* Prime Minister Boris Johnson

This latest shift, which carries the support of the Business Secretary, the Department of Education and the majority of UK academic institutions, aims to keep the country competitive in the global market and to continue to attract international students to the UK, along with the many benefits they bring to our universities and our wider economy.

It is perhaps refreshing to see hints of a somewhat less hostile approach to UK immigration policy from other branches of government than the one we have become accustomed to seeing from the Home Office. It remains to be seen how this particular visa route will work in practice but it is at least a positive sign and a step in the right direction.

TIER 2 CHANGES: TAKEAWAY SERVICE NO LONGER A BAR

In the most recent Statement of Changes, which come into effect on 1 October 2019, the government has made some positive changes to work routes and the Tier 2 rules.

These include widening the scope of the Shortage Occupation List and finally removing the requirement for retaurants which stipulated that, in order to sponsor chefs from outside the EU, they were not allowed to offer a takeaway service. The requirement had long been the cause of bemusement following the rise of online delivery apps and the restaurant sector's growing reliance on online sales to drive business, even at "higher end" establishments known for offering fine dining services. Thankfully this will no longer be a problem for those business owners seeking to sponsor skilled chefs.

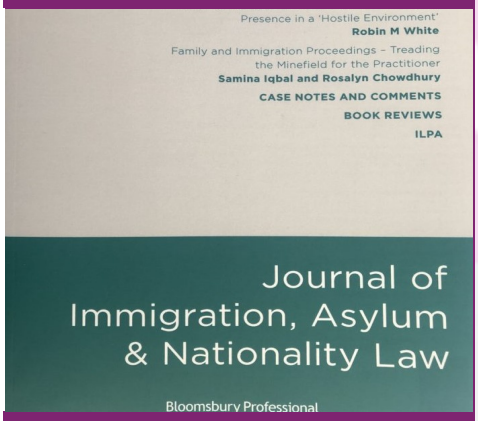
Other changes include exempting PHD level occupations from the annual 20,700 limit on visas for skilled workers, permitting certain work-related absences for the purposes of ILR and the usual modification of minimum salary rates in the codes of practice in Appendix J.

Samina Iqbal co-authors article on immigration and family law

Samina Iqbal has co-authored a comprehensive article for those practising in the areas of immigration and family law.

The paper addresses in particular the issues of confidentiality and disclosure which often arise where there are parallel proceedings and attempts to give practitioners the tools needed in both jurisdictions.

The article is entitled "Family and Immigration Proceedings – treading the minefield for the practitioner" and is published in the highly-regarded Immigration, Asylum and Nationality Law Journal (IANLJ; vol 33, no 3, 2019, 240-258). You can access the link for the journal here.



LEGAL500 RANKS GOLDSMITH CHAMBERS

Goldsmith's immigration team is very proud to have been ranked at Band 3 in the latest edition of the Legal 500. Comments included:

Goldsmith Chambers is 'committed to defending the rights of clients' in immigration crime, family, and wider public law matters, and 'is very experienced and knowledgeable in the area of immigration law, as well as human rights and EU regulation' according to instructing solicitors.

The team is 'very active with sharing their knowledge as they organise regular seminars and will very often advise on cases pro bono'. Counsel are 'very organised, competent, and responsive'. Senior immigration clerk Neil Dinsdale is 'always ready to assist and advise on the availability of counsels and is extremely efficient'.

In addition to Chambers' ranking, we are extremely proud to announce individual rankings in Immigration for the following members of Chambers:

Leading Silks:
Band 2 – Anthony Metzer QC *"A razor-sharp silk that has leading knowledge in immigration and nationality matters."*

Leading Juniors:
Band 2 – Charlotte Bayati *"She has an outstanding reputation in London for her representation in asylum, immigration and human rights cases which contain an alleged abuse of executive power."*

Band 3 – Sanaz Saifolahi *"She is exceptionally strong in cases involving EU freedom of movement and human rights law."*

Band 4– Guy Davison *"One of the most hardworking barristers with an in-depth knowledge of the law."*

Samina Iqbal *"Knows immigration law inside-out and is impressive on paper as well as on her feet."*

Sarah Pinder *"She has a very effective, calm and considered approach in advocacy, an attribute which is often well-received by judges."*

Alexis Slatter *"He is a no-nonsense advocate and very effective as well."*

RECENT CASELAW NEWS

Court of Appeal overturns bizarre conviction for contempt against unsuspecting paralegal

Re Nasrullah Mursalin[2019] EWCA Civ 1559 concerned the case of Mr Mursalin, a supervised caseworker in a firm of solicitors with aspirations for the Bar, who inadvertently disclosed confidential family court documents in a client's immigration appeal.

