IMMIGRATION LAW UPDATE

Spring 2019, Goldsmith Chambers

UPCOMING SEMINAR: IMMIGRATION UPDATE

WED 8 MAY 2019

Goldsmith Chambers are hosting a series of seminars covering recent developments and cases in the immigration, EU and asylum law fields.

Speakers Anthony Metzer QC, Alexis Slatter, Pierre Georget and Lawrence Youssefian will cover topics including:

- *Banger* and the consequential amendments to the EEA Regs
- 322(5) tax discrepancies and the *Balajigari* appeal
- *KV (Sri Lanka)*: medical evidence in asylum appeals
- Children, reasonableness and the fallout after *KO (Nigeria)*

The seminars will be held at BPP (Red Lion Street) and will start at 6:00pm.

For further information and to book places before they fill up, please contact Brogan Smith:

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TOEIC: PRESSURE BUILDING ON HOME OFFICE

The national media has been focusing in on the plight of those accused of cheating in English language tests in what is being described as a scandal to rival *Windrush* and more evidence of the UK's unfair and hostile approach.

Those reading will be familiar with these stories and will probably have handled such cases, many of which will have been successful on appeal to an independent judge. However, despite the bad press and pressure not only from politicians but also from the courts (see, for example, *Ahsan*), the Home Office is maintaining its position in many of these cases and very little has been done to address the issue. Home Secretary Sajid Javid has responded to the criticism, indicating that an internal review is still being conducted and that he has "listened to the points raised... and has asked for further advice."

> *"a bigger scandal than Windrush in terms of the number of individuals removed from the country and whose livelihoods are being destroyed by anguish and despair."* Mike Gapes MP

This scandal has been with us for years now. The Panorama documentary was aired in 2014 so it is difficult to see what has taken the government so long. And this new willingness to review in the face of media pressure bears little resemblance to the position of the Home Office at ground level, where we continue to see strongly defended claims and arguments to distinguish *Ahsan*.

It is estimated that about 30,000 people had their leave cancelled or curtailed in the wake of the ETS scandal on the back of what has repeatedly been described by judges as flimsy evidence. We at Goldsmith have been successful in a majority of cases so we urge anyone affected to seek specialist advice.

TIER 1 CHANGES: BEGINNING OF THE END FOR THE PBS?

On 29 March 2019, the government finally closed the Tier 1 (Entrepreneur) category. With that came the introduction of a new set of rules. Appendix W "Immigration Rules for Workers" appears to be designed eventually to overhaul all visa categories related to working in the UK, possibly replacing Tiers 2 and 5 as well. However, no further changes have yet been announced.

The immediate change is that there is now no obvious route to encourage entrepreneurs who wish to set up in the UK and invest their own funds into the economy, creating businesses and jobs. The apparent successor to the Tier 1 Entrepreneur route, known as the "Innovator" category, is restricted to those who receive endorsement from various named incubator and investment schemes. The problem is that no-one appears to know how this will work in practice, including, it seems, many of the endorsing bodies themselves.

Sarah Pinder has updated her Tier 1 Entrepreneur full-day course with MBL Seminars to include the new updates and will be delivering this in London on 10 May 2019.

Samina Iqbal and Kezia Tobin present Lexis Nexis webinar

Samina Iqbal and Kezia Tobin present the latest developments in immigration law in a new LexisNexis webinar released on Wednesday 1st May.

In the hour long update, Samina and Kezia discuss the Supreme Court cases of *KV* on scarring in asylum appeals and *KO* on children's best interests in removal and deportation cases. It also takes viewers through several other significant caselaw updates, from ETS and PBS cases through to EEA challenges for EFMs.

With helpful power point slides which are viewed alongside the video, the update can be accessed via the LexisNexis website here.

Viewers can access a discount by using this code: GOLDSMITHCHAMBERS20.

More upcoming Goldsmith Events

- Wed 8 May 2019
  Immigration Law Seminar
  @ BPP (Holburn)
  (see above for more info)
- Thurs 23 May 2019
  Law Friends Immigration London Spring Conference
  @ Conway Hall
  Follow this link for more info and a list of speakers/topics.

