THE CREEPING AND CONCERNING JURISDICTION OF THE HAMID COURTS[1]

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Anthony Metzer QC, Head of Goldsmith Chambers, considers the very wide professional ramifications for lawyers and their firms of Hamid Courts and the Courts' inherent jurisdiction to ensure that lawyers act in accordance with their Codes of Conduct.

INTRODUCTION

1. The Administrative Court[2] and, more recently the Upper Tribunal[3], have determined that the Courts have an inherent jurisdiction to govern their own procedures which includes ensuring that lawyers act properly and in accordance with their Codes of Conduct. It was initially thought it may only cover immigration cases but it has become clear, it is very much alive in the civil courts too. It envisages hearings where a Judge considers a lawyer may have acted improperly in the preparation and conduct of judicial review proceedings. The jurisdiction has come to be known as the Hamid Courts after the case set out here and has potentially very wide professional ramifications for the lawyer(s) and their firms.

THE HAMID CASE

2. In R (*Hamid*) v SSHD [2012] EWHC 3070 (Admin), the Administrative Court set out its desire to employ its inherent jurisdiction to require a lawyer to attend Court to explain their actions in cases where a Judge has concluded that they may have acted improperly. An application for judicial review challenging the lawfulness of removal and for an urgent injunction had been made to the Administrative Court by a firm on behalf of a client who was due to be removed from the UK the following day.

3. In October 2012, a new version for Judicial review application for urgent consideration was introduced in response an increasing number of applications in respect of pending removals requiring immediate attention and to assist the Court with processing such claims.

4. The revised form required the lawyer to give:

   a) reasons for urgency;

[1] I would like to thank Emma Harris from Chambers for her considerable assistance with this Practice Note.
[2] R (Hamid) v SSHD [2012] EWHC 3070 (Admin)
[3] R (Shrestha & Ors) v SSHD (Hamid jurisdiction: nature and purposes) [2018] UKUT 00242 (IAC)

b) the timetable for the matter to be heard;

c) the justification for immediate consideration of the application;

d) the date and time when it was first appreciated that an immediate application might be necessary;

e) if there had been any delay, the reasons for that delay;

f) any efforts to put the Secretary of State and any interested party on notice.

5. The Judge determined that the application completed that month did not meet any of those requirements. The application was also refused as being totally without merit.

6. The Court identified that professional misconduct could arise if an application was made with a view to postponing the implementation of a decision where there were *no proper grounds for so doing*, applying R (*Madan*) v SSHD [2007] EWCA Civ 770.

7. In *Hamid* itself, the solicitor attended Court, apologised and explained that they had not appreciated that there had been a change in procedure. The Court accepted the apology but gave a stark warning that non-compliance like this would not be allowed to continue. Failure by a firm to comply with the correct procedure in future would result in the requirements for "*the attendance in open court of the solicitor from the responsible firm, together with their senior partner and the firm would be publicly named*". The Court would also not hesitate to refer persistent failure to follow the procedural requirements to the Solicitors Regulation Authority ("***SRA***").

WHEN ARE HAMID COURTS BEING CONVENED?

8. There are a wide range of circumstances in which Hamid Courts have been convened against both practitioners and firms. R (*Awuku & Ors*) v SSHD [2012] EWHC 3298 (Admin) and R (*Awuku (No 2) & Ors*) v SSHD [2012] EWHC 3690 (Admin) contain reference to six separate cases including:

a) *Hamid*: following the original Hamid case, a further application was made on virtually the same points with no disclosure of the previous application and that refusal. This was considered to be a gross breach of the duty of disclosure arising in an ex parte application. The solicitor was named and although not referred to the SRA, was required to report to the SRA what steps were being taken to ensure that a proper training programme is in hand within the firm.

b) *Murugesapillai*: in an application to stay removal, it was claimed that a suspensive appeal was pending when in fact the appeal had been lodged

late and a decision had been made not to admit the appeal. The solicitor was not referred to the SRA but the case was marked as one where there had been a grave non-disclosure and a failure to comply with the rules of court.

