# IMMIGRATION TEAM UPDATE

Winter 2018, Goldsmith Chambers

GOLDSMITH CHAMBERS

## THE DIGITAL AGE OF IMMIGRATION APPLICATIONS

In November 2018, the Home Office switched the majority of immigration applications to online forms. Much of the processing is again handled by third party contractors, which is far from ideal.

One benefit that we foresee at Goldsmith Chambers is that application forms will now automatically be updated online and so applications will no longer be rejected as 'invalid' for simply using old versions of the forms. The same rationale applies to payments since these will be taken before the application can be submitted thus avoiding invalidity of applications due to purported non-payments.

However it remains to be seen how user friendly the online experience will turn out to be.


# TEAM NEWS

## JUDICIAL APPOINTMENTS

We are delighted to announce that **Anthony Metzer QC**, a member of the team and Head of Chambers, who was appointed in September 2018 as a Deputy High Court Judge for England and Wales, has also been assigned as a Judge for the Immigration and Asylum Chamber of the Upper Tribunal. With this appointment, he is authorised to preside over Judicial Reviews in the Upper Tribunal.

We are also very pleased to announce the appointments of **Joseph Plowright** and **Sarah Pinder** in January 2019, as First-tier Tribunal Judges (part-time) to the Immigration and Asylum Chamber. We welcome the addition of two experienced immigration practitioners to the Bench.

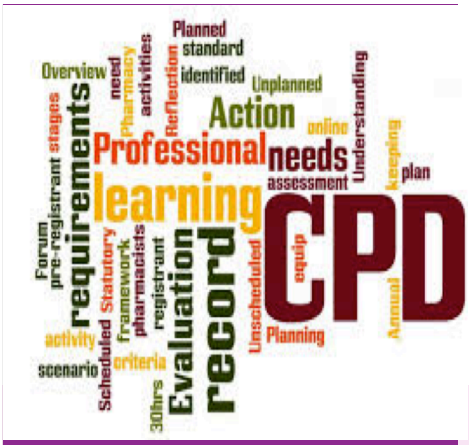
## WE CONTINUE TO GROW

The immigration team are very pleased to welcome Lawrence Youssefian, who joined chambers on 2nd January 2019 from Richmond Chambers. Lawrence specialises in immigration and worked for three years at a boutique immigration and human rights law firm as an in-house appeals advocate prior to coming to the Bar. Lawrence also previously interned for seven months at the International Criminal Court in The Hague.

## LEGAL 500 2018 EDITION

We were truly delighted to learn that for the first time, the team as a whole has been recommended in Band 4 of the Legal 500 immigration (including business immigration) category. The ranking reads as follows:

TEAM – BAND 4 – *"Goldsmith Chambers is considered 'an up-and-coming set for immigration and asylum work, with a number of very capable barristers'. Charlotte Bayati was part of a team instructed on an appeal to the Supreme Court which considered how the test of reasonableness should be applied when determining the removal of a child who has been resident in the UK for seven years or more. In a separate appeal, Guy Davison was instructed in case that considered the status and level of criminality required to tip the balance towards the removal of an*




## Upcoming Goldsmith Events

- Goldsmith Chambers joins Astenj Professional Training's Immigration Conference – 9th February.
- Central Law Training's Immigration Conference chaired by Sarah Pinder with Goldsmith Chambers speakers and other expert – 15th May

*individual from the UK."*

Three of our members have also been recommended again as leading juniors:

Band 3 – Charlotte Bayati – *'A very efficient and compassionate barrister who will go the extra mile for her clients.'*
Band 4 – Guy Davison – *'A fearless advocate and one of the shrewdest and most savvy barristers I know.'*
Band 4 – Sarah Pinder – *'An excellent advocate with a high success rate because of her aptitude and preparation.'*

# RECENT PUBLICATIONS & TRAINING

Earlier in 2018, Frances Allen became a co-editor of the Immigration Law Handbook by the Oxford University Press and saw the 10th edition published. The Handbook is recognised as the leading reference work both by the judiciary and the immigration bar, providing all relevant immigration and asylum legislation and related materials in one volume. Updates in the 10thEdition include the text of the Immigration Act 2016, the 2016 changes to the Immigration Rules and the EU Trafficking Directive.

On Tuesday 23rd October in the evening, Goldsmith Chambers celebrated the launch of the new edition. The event, co-hosted with One Pump Court at the historic Conway Hall, welcomed a wide range of attendees including immigration judges, barristers and practitioners. Goldsmith Head of Chambers Anthony Metzer QC paid tribute to the Handbook's original authors Margaret Phelan and James Gillespie and to the wealth of expertise brought to the 10th Edition by editors Frances Allen of Goldsmith Chambers, Julia Gasparro of One Pump Court and Jo Swaney, Immigration Judge of the First-Tier Tribunal.