Under section 12 of the Administration of Justice Act 1960 and Rule 12.73 of the Family Procedure Rules, the disclosure of such documents amounts to contempt of court unless the Family Court has given permission. The resident family judge sitting at Reading, HHJ Moradifar, was so unimpressed with the unlawful disclosure to the IAC that he convened contempt of court proceedings, found Mr Mursalin in contempt and committed him to prison for 6 months (which he suspended). This all occurred in a day, without any written notice and much to the astonishment of Mr Mursalin, who had been supervised throughout the litigation by a solicitor and only attended the family court at the request of his supervisor. Mr Mursalin appealed to the Court of Appeal and the Court noted numerous errors in the conduct of the contempt proceedings quashed the order of committal.

Nevertheless, the case serves as a very timely reminder of the dangers surrounding disclosure of documents from parallel family proceedings. Practitioners take serious note and can delve further in the recent article co-authored by Samina Iqbal cited above.

Banger: all round success for EFMs as UT reaches final decision

The Upper Tribunal has finally promulgated its decision following the reference to the CJEU and the latter's landmark 2018 decision (covered widely in previous editions of this newsletter).

In *Banger (EEA: EFM - Right of Appeal)* [2019] UKUT 194 (IAC), despite an invitation from the SSHD to dismiss her appeal on the grounds that the issues had become academic following the amendment subsequently made to the 2016 Regulations, the UT proceeded to issue very helpful guidance on all Extended Family Member (EFM) cases and rights of appeal, regardless of when they were refused.

In brief, the UT held that, although the amendment made to the 2019 Regulations on 29 March 2019 did not have retrospective effect, it is open to those EFMs who were refused prior to that date to request a new decision from the Home Office, which should now generate a right of appeal. Alternatively, they can invoke the principle of direct effect in EU law and apply to the First-tier Tribunal under rule 20 of the 2014 rules for an extension of time to file their notice of appeal.

This decision therefore represents a further success in what has been a truly groundbreaking case for applicants seeking to rely on *Surinder Singh* rights and for all EFMs who, until then, had found themselves without a statutory right of appeal and having to resort to an extremely costly and difficult judicial review claim in order to establish their rights of residence in the UK. As previously observed, this is hopefully the last that we will hear of EFMs being denied a right of appeal following the extremely controversial case of *Sala* in the Upper Tribunal in 2016 and the government's subsequent change of position after *Sala* and its subsequent eagerness to amend the Regulations to limit appeal rights.

Throughout the litigation, including in the CJEU, Ms Banger was represented by Goldsmith Chambers' Anthony Metzer QC and Sanaz Saifolahi.

Guidance from the Upper Tribunal on PTA applications and time limits

In a flurry of separately reported decisions, the Upper Tribunal has sought to clarify various technical procedural matters relating to applications for permission to appeal (PTA) and the effect of time limits in specific sets of circumstances.

In *Bhavsar (late application for PTA: procedure)* [2019] UKUT 196 (IAC), it was held that, where an application for PTA to the First-tier Tribunal has been refused (or not been admitted) for being out of time, in any subsequent renewal (whether that is in time or not), the Upper Tribunal must determine whether it is in the interests of justice to admit the application. So, as far as practitioners are concerned, it should include a specific application for the Upper Tribunal to admit it out of time.

In *Durueke (PTA: AZ applied, proper approach)* [2019] UKUT 197 (IAC), the Upper Tribunal explained that, where a point is raised in an application for PTA that was not considered by the FTT (e.g. a *Robinson* obvious point that should have been considered), the evidence required to establish that point must actually have been before the FTT. The UT also felt it appropriate to remind us that grounds of appeal should amount to more than a simple disagreement with the decision, even where characterised as misdirections of law.

In *Smith (appealable decisions; PTA requirements; anonymity)* [2019] UKUT 216 (IAC), it was explained that parties who succeed in FTT appeals on some grounds but fail on others are required, if the SSHD seeks and obtains permission on the former grounds, to raise the latter matters early and, if necessary, to obtain permission to appeal if they wish to argue the issues on which they lost in the FTT.