c) *N*: in an ex parte application for a stay of removal, the solicitors failed to disclose that in the fresh claim being advanced, the Secretary of State's position was that the evidence being relied upon had already been considered by an Immigration Judge and that the only additional document was inconsistent and unverifiable. Non-disclosure was accepted and an apology was made. The solicitor was not named or referred to the SRA.

d) *Awuku*: this concerned a judicial review to stay removal. The issue was that matters were raised in the judicial review, including the existence of a daughter in the UK and a political asylum claim, that had not been mentioned in earlier proceedings despite being known to the solicitors (by their own admission) and no explanation was given as to why those matters were not raised at the appropriate time. The explanation given was that the appeal was not reviewed by a qualified lawyer but this was not found to be a good excuse. The firm was named but the apology was accepted and no further action was taken.

e) *T&T*: this concerned a challenge to a third country certification. A change in Home Office policy meant that the argument advanced was not arguable. Counsel and solicitors provided written statements apologising profusely and for that reason were not named and no further action was taken.

9. In R (*B & Anor*) v SSHD [2012] EWHC 3770 (Admin) it was held that the applications made were "nonsensical" and were put forward by lawyers who did not have sufficient competence to practise in the relevant area of immigration law. Whilst counsel was heavily criticised for the drafting of the application, the solicitors did not avoid criticism either, through their over-reliance on counsel, as they were reminded of their duty to instruct competent counsel and to satisfy themselves independently that the arguments could properly be made to the Court.

10. In R (*Butt & Ors*) v SSHD [2014] EWHC 264 (Admin), the Court had indicated that solicitors and firms might expect to be referred to the SRA after *two or three* referrals to the Admin Court to explain their conduct. That comfort has, however, since been thoroughly rejected. The leading authority of R (*Sathivel & Ors*) v SSHD [2018] EWHC 913 (Admin) has now made it abundantly clear that the Court will consider referring a case to the SRA on the *very first* occasion that a lawyer falls below the relevant standards.

11. Although early cases following *Hamid*, did not result in a referral to the SRA, it is likely that such a referral would now be made in similar factual circumstances. In R (*Okondu and Abdussalam*) v SSHD (*wasted costs; SRA referrals; Hamid*) IJR [2014] UKUT 377 (IAC) a referral was made to the SRA where a solicitor

had signed statements of truth in judicial review proceedings which were "grossly misleading and inaccurate" and who had sought to argue in his defence that the document had been prepared by a paralegal and that he had signed it without reading its contents. He was held to have acted recklessly and in a manner likely to mislead the Tribunal. On referral to the SRA, he was fined £10,000.

12. R (*Akram & Anor*) v SSHD [2015] EWHC 1359 (Admin) involved similar misconduct in that applications were being made to the Admin Court which were totally without merit and the principal solicitor who was signing the accompanying statements of truth had failed to scrutinise them. Of additional concern was that the agreement between the solicitor and the client included an assurance that experienced counsel would be instructed but no such counsel was instructed. The firm and principal solicitor were named and the matter was referred to the SRA for investigation, however, no disciplinary action appears to have been taken.

13. Some of the reported cases since Hamid have included dishonesty and referrals to the SRA which have led to serious consequences including principal solicitors being struck off. In *Re Sandbrook Solicitors* [2015] EWHC 2473 (Admin), the firm was found to have dishonestly engaged in a course of conduct by making applications which were totally without merit in order to prevent removals of its clients from the UK. In some instances when injunctions had been granted on a urgent basis (without full disclosure to the Court of the background to the cases), the firm then failed to pursue the proceedings, thereby preventing the removal of the client but taking the matter no further. The firm was named, the matter was referred to the SRA and the principal solicitor was subsequently struck off (See: *Vay Sui IP v SRA* [2018] EWHC 957 (Admin)).