The authors and editors were honoured to welcome guest speaker Mr Justice Lane, President of the Immigration and Asylum Chamber of the Upper Tribunal. President Lane emphasised how essential the Handbook continues to be to both practitioners and the judiciary, pointing to its ubiquity on Tribunal benches. He also highlighted the huge changes the field of immigration law has seen since the first edition of the Handbook was published in 1997 and the vital role the book plays in bringing together this ever increasing body of materials. More information on the 10th edition of the Immigration Law Handbook can be found here, where you can also purchase your own copy.

Goldsmith's immigration team were otherwise busy in late autumn and early winter with various training sessions. The team co-hosted three immigration conferences with the Law Friends Society in October taking place in Manchester, Birmingham and London. Later that month, Joe Plowright was invited back to Pakistan to give a day's advocacy training to students and lawyers at the Pearl Continental in Lahore. November saw two Goldsmith events. The first with the immigration and civil teams co-hosting a seminar on unlawful detention with a particular emphasis on claims lodged in the civil courts. The second organised by Dr Charlotte Proudman, co-hosted with the family team and featuring a collaboration with the NPCC to raise awareness of the new Pilot Practice Direction on Female Genital Mutilation and forced marriage in family courts. Key note speakers included Rt Hon Sir Andrew McFarlene, the President of the Family Division. Two webinars were also filmed with Lexis Nexis: Samina Iqbal and Sarah Pinder on immigration law and the hostile environment (access the webinar here) and Anthony Metzer QC and Sanaz Saifolahi

on Brexit and the consequences for business immigration (access the webinar here). You can receive a 20% discount if you email webinars@lexisnexis.co.uk quoting the discount code SPEAKER20.

# NOTABLE CASES & UPDATES

### A child's best interests, the reasonableness test, Paragraph 276ADE and s.117B(6) of the 2002 (as amended) considered by the Supreme Court

On the 24th October 2018, the Supreme Court handed down judgment in four linked cases known collectively as *KO (Nigeria) and Others v Secretary of State for the Home Department [2018] UKSC 53*. Our Charlotte Bayati, led by Stephen Knafler QC, represented two appellants and their families linked and referred to as one of the four appellants, NS and others, in their appeal that considered the best interests of children in cases where they, or their parents, face removal from the UK. These cases arrived in the Supreme Court following the appellants' appeal from the Court of Appeal in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093.

The Supreme Court determined that the conduct of a parent is irrelevant to the assessment of the impact of the removal on a child when considering the *"reasonableness"* or, in the context of deportation cases, the *"undue harshness"* test. However at Paragraph 18, Lord Carwarth sets out that in both contexts, either through Paragraph 276ADE(1)(iv) or s.117B(6), it will be *"inevitably relevant"* to consider where the parents are expected to be since it is well established that it will normally be reasonable for the child to be with them. To that extent, Lord Carnwarth finds that the record of the parents' conduct may become *"indirectly material"*, if it leads to their ceasing to have a right to remain in the UK and having to leave. Therefore, it is only if it would not be reasonable for the child to leave with them, following such an assessment, that the provision contained in s.117B may give the parents a right to remain.

Trying to relay these principles into more practical terms, Lord Carnwarth leans on two citations from *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245 and *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874 highlighting that an assessment as to what is reasonable to expect in relation to a child needs to be undertaken *"in the real world in which the children find themselves"*, meaning against which context a tribunal is having to assess their best interests – for example, are both of the child's parents facing removal, or just one ? [19]. A more detailed note of the Court's findings can be accessed here.

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### *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58

Shortly after the publication of *KO*, the Supreme Court handed down their judgment in another long-standing Article 8 ECHR appeal. In *Rhuppiah*, the Court held that a *"precarious"* immigration status is any status short of Indefinite Leave to Remain. However, the appeal was allowed and remitted back to be considered afresh on the basis that *"financial independence"*, a factor to be considered under s.117B(3), means not having recourse to public funds. The Supreme Court also found that human rights cases can succeed outside the statutory scheme of s.117 introduced into the 2002 Act by the Immigration Act 2014. This allows judges some flexibility when deciding human rights cases.