EFM APPEAL RIGHTS, TOO LITTLE TOO LATE?

The government has finally given up its fight to take away the appeal rights of extended family members of EU citizens. By an amendment to the 2016 EEA Regulations, EFMs once again now have a right of appeal to the FTT.

The amendment was brought in following the success of *Banger* in the CJEU. Represented by Goldsmith's Anthony Metzer QC and Sanaz Saifolahi, Ms Banger succeeded in extending the Surinder Singh route to include EFMs of British citizens and the decision has now led to even more monumental changes to the post-*Sala* procedural regime, where the only remedy was JR.

> *In regulation 2(1) (general interpretation), in the definition of "EEA decision", in the words following sub-paragraph (d), omit "a decision to refuse to issue a document under regulation 12(4) (issue of an EEA family permit to an extended family member), 17(5) (issue of a registration certificate to an extended family member), or 18(4) (issue of a residence card to an extended family member)".*

And with those simple words, there is no longer any bar preventing EFMs from exercising a right to appeal an "EEA decision" under Reg 36.

This is hopefully the end of a sorry story of attempts to limit individuals' rights to effective remedies by a government that performed a quite spectacular U-turn over appeal rights for EFMs following *Sala*, proceedings in which the SSHD never actually sought to dispute the issue until the UT oddly raised it for the first time by its own motion (contrary to the position of both parties).

Unfortunately this may have come too late in the day for EFMs who were left with only costly and difficult JRs to pursue their right to be here, many of whom may simply have given up. It remains to be seen what further guidance is given in relation to those affected. It is hoped that the UT's long-awaited final decision in *Banger* will address these issues and the practical steps available for those affected, so **watch this space**.

RECENT CASELAW NEWS

Victory in the Supreme Court for torture victims over the issue of "self-infliction by proxy"

In the helpful recent decision of *KV (Sri Lanka)*, the Supreme Court considered the issue of "self-infliction by proxy" (SIBP) in asylum appeals involving past torture and its significance when assessing the evidence of medical experts in such cases.

KV was a Sri Lankan national who claimed to have been a victim of torture at the hands of the authorities during the country's civil war. Despite numerous adverse credibility points which emerged from his account, his appeal turned on the medical scarring report. Both the UT and the CA had attached little weight to the report and had relied on an alternative explanation of SIBP as the cause of his scarring.

The Supreme Court, adopting the dissenting judgment of Elias LJ in the CA, considered SIBP so unlikely a possibility in practice, and particularly given the nature of *KV*'s scars, that it had not been open to the lower courts to reject the report on that basis. It remains to be seen how *KV* will be applied in other cases but it is certainly a helpful authority in cases where reliance is placed on medical reports purporting to corroborate an appellant's account of the cause of scarring, particularly where compliant with the Istanbul Protocol.

The successful *KV* was represented by Charlotte Bayati of Goldsmith Chambers, instructed by Arun Gananathan of Birnberg Peirce.

Developments since *KO (Nigeria):* children, reasonableness and a sorry state of affairs

In October 2018, the Supreme Court case *KO (Nigeria)* (in which Charlotte Bayati of Goldsmith Chambers also appeared) was expected to clarify much of the confusion on how to interpret and apply s.117B(6) and s.117C of the 2002 Act. In a nutshell, the Supreme Court held that when considering what is 'reasonable' or 'unduly harsh', the focus is on the child or partner alone. Save for the 'real world' fact that the Appellant is required to leave the UK, his/her previous conduct or reasons behind his/her removal are immaterial.

However, judging by the number of Upper Tribunal cases that have been reported recently, it appears that, regrettably, the Supreme Court's attempt at a 'simpler and more direct approach' has failed in practice.