14. More recent cases have shown that all forms of misconduct can fall within the *Hamid* jurisdiction and that it is not only limited to hopeless and/or last-minute judicial review litigation. In R (*Jetly & Anor*) v SSHD [2019] EWHC 204 (Admin) the Judge was unable to proceed with a hearing. There was no signed statement of truth on the claim form, no bundle of authorities had been lodged, the trial bundle was "completely inadequate", the solicitors were not on the record and a letter from a firm purporting to be involved contained discrepancies which required resolving. At the next hearing, there was no evidence that the Claimants had directly authorised any firm to act on their behalf; the solicitors whose name appeared on the record said that they were never instructed to bring the proceedings and a second firm had never formally come on the record. The matter was referred to the SRA and the DPP to investigate whether reserved legal activities had been carried out by a person or persons without the requisite authority. Similarly in *R (Hoxha) (Representatives: Professional Duties) v SSHD* [2019] UKUT 124 (IAC) there was a referral to the OISC to consider whether a firm had been acting beyond its OISC registration in seven judicial review cases.

15. More recently, in R (*DVP & Others*) v SSHD [2021] EWHC 606 (Admin), a *Hamid* court was convened in respect of a solicitor. He had been acting on behalf of six Claimants who were all being accommodated by the Defendant at Penally Camp. In pre-action correspondence, the solicitor sought the transfer of his clients and all occupants out of the Camp. The solicitor then made an application for judicial review to have all occupants transferred and sought urgent consideration of the application but, by the time this application was made, all six of the clients had *already* been transferred as requested. The claim had been brought in their names but was no longer for their benefit. The remaining occupants of the Penally Camp had not instructed the firm to act on their behalf. Apart from an issue of standing, additional failings in the preparation of the application included that no reasons were given in the prescribed form as to why the matter required urgent consideration and the form had not been reviewed before being signed. There was found to have been a failure to comply with the duty of candour in this case by the solicitor, as the application had not included any mention of the solicitor's clients having been transferred out of the Camp and this was particularly significant because the application had been made ex parte. The application, which was held to be in no way urgent, was described as a "significant abuse of the procedures… and should never have been made." In deciding what next steps to take, the Court noted the acceptance of responsibility and the regret and apologies that had been offered. It also noted that the solicitor responsible had annexed to his witness statement a copy of a training note which had been produced for all solicitors working in public law at the firm. Consequently, the Court concluded that it was sufficient that the Court had publicly shown its disapproval by naming the solicitor and firm involved.

THE WIDTH OF THE HAMID COURT JURISDICTION

16. Although the decision to hold *Hamid* Courts is taken primarily by the High Court under its inherent jurisdiction, that is a jurisdiction which has also been claimed by the Upper Tribunal: (*R (Shrestha) v SSHD (Hamid jurisdiction: nature and purposes)* [2018] UKUT 242 (IAC).) Additionally, it is important to note that the former President of the Queen's Bench Division announced in November 2018 that the *Hamid* jurisdiction was not limited to dealing with immigration matters and extended to *all* matters dealt with by the Administrative Court and therefore has potentially wide application to the civil courts too.

17. It is clear that more recently, the procedure has been adopted by the High Court generally. In *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588, which concerned a planning matter, at [11] it was considered that the *Hamid* jurisdiction:

    "may have some relevance in cases of meritless applications to re-open an appeal, in particular where persistent meritless applications are pursued in the absence of any material change of circumstances upon which the applicant could justifiably rely."

18. In *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB), which had been a libel case, a *Hamid* hearing was convened against a firm and a partner of that firm as a result of proceedings having been live-streamed to a number of individuals outside England and Wales without the Court's permission having been given, or applied for and in breach of express Court orders. The lawyer involved accepted responsibility and made a full and unreserved apology. It was accepted that there was no deliberate defiance of the Court's Order but the Court emphasised the "utmost seriousness" of breaches of this kind and pointed out that referrals to the SRA or to the Attorney General with a view to considering proceedings for contempt of court may be contemplated. This judgment was intended to serve as a warning to others. In this case, prior to the *Hamid* hearing, the firm had already referred itself to the SRA and the Court therefore merely directed that a copy of its judgment be provided to them so that the Court's views on the seriousness of the breaches would be known to it.

