

## Immigration—looking ahead to 2017

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**Immigration analysis: Our panel of experts, who work in different areas of immigration practice, considers what lies ahead for immigration in 2017.**

### The experts

**Sophie Barrett-Brown (SBB)**, senior partner and head of the UK practice of Laura Devine Solicitors

**Dan Bunting (DB)**, barrister at 2 Dr Johnson's Buildings Chambers

**Greg Ó Ceallaigh (GOC)**, barrister at Garden Court Chambers

### Legal developments and practical impact

#### What are likely going to be the most important cases in 2017, and why?

**SBB:** Notwithstanding Prime Minister Theresa May's assertion at the recent Conservative Party conference that it was up to 'the government alone' to invoke Article 50 of the Lisbon Treaty and that it would do so by March 2017, the High Court held in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2016] All ER (D) 19 (Nov) that the government must first consult Parliament. The appeal was heard in the Supreme Court in December 2016 and judgment is expected in January 2017. Obviously, this case is significant to UK immigration policy since requiring parliamentary review may affect not only the timing for triggering Article 50 but may materially affect policy outcomes for EU migrants living in the UK, and those seeking to come in the future.

Decisions on various other important cases heard in the Supreme Court in 2016 are also expected in 2017 including:

- *R (on the application of MM (Lebanon) (AP)) v Secretary of State for the Home Department* [2014] EWCA Civ 985, [2014] All ER (D) 133 (Jul) (on the lawfulness of the minimum income requirements for the spouse/partner of British citizens/settled persons), and
- *R (on the application of Agyarko) v Secretary of State for the Home Department* [2015] EWCA Civ 440, [2015] All ER (D) 50 (May) (on whether the tests, for partners of British citizens whose relationships here formed while in the UK unlawfully, of 'insurmountable obstacles' or 'exceptional circumstances' are compliant with article 8 of the European Convention on Human Rights (ECHR))

**DB:** We are still awaiting judgment in *MM (Lebanon)* that was heard by the Supreme Court in February 2016. It is likely that this will be of huge significance, especially if the Court of Appeal's judgement is overturned.

Even if that is not the outcome, there will be useful guidance as to the test for applications that raise Article 8 grounds. The case is also likely to impact on the wider culture of the immigration rules and give guidance to the Home Office in moving forward.

Another case which the Supreme Court has heard relates to whether the decision to prosecute an asylum seeker for illegal entry engages Article 8 (*SXH v Crown Prosecution Service* [2014] EWCA Civ 90, [2014] All ER (D) 49 (Feb)). Although the point is a narrow one and will affect only a small number of people prosecuted for illegal entry offences, it potentially has wide implications for the question of when the actions of the state will engage Article 8.

**GOC:** Asylum and immigration law moves at an extraordinary pace, largely dictated in the UK by government responses to public concern about immigration that is itself fed by hysterical media coverage. However restrictive and damaging the changes introduced, the coverage is unaffected, which leads to yet more legislation and rule changes. At present there is a major immigration act introducing sweeping changes approximately every two years, each arriving long before the impact of the previous bill can be determined.

On a European level the migration crisis has abated somewhat but continues to have huge legal and political consequences.

One case coming up in the next year will be C-528/15: *Al-Chodor v Czech Republic*, which could have major implications for the lawfulness of the detention of people subject to the Dublin procedure. We are also likely to see the result of the Supreme Court decision in the appeal in *MM (Lebanon)* and other cases setting the limits to the government's attempts to reduce the protections to migrants provided by Article 8. There will also be numerous cases determining the effect of the Immigration Act 2016 (IA 2016), such as challenges to the requirement that certified human rights appeals can only be brought after removal and the bail provisions that are already in force.