It particular, it remains unclear whether there is a need to show 'powerful reasons' to displace the starting point that it would not be reasonable to expect a qualifying child to leave the UK: *MA (Pakistan)*. *MA* was followed by the Upper Tribunal in *MT and ET*. What *KO* does not do is overrule *MA* or *MT & ET*. We at Goldsmith Chambers have had a number of successful cases in the Tribunals arguing the need for powerful reasons to displace the starting point. This approach appears to be consistent with the Home Office's own policy (updated after *KO*) that the starting point is that a qualifying child would not be expected to leave the UK, though it suggests (we think wrongly) that if both parents are required to leave then the qualifying child would also be expected to leave the UK.

One concern is that the Home Office's policy now appears to draw no distinction between British children and children who have resided in the UK for more than 7 years. This may lend some support to the suggestion that, at least in the Home Office's view, identical weight can be attached to how unreasonable it is to expect British and non-British children with 7 years' residence to leave the UK.

In relation to s.117B(6), in the most recent post-*KO* case (*JG*), the UT rejected the SSHD's attempt to read down the section by arguing that that provision only applied if the qualified child was actually expected to leave the UK. The UT held that the effect of s.117B(6) is to require decision makers to hypothesise that the qualified child would leave the UK *"even if this is not likely to be the case"*. This was recently approved in the Court of Appeal case of *AB (Jamaica)*, which is the first Court of Appeal case to consider *KO*.

In general, given the way in which *KO* disposed of the appeals, it is safe to assume that it is easier to show that it would be unreasonable for a qualifying child to leave the UK if only one parents is required to leave. If both parents are required to leave, it may be that stronger factors that demonstrate unreasonableness of relocation are needed (though there is no authority on this point as of yet).

As for s.117C, things are a little more muddled and we can expect further elaboration on the interpretation and application of this provision. So far, in *RA*, the UT reaffirmed the unhelpful *NA (Pakistan)* and held that s.117C(6) also applied to criminals sentenced to less than 4 years. When considering 'very compelling circumstances' under s.117C(6), *MS* held that the seriousness of the particular offence for which the foreign criminal was convicted should be taken into account. Further, determining the seriousness of the particular offence "will normally be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case" (see also *RA*).

Watch this space for further developments on both s.117B and s.117C of the 2002 Act.

Fallout from *Kiarie:* UT continues to hold firm in video-link appeals

CJ (international video-link hearing: data protection) Jamaica [2019] UKUT 00126 is the latest UT decision concerning s.94B certificates following *Kiarie* and the subsequent watering down of the Supreme Court's decision by both the CA (*Nixon*) and the UT (*AJ*). In *CJ*, a barrage of novel and interesting arguments were made as to why the out of country appeals process was unlawful in arguable human rights appeals, including that it breached the GDPR and was discriminatory. The UT rejected them all and dismissed the appeal.

This is unlikely to be the last word on the issue and it could well end up going back to the Supreme Court in due course. But the ongoing problem of what to do with all the appellants deported pre-*Kiarie* in a post-*Kiarie* world continues to plague the IAC. As far as we know, not one "*AJ* direction" has been made to return any of these appellants who were deported pursuant to s.94B certificates, which (it is worth remembering) the Supreme Court in *Kiarie* found to be in breach of article 8. Many of these appeals have now been pending for over 2 years, with couples separated and children left without a parent, without affected rights being independently scrutinised by a court. Many may well yet be found to have been unlawful under the HRA. But, despite that, they are effectively being delayed and used as test cases for the SSHD to roll out a brand new (and hugely expensive) procedure for out of country appeals. These appeals are a blot on the IAC's caseload. Such long delays in human rights appeals are arguably sufficient in themselves to make the whole process unlawful.

Balajigari: para 322(5) in tax discrepancy cases – a victory finally?

On 16 April 2019 the Court of Appeal handed down judgment in Balajigari & Ors. The four linked appeals arose out of the Home Office's controversial use of para 322(5) to refuse settlement to applicants due to discrepancies between earnings declared to HMRC and income reported in previous visa applications. There has been widespread concern that the Home Office has been too ready to find dishonesty without adequate evidential basis or a fair procedure and *Balajigari* brings welcome relief in three key respects.