THE HAMID PROCEDURE

19. *R (Sathivel) v SSHD* [2018] EWHC 913 (Admin), introduced a clearer procedure for dealing with conduct which fails to meet professional standards:

    a) When a Judge concludes that a lawyer has acted improperly that may be recorded in a court order, the papers are then referred to the High Court Judge having responsibility for this jurisdiction and a "show cause" letter may then be sent;

    b) When a show cause letter is issued, the addressee must respond with a witness statement drafted by the person who was responsible for the case in question, and the statement of truth must be signed. To lie or deliberately mislead in such a statement might be a contempt of court;

    c) A full, candid and frank response to the questions posed in the show cause letter, and to the issues set out in the court order referring the case, should be given. If there had been a recent change of lawyers, the statement must include full particulars of the circumstances giving rise to that change. Relevant documents must be annexed, and a full account of efforts made by the solicitor to obtain all relevant documents from the old solicitors must be set out. If the Court concluded that the change of instruction was a device, it would consider including in any complaint to the SRA the position of the previous solicitor;

    d) The Court would not necessarily refer the matter to the Divisional Court before deciding to pass the file to the SRA as a complaint. A complaint might be made to the SRA on receipt of the response to the show cause letter, if that was appropriate;

    e) The Court would consider referring a case to the SRA on the first occasion that the lawyer fell below the relevant standards.

20. What this guidance highlights is the importance of that first response to the show cause letter.

SEEKING TO AVOID HAMID PROCEEDINGS

Urgent Injunctions

21. The context for many of these cases is where the removal of a client is imminent and urgent injunction applications are being made to delay removal after a fresh claim has been made late in the day.

22. Counsel and solicitors have duties within their Codes of Conduct when deciding whether to act or to terminate instructions to ensure compliance with the law and the Code.

23. Some of the relevant principles applicable to solicitors include that they must act "in a way that upholds the… proper administration of justice"[4], "in a way that upholds public trust in the solicitors' profession"[5] and "with independence"[6] and must "not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client)."[7]

24. These same principles are echoed within the Bar Code of Conduct for Counsel.[8] The following would appear to be essential reading for anyone doing urgent JR work and wishing to avoid the risk of a *Hamid* Court referral:

    a) Administrative Court Judicial Review Guide, particularly the section on urgent cases (section 16 & 17 of the 2018 guide)

    b) Law Society Practice Note on Immigration Judicial Review

    c) *R (Madan) v SSHD* [2007] 1 WLR 2891

    d) *R (SB (Afghanistan)) v SSHD* [2018] EWCA Civ 215

25. Although the lawyers in SB were found to have acted honestly and in good faith, they were held to have misrepresented the facts of the case to a Judge by claiming that their client had the benefit of a suspension of the removal window when he did not. They had not had sight of all of the relevant documents and

[4] See https://www.sra.org.uk/solicitors/standards-regulations/principles/ - SRA Principle 1
[5] SRA Principle 2
[6] SRA Principle 3
[7] Code of Conduct for Solicitors at 1.4
[8] See The Core Duties which provide that "CD1 You must observe your duty to the court in the administration of justice", "CD4 You must maintain your independence" and "CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession". rC3.1 also provides that "you must not knowingly or recklessly mislead or attempt to mislead the court".

made positive assertions about the factual content of those documents which turned out to be incorrect. At [57] it was stated:

"The duty of candour is directed in the most part to ensuring that matters unfavourable to the applicant are drawn to the attention of the judge. There are many late applications for injunctive relief which are based on little more than an assertion that something may turn up if the new advisers are given time to investigate. Such applications should get nowhere. Yet there is a strong imperative for those instructed late in the day to make no representations or factual assertions which do not have a proper foundation in the materials available to them. Gaps in knowledge should not be filled by wishful thinking. In almost all such cases there will have been extensive engagement between the putative applicant and the immigration authorities and often the independent appellate authorities. So too in many cases there will have been dialogue between the authorities and previous lawyers. There will be a large reservoir of information available. Without access to that information it behoves those who come on to the scene at the last minute to take especial care in the factual assertions they make."