So all very technical then! But it is certainly worth being aware of the procedural rules and the guidance in these decisions if making (or defending) PTA applications or risk being criticised down the line.

No change in Sudan country conditions

In *AAR & AA (Non-Arab Darfuris - return) Sudan* [2019] UKUT 282 (IAC), the Upper Tribunal examined the latest country evidence concerning Sudan and found that there was no reason to depart from previous country guidance.

In the UT's view, "the situation in Sudan remains volatile after civil protests started in late 2018 and the future is unpredictable". Tribunals should therefore still follow *AA (non-Arab Darfuris - relocation) Sudan CG* [2009] UKAIT 00056 and *MM (Darfuris) Sudan CG* [2015] UKUT 10 (IAC).

MS: Court of Appeal leaves door open for SSHD on cessation on internal relocation grounds

In *SSHD v MS (Somalia)* [2019] EWCA Civ 1345, the Court of Appeal were critical of two helpful decisions of the UT (in *MS* itself and in *AMA*) which had found that the Home Office could not rely solely on internal relocation arguments to justify cessation of an individual's refugee status. The Court of Appeal overruled the Upper Tribunal and found that there was nothing in principle to say that cessation could not be justified on the basis of a relocation alternative, nor was it helpful to say that such arguments would not likely succeed in practice.

An issue that arises almost exclusively in the context of criminality and deportation, cessation is commonly invoked by the SSHD as an alternative argument to justify revoking refugee status and seeking to remove refugees who have committed crimes in the UK.

In Somalian cases, since the 2014 CG case of *MOJ* found that there was no longer civil war or a general risk in the capital Mogadishu, the Home Office has sought to argue that individuals can return there safely, even where (as is often the case) they arrived in the UK as very young children and have little, if any, knowledge of Mogadishu and the reality of life there.

MS and *AMA* provided helpful authorities for appellants who originated from other parts of Somalia in response to the Home Office approach to rely on internal relocation to Mogadishu (many other areas of Somalia are still accepted to give rise to a potential risk from Al Shabab and removals are only to Mogadishu). However, the Court of Appeal has overruled the UT, opening up the question of the reasonableness of internal relocation in any individual case as part of the consideration of cessation, even if it is accepted that an appellant cannot safely return to his/her home area. Although many such appellants should still have arguments based on *MOJ* to say that their relocation there would be unreasonable, unfortunately this latest decision of the Court of Appeal leaves a lot more room for Tribunals to manoeuvre and, it follows, more scope to find against appellants in revocation cases.

Vomero: 10 years' residence and "imperative grounds" in EEA deportation appeals

In *SSHD v Vomero (Italy)* [2019] UKSC 35, the Supreme Court gave its second judgment in this long-running case, following the referral of its questions to the CJEU and the latter's decision in *FV (Italy)* (Cases C-424/16 and C-316/16).

In short, the Court (Lord Reed giving the judgment) echoed the CJEU's decision and held, contrary to the previous observations of the majority in its first judgment, that permanent residence (PR) is a pre-requisite for reliance on the further enhanced protection on "imperative grounds" after 10 years' residence in the Member State. Whether a person is entitled to such protection will also depend on the level of the person's "integration" and the extent to which any criminality or periods in prison can be said to have broken the person's "integrative links" to the Member State in question. Thus it is not a simple question of residence but invites consideration of a person's overall level of integration (for which evidence of persistent criminality will obviously not be helpful).

Although the Court set out and explained the CJEU's decision, the only remaining issue in this appeal was whether or not Mr Vomero was permitted to argue his case on the basis that he had indeed acquired a right to PR. However, the Court declined to entertain that argument and remitted the case to the Upper Tribunal to decide the point.

Other cases of interest currently pending in the Supreme Court

AM (Zimbabwe) v SSHD: an article 3 case on the effect of *Paposhvili v Belgium* [2017] Imm AR 867 and a potential relaxation in the *N* approach to medical cases (hearing date 4-5 Dec 2019).

MS (Pakistan) v SSHD: a case on the relevance of Competent Authority decisions in the Tribunal's approach in asylum appeals of claimed victims of trafficking (hearing date 21 Nov 2019).