First, the Court confirmed that an earnings discrepancy only constitutes sufficiently reprehensible conduct for the purpose of 322(5) if it is a result of the applicant's dishonesty. Carelessness or ignorance or poor advice do not meet the necessary threshold.

Secondly, the Court concluded that where the SSHD was minded to refuse ILR on the basis of alleged dishonesty, he was required, as a matter of procedural fairness, to indicate clearly to the applicant that he has that suspicion and to give the applicant an opportunity to respond. The SSHD was then required to take any such response into account before drawing a conclusion that there has been dishonest conduct. The Court did not accept that the availability of a procedure for administrative review satisfied the requirements of common law procedural unfairness, principally because fairness usually required an opportunity to make representations in advance of a decision, but also because the administrative review procedure did not permit new evidence to be adduced in response to the allegation of dishonesty.

Thirdly, the Appellants successfully argued that refusals on this basis will typically constitute an interference with Article 8 that the SSHD must therefore justify. The practical consequence of this is that a decision by the SSHD that a discrepancy in earnings is due to dishonesty will be reviewable as a matter of fact, whether in the context of a HR appeal or JR proceedings. As such, the tribunal will not be limited to a rationality review of the decision but will be required to reach its own conclusion as to whether the discrepancy was due to dishonesty.

In light of the CA's finding that the Home Office's approach in 322(5) cases was 'legally flawed', there may now be scope for applicants who have been refused under para 322(5) to challenge the refusal or ask the Home Office to reconsider the initial decision. However, the Court made clear that the defects in the Home Office's approach will not necessarily lead to a para 322(5) refusal being quashed if the tribunal finds that the result would have been the same even if the applicants had been given an opportunity to explain the earning discrepancies. The SSHD has recently applied for permission to appeal the *Balajigari* judgment so there may yet be further developments.

Alexis Slatter of Goldsmith represented Mr Kawos, one of the successful appellants.

Uncertainty surrounds Country Guidance on risk in Kabul

AS (Safety of Kabul) Afghanistan CG, the very unhelpful CG case last year which found that internal relocation to Kabul would generally not be unreasonable for healthy single men, is currently pending in the Court of Appeal. A preliminary judgment was handed down in February ([2019] EWCA Civ 208) concerning the correction of certain factual errors in the UT's reasoning and a final decision is now expected to follow in the coming months.

In fact, it may be that we now need new country guidance altogether on Kabul. The UNHRC's latest conclusions from August 2018, post-dating *AS*, are that relocation is not generally available to Kabul in view of the more recent deterioration in the security and humanitarian situation in the capital. This represents a shift from its previous report from 2016. Given the UT's strong reliance on the UNHCR's 2016 report to support the conclusions in *AS*, appellants would be well advised to draw these more recent developments to the attention of judges and invite them now to consider the *AS* country guidance in that more helpful light.

UT reports OISC rep for undertaking JR work (badly)

R (Hoxha & Ors) v SSHD [2019] UKUT 00124 (IAC) is a salient reminder to OISC firms about the limits of their authorisation to conduct litigation in JR claims. It is also yet further condemnation, following the *Hamid* line of cases, of spurious claims brought on generic and hopeless grounds and a sign that it is no defence to say a claimant was formally acting as a litigant-in-person. The UT considered a number of claims by OISC-regulated Zafar Law Chambers and referred the individual concerned to the OISC.

This is another clear warning to those acting in JR matters. OISC firms need special authorisation and must instruct counsel authorised to conduct litigation. More generally, the repeated use of unfocused and poorly drafted grounds risks intervention by the courts and regulators. We at Goldsmith are specialists in immigration JR work and we frequently advise on merits and procedure at the early stages of proceedings. Given the views of the courts, this first step in the process of bringing JR claims is fast becoming more and more vital.

"New matters" under s.85: to adjourn or not to adjourn

Since the amendment to s.85 of the 2002 Act, many would be forgiven for wondering what might constitute a 'new matter' requiring the SSHD's consent before the Tribunal could take the new matter into account. Whilst one may have expected the meaning of 'new matter' to be construed very restrictively to prevent the Tribunal from limiting its own powers in an appeal, recent cases suggest otherwise.