### What are likely to be the most significant legislative and regulatory developments, and why?

**SBB:** As a consequence of Brexit, something of a redesign of the UK immigration system seems likely. How quickly we shall begin to see policy evolving, and what shape it may take, remains to be seen. Meanwhile, various pre-planned Rule changes are already in the pipeline for 2017. In March 2016, the government announced a two-phase plan for Tier 2 of the Points Based System (PBS). Phase one was rolled out in November 2016, while phase two is scheduled for April 2017. Anticipated changes include:

- launching the Immigration Skills Charge, which will impose on employers a £1,000 per year charge for each Tier 2 migrant
- expanding the Immigration Health Surcharge to cover Tier 2 (ICT) migrants and their dependants (currently exempt)
- increasing the Tier 2 (General) salary threshold for experienced workers to £30,000 (from £25,000)
- closing Tier 2 (ICT—Short-Term Staff (STS))—this will also have consequences for salary thresholds as the minimum salary for STS is £30,000 (£24,000 before 24 November 2016), whereas the minimum salary for Long-Term Staff is £41,500
- removing the one-year experience requirement for Tier 2 (ICT) applicants earning at least £73,900 annually
- reducing the Tier 2 (ICT) high-earner threshold (enabling migrants to extend leave to remain to a maximum of nine years rather than five) to £120,000 (from £155,300)

Also on the horizon are a number of proposals announced by Home Secretary Amber Rudd at the Conservative Party conference:

- establishing a £140m Controlling Migration Fund to relieve the burden shouldered by public services in high-migration areas
- introducing a re-entry ban and facilitating the removal of foreign criminals, including those from within the European Economic Area (EEA) and Switzerland
- a consultation on Tier 2, including on reforming the Resident Labour Market Test (RLMT) to better protect the domestic labour force
- a consultation on Tier 4, including on developing a two-tier student visa scheme offering preferential treatment to students at the best universities and imposing more stringent requirements on students applying to 'lower quality courses'

Theresa May also announced her intention to repeal the European Communities Act 1972, which enshrines EU legislation into UK law, in a 'Great Repeal Bill'. According to Mrs May, this would permit Parliament to review and debate measures individually and determine which would be kept, scrapped, or amended.

The new Immigration (European Economic Area) Regulations 2016, SI 2016/1052 will come into force on 1 February 2017 and will introduce more onerous procedural requirements on EEA nationals and their family members applying for residence documents (such as the requirement to use a specified form and that the application is 'complete'). There has already been a notable increase in the proportion of 'rejected' EEA applications in recent months and this can only be expected to increase further once these provisions are in force. As several aspects of the new Regs appear to go beyond the Citizens Directive 2004/38/EC, it is possible that legal challenges may be brought in 2017.

**DB:** We have had a further Statement of Changes (HC 667), most of which has already taken effect. The trajectory is clear—it will be made harder for people to comply—for example salary thresholds for the various Tier 2 categories are increased.

At some point, there will have to be a decision as to what to do about the millions of EEA nationals and family members who are in the UK. Notwithstanding what is being currently said politically about these people not being used as negotiating tools, it is likely that their position will be finalised as part of the negotiations after Article 50 has been triggered.

**GOC:** The general theme of the past number of years, of the rolling back of protections for migrants, is likely to continue.

The risk of the Human Rights Act 1998 being repealed and replaced with something that appeals to the populist right is increasing, although the sheer complexity and difficulty of organising the UK's departure from the EU may prevent a second enormous constitutional change from being wrought at the same time.

The European Commission has published proposals on reforming the asylum acquis in response to the migration crisis, and for a new Dublin Regulation. While Dublin II lasted for a decade, Dublin III has dated very quickly. When it was published in 2013, introducing substantial new protections for those subject to it (eg C-63/15: *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016] All ER (D) 58 (Jun)), the migrant crisis had not yet begun. The new asylum acquis and Dublin IV as proposed are extremely retrograde and appear designed to deter migrants from entering the EU at all. On 16 December 2016, the Immigration Minister announced that the government had decided not to opt in to Dublin IV.

There may be a substantial new immigration act depending on the manner and timing of Article 50 being triggered and the UK departing the EU, although that remains to be seen. There may also be substantial new legislation to deal with protecting rights currently guaranteed by EU law and the position of EU nationals in the UK.