DN (Rwanda) v SSHD: a case challenging the correctness of the Court of Appeal's decision in *Draga* in unlawful detention cases (hearing date 7-8 Oct 2019).

FA (Pakistan) v SSHD: a case concerning the effect of *HJ (Iran)* and *RT (Zimbabwe)* in asylum appeals based on the risks from practising one's religious faith (hearing date TBC).

R (Pathan) v SSHD: a Tier 2 PBS case concerning whether there is a requirement for the SSHD to give notice to an individual applicant that his/her sponsor's licence has been revoked (hearing date 12 Dec 2019).

Extremely helpful recent Upper Tribunal decision in Reg 9 *Surinder Singh* cases

Following the widely covered developments in the CJEU and the Upper Tribunal in the *Banger* litigation and the extension of the Surinder Singh principle to unmarried partners (read more below about the Upper Tribunal's final decision in those proceedings), another recent and very helpful decision has been promulgated by the Upper Tribunal dealing with the approach Tribunals should adopt when applying the test under Reg 9 of the 2016 Regulations in practice.

In *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 281 (IAC), the Upper Tribunal considered the common Home Office arguments that the British citizen's residence in the relevant EU country was not "genuine" as it did not involve a "transfer of the centre of their life" and/or that the intention was purely to circumvent the immigration rules. Those arguments rely on the current wording of reg 9 and often arise in cases where the residence in the EU county was for only a relatively short time before moving back to the UK.

In summary, the Upper Tribunal held that the "centre of life" requirement in the Regulations was not part of the correct test derived from CJEU caselaw and did not ultimately matter in such cases. All that is required is for the work or self-employment carried out in that country to be genuine and effective. That is the limit of any required "intention". Further, there is no requirement to show "integration", sole residence in the EU country or a "severing of ties" with the UK.

The arguments based on the CJEU's caselaw are not new and we have been running them for a long time now. But in our experience Tribunals have tended to differ widely in their approaches, often applying Reg 9 strictly and dismissing appeals on the centre of life/genuine residence issue. So this is an extremely helpful development for those running *Surinder Singh* cases in the Tribunals and hopefully puts these questions beyond argument for the time being. Particularly helpful is confirmation that any allegation that the intention was to circumvent immigration rules is an allegation of abuse of rights, and as such the burden is on the SSHD to establish this.

Looking ahead, all *Surinder Singh* appellants accused of attempting to circumvent immigration rules, or whose residence in the EU country is simply not accepted to have been "genuine", would be well-advised to draw this determination to the Tribunal's attention.

Zambrano in the Supreme Court

As we await the decision of the Supreme Court in the linked appeals of *SSHD v Shah* and *Patel v SSHD*, which will determine the effect of the CJEU's decision in *Chavez-Vilchez*, it is worth drawing attention to a potential change in focus and emphasis in *Zambrano* cases. The *Zambrano* right of residence has always lived somewhere on the outskirts of EU law. Unlike the other rights of residence in EU law, it involves no exercise of free movement under article 21 TFEU but depends solely on the more nebulous right of EU citizenship in article 20, i.e. the right to reside in the EU.

The caselaw has always recognised that, in order to engage article 20, the effect of the immigration decision must be to deprive the EU citizen of that right of residence, i.e. by forcing, compelling or obliging the EU citizen to leave the EU. Where leaving the EU is not a compulsion but merely a matter of choice, the decision does not engage EU law and there is no right of residence.

The question that continues to be asked since *Zambrano* is where to draw the line: to define what amounts to compulsion rather than mere choice. Previously, the Regulations were premised on the notion that, where another person with permission to be in UK could look after the British citizen, these "alternative arrangements" meant that there was no compulsion. It is then a matter of choice.

In *Chavez-Vilchez* however, the CJEU held that simply because a child of a non-EU citizen parent has another parent with whom they could theoretically live and therefore remain in the EU, this was not determinative of compulsion vs choice question. It is merely one relevant factor in the overall evaluative analysis, together with issues such as the nature and degree of dependency, the right to family life and the child's best interests.

As a result of that decision, the 2016 Regulations were amended to remove this as a strict requirement. However, the question of the correct test to apply in practice remains in issue. It is hoped that the Supreme Court will lay down guidance which signals a slight relaxation on the test in *Zambrano* cases.