In *OA & Ors*, a Presidential Panel held that satisfying para 276B of the Rules for ILR during the course of one's appeal is a new matter. In other words, if you make an in-time application which was refused and then accrue 10 years continuous lawful residence whilst awaiting for a hearing date, like many do, the Tribunal requires the Home Office's consent if it wants to take that into account. Some may find this judgment particularly troubling given the length of time it takes for an appeal to be listed for hearing. Those who may be in a similar position to the Appellants in *OA* would be well advised to make a statement of additional grounds without delay. As made clear in *OA*, a statement of additional grounds under s.120 of the 2002 Act should be made formally in writing to the Home Office (not simply included in the grounds of appeal).

In the subsequent case of *AK & IK*, it was held that relying on a criteria that relate to a different category of the Rules from that relied upon in the initial application is a 'new matter' if it requires a new decision from the Home Office. In *AK & IK*, the Appellants were relying on the same factual matrix but on a new provision of the Rules that was introduced subsequent to their application. The Appellants relied on the case of *Mahmud* to argue that since there was no change in the factual matrix, the introduction of new criteria could not constitute a new matter. The UT disagreed because it was held that a new judgment on the facts was necessary.

Guidance from the Court of Appeal on what constitutes a 'new matter' under s.85 would be welcome, not least to restore some power to the Tribunals so that all relevant facts in a person's human rights or asylum claim could once again be taken into account. After all, that was surely the purpose behind the whole "one stop" appeals process. Otherwise, we may risk seeing fundamental human rights claims determined artificially on fragmented facts.

No room for the idea of "home-grown criminals" in deportation appeals, says Court of Appeal

The CA has stayed true to form in yet another unhelpful criminal deportation decision. *Binbuga (Turkey) v SSHD [2019] EWCA Civ 551* concerned a 28 year old man who had been in the UK since the age of 9. The first question was whether he was *"socially and culturally integrated"* under the private life exception. The FTT had allowed his appeal, finding that his involvement in a London gang was itself evidence of his integration, albeit into some of the less savoury aspects of UK society. Unsurprisingly, neither the UT nor the CA agreed. Social and cultural integration extends only to lawful activity, i.e. *"clubs, societies, workplaces or places of study, but not association with pro-criminal peers"*. Quite apart from the surprising finding that the appellant had not integrated despite over two thirds of his life spent here, one may wonder about a potential disconnect between the version of UK society envisaged by the Court of Appeal and the unfortunate reality of UK society in some of our poorest communities and the pressures and challenges many of these youngsters face.

A further interesting question which arose in the appeal was whether there was any place in deportation cases for the idea of (especially young) criminals being "home grown" and so, at least to some extent, the UK's responsibility. Again, although perhaps more surprisingly, the Court found that such a description is "unhelpful" and "liable to mislead". Quite where that leaves the State's duty, recognised in *Maslov*, to facilitate the re-integration of youth offenders, it is difficult to say. *Maslov* was not cited in the judgment. Moreover, such a stance belies an unfortunate naivety that the mistakes of young people who succumb to the negative pressures can not, in principle, be placed in the context of the reality they actually have to face in their lives.

Good character guidance: applications to be refused for overstaying in the last 10 years

The most recent version of the Home Office's policy guidance on the "Good Character" requirement for naturalisation has made it clear that anyone who has overstayed at any point in the 10 years before the application will be refused British citizenship. This will apply across the board, the only exceptions being where applications were subsequently made within the period specified by para 39E of the rules or where the overstaying was not the applicant's fault. Unless any of those apply, applicants can expect their applications to be refused.

This represents a dramatic and concerning shift in policy by the Home Office. Previously, the policy provided that overstaying would rarely, on its own, be sufficient justification to refuse citizenship. Following a change in late 2014, this is the first time that this new approach to overstaying has been explicitly stated. Anyone advising on the naturalisation process should take note.