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### *MM (Malawi) & Anor v the Secretary of State for the Home Department* [2018] EWCA Civ 2482

The team's Charlotte Bayati, led by Stephen Knafler QC, represented one of the appellants, MV in this appeal concerning the application of Article 3 ECHR to medical cases. MV suffers from PTSD and secondary severe deppression. His appeal had been dismissed by the FTT and his appeal in the Upper Tribunal was also unsuccessful. Following the ECtHR's judgment in *Paposhvili v Belgium* [2017] Imm AR 867 and the Court of Appeal's consideration of its impact in *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64; [2018] 1 WLR 2933, it had to be argued that the House of Lords case of *N* as explained in *AM (Zimbabwe)* is binding on the court, and MV could not satisfy its criteria. MV's representatives had to accept that the appeal should be dismissed but argued that the real issue was whether, because MV satisfies the criteria in *Paposhvili*, this case might be an appropriate vehicle for the Supreme Court to revisit the criteria in Article 3 medical cases. Hickinbottom LJ found that it was not on the basis that the medical evidence in MV's case was not sufficient to support a finding that his case met the said threshold. MV is looking to appeal to the Supreme Court.

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## *Banger*: Upper Tribunal hearing listed

Following the judgment of the Court of Justice of the EU (C-89/17 *Secretary of State for the Home Department v Banger*), the Upper Tribunal has now listed the matter for a hearing on 20th March 2019. The Tribunal will consider *inter alia* the wording of Regulation 9 since the CJEU found that the *Surinder Singh* principle does indeed apply to unmarried partners as well as the issue of rights of appeal in Extended Family Member ('EFM') applications. Anthony and Sanaz were both interviewed by the publishers Lexis Nexis to discuss the CJEU judgment of *Banger*. You can access the written interview here and the Times Law Report of the judgment here.

In respect of appeal rights, the SSHD has recently confirmed that he will be introducing appeal rights for EFMs, whose applications have been refused, and the 2016 Regulations will be duly amended. This announcement arises out of a test case that had been due to be heard in May 2019 and which has now been settled.

## Derivative rights under Article 45 TFEU

Chambers' Anthony Metzer QC and Sanaz Saifolahi appeared for the successful Appellant in the newly reported case of *LS (Article 45 TFEU – derivative rights)* [2018] UKUT 00426 (IAC). LS is a national of the Russian Federation and is the maternal grandmother and primary carer of S, a British National child. LS had originally entered the UK as a visitor. The parents of S are both British Nationals, who, in the course of their employment, travel extensively to other EU countries. As such, LS maintains the primary care responsibilities for S.

LS made an application for a residence card relying primarily on *S & G (C-457/12) (S v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v C)* - a judgment of the CJEU dated 12th March 2014. It was argued that in light of the parents' employment and frequent travel, LS was and had to be the primary carer for S. Alternative childcare was not a reasonable option for a number of practical reasons, including the nature and extent of the care required. The SSHD refused the application, relying on Regulation 9 of the 2006 Regulations as it then was. LS appealed and the First Tier Tribunal allowed the appeal. The SSHD then sought permission to appeal to the Upper Tribunal, which was granted.

Following an error of law hearing and a re-hearing, the Upper Tribunal reported the following as the judicial head-note:

- *In determining whether the absence of adequate provision for the childcare of the child of a Union citizen may be a factor capable of discouraging that Union citizen from effectively exercising his or her free movement rights under Article 45 TFEU, the Tribunal will need to undertake a wide evaluative assessment of the particular childcare needs in light of all relevant circumstances.*
- *It is necessary for an appellant claiming to have a derivative right of residence under Article 45 TFEU to establish a causal link between the absence of adequate childcare and the interference with the effective exercise by a Union citizen of his or her free movement rights, and the appellant will need to demonstrate, by the provision of reliable evidence, that genuine and reasonable steps have been taken to obtain alternative childcare provision."*

Despite not advancing the appeal under the EEA Regulations, it was successfully argued, by applying primary European law, that Article 45 TFEU expressly applied to these circumstances. The focus of the argument was not on the care that LS provides to S; rather, it was argued that unless LS can care for S, her parents, both British Nationals, would be discouraged from effectively exercising their Treaty Rights, on the basis that alternative childcare provision is neither practical nor reasonable in all of the circumstances.

## 322(5) highly skilled tax case reported

The Upper Tribunal has issued guidance in *R (Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5))* [2018] UKUT 384 (IAC) on how to properly decide applications from Tier 1 (General) applicants, which raise issues of dishonesty under paragraph 322(5) of the Immigration Rules. However, the Court of Appeal also heard linked cases on 23-24th January 2019 and it is thought that this guidance will be substantially reconsidered by the Court. Alexis Slatter represented one of the appellants on a direct access basis.