"There are times when advisers have clear instructions from a client which turn out to be wrong. In the context of last-minute applications of the sort which arose in this case great care should be taken before accepting them without inquiry. Yet SB was not responsible for the misleading statements in this case. At the very least it should have been explained that the account given in the grounds of claim was put forward without the documents having in fact been checked, and giving reasons to support the stated belief that this is what they contained, so that the judge could make a critical assessment of those reasons and would be put on alert to check the position with OSCU."

CONCLUSION

26. It may be instructive to consider a few tips to avoid the jurisdiction, and where it unfortunately were to happen, minimising the risks of sanctions. In respect of the former:

a) Before taking on a case at the last minute, think carefully about whether you can properly represent the client's interests, and do so in a manner that does not place you in breach of your other duties to the Court, and to the administration of justice;

b) If an application is going to be made, ensure that it is made as soon as possible;

c) Ensure that the correct form is used and fully completed;

d) Be extremely aware of the duty of candour in such cases:

i. Highlight the gaps in your knowledge and in the documentation;

ii. Ensure that if you are making factual assertions, they are positively verifiable from the documentation available. If the documentation is not available and you have been unable to verify an assertion then that fact needs to be made very clear and reasons must be given as to why you nonetheless have the stated belief (i.e. because those were your clients' instructions);

iii. If information comes to light which means that it becomes clear that something said in an urgent application was false or misleading then that must be brought to the attention of the Court immediately;

iv. Where there has been communication from the Defendant and any previous decisions, in an ex parte application the Defendant's stated position on the case must be disclosed to the Court;

v. All of the points that militate against a grant of relief must be put on the face of submissions and addressed;

e) Put the Defendant on notice of an application being made at the earliest opportunity and by all practical means.

27. In respect of the latter, it was useful to witness the response of the Court in a case in which I was instructed as leading counsel on behalf of a solicitor, in *Singh & Others v SSHD* (January 2020). The matter concerned the solicitors' conduct in respect of seven judicial review claims lodged by his firm which had been certified as totally without merit and in particular focussed on the duty of a solicitor to take ownership and responsibility for such claims.

28. The client was the Director of a firm of solicitors, and had been spread thinly between his different places of work as he was practising from two branch offices as a solicitor and was also operating from two sets of Chambers as a self-employed barrister. In immigration matters, he had the assistance of another solicitor but was otherwise responsible for the supervision of two caseworkers.

29. Failings identified included:

a) A failure to include relevant documents within the applications;

b) The inclusion of irrelevant and misleading post-decision material;

c) The advancing of legal argument which was totally without merit;

d) A failure by the qualified staff to properly supervise those without legal training who were operating well beyond their knowledge and understanding when drafting grounds for judicial review and grounds to the Court of Appeal.

30. Despite this litany of errors, the panel were persuaded to show leniency and did not refer the solicitor to the SRA. Reasons given included :

    a) The solicitor had exhibited contrition and acceptance of the errors made; and

    b) Oral evidence was given by him of staff training and a more robust structure for supervision in future.

31. If the point is reached where a show cause notice has been issued, then it must be dealt with promptly and robustly, and the following should be included:.

    a) A comprehensive and detailed witness statement should be drafted in response;

    b) Address all the alleged failings. If there have been some or all, which are accepted, ensure that the statement includes a clear and unequivocal apology;

    c) The statement should explain why any failing has occurred but, where the fact of the failing is not disputed, it is far better to hold up your hands to the failure than to seek to justify it. Justifications can have the opposite effect to the one intended as they would appear to be minimising the impact upon the Court;

    d) Devote the majority of the statement to showing precisely what changes have been made to systems and processes and what training has been undertaken to ensure that such failings will not be repeated;

    e) If it is an issue of supervision, as in Singh, then evidence can and should be produced of a change in staffing, new systems for supervision and use of outsourcing where appropriate;

    f) When it comes to getting training for staff, it can be useful to be able to show that a programme of regular training has been put in place, rather than just as a one-off and also that a reputable external training source has been used to ensure that the training is of high quality.

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