Should the government bring the bail provisions in IA 2016 fully into force that would fundamentally alter the status of those without leave in the UK, abolishing the concept of temporary admission.

### How is Brexit likely to affect these?

**SBB:** Most of the above legislation and Rules changes were planned pre-referendum and will not be directly impacted by Brexit. However, as noted above, in the longer term Brexit is likely to result in changes to domestic immigration law. What these changes may be will very much depend upon how negotiations on the future rights of EEA nationals unfold—domestic immigration law may need to accommodate routes for EEA nationals or at the end of the spectrum they may remain outside the domestic immigration system post-Brexit.

**DB:** The vote on 23 June 2016 has created a huge amount of uncertainty in immigration law. Potentially, it will bring millions of people within the Immigration Rules in one way or another. The already existing backlog in applications had more than tripled in the weeks after the referendum vote, and it is hard to see how the Home Office have the resources to deal with everyone on a case-by-case basis.

One potential good consequence of Brexit is that it may be that much of the attention of those in the Home Office that would otherwise be engaged in tinkering with the Immigration Rules will be taken up with working out the solution to this.

**GOC:** It depends what Brexit means, when it happens and how it happens. Brexit will affect everything.

For example, on the one hand leaving the EU could result in the UK no longer being bound by the asylum acquis or the Dublin III Regulation. On the other hand, the UK is one of the most enthusiastic cheerleaders of the Dublin system and may wish to keep it—which would almost certainly mean remaining bound by the asylum acquis. Conceivably the UK may have less of a free hand in escaping European migration Regulations than it does at present.

## Clients and business developments

### How do you think the practice of immigration law is going to develop in 2017?

**SBB:** As the government maintains its focus on reducing net migration to the 'tens of thousands', and with formal Brexit negotiations imminent, practitioners should expect the pace of change to immigration policy to continue in 2017. Key to practitioners will be seeking to anticipate change as far as possible and advise clients strategically.

Changes that have been made to the Rules in 2016 (such as the removal of the 28-day allowance for out-of-time applications, replaced with a 14-day period coupled with (potentially subjective 'good reasons') will really begin to bite and we can expect to see an increase in refusals for applicants unwittingly caught by these changes.

With continued erosion of appeal rights we may also expect to see an increase in practitioners having to resort to judicial review.

**DB:** Although the aim is to be more 'streamlined', it is likely that there will be ever more complexity involved in the system.

Advisers should now be aware of the new criminal offences relating to illegal working and have procedures to deal with this in place. It is likely that the Home Office will be 'cracking down' on this in the months to come.

As always, it will be important to stay on top of all the various changes. One example, from the new Statement of Changes, is that the 28-day 'grace period' for making applications by overstayers has been tightened up as well as reduced to 14 days. Advisors will need to act fast when (as often happens) clients come in at or near the expiration of any leave.

The uncertainty caused by Brexit will be a major problem that businesses face in all areas, but particularly for any with an EEA workforce.

**GOC:** Practitioners are already seeing a huge increase in requests for assistance from EU nationals, whether seeking to establish British citizenship or to secure confirmation of Permanent Residence in advance of the anticipated seismic shift.

The recent amendments made by IA 2016 to section 94B of the Nationality, Immigration and Asylum Act 2002 will mean many more appeals out of country, and practitioners are going to have to become adept at running cases without clients, running hearings via Skype and using judicial review and interim relief to prevent people being removed when they should not be.

#### **What do you think the key challenges are going to be?**

**SBB:** A key challenge in the immediate future will remain the uncertainty associated with Brexit, both as it relates to the terms of the deal, as well as the timeline. Once the process begins, the UK may choose to develop an entirely new system for EEA/Swiss migrants that would run parallel to the PBS, or, alternatively, it could overhaul the current PBS to include these migrants.

'Remove first, appeal later' will present challenges for many clients in 2017, as will the continued narrowing of various categories of the Immigration Rules. It will certainly be an interesting year ahead.

**DB:** It is hard to see beyond Brexit as being the dominant issue, but how the government is going to try and tackle non-EU migration, and what that means in practice, is a key issue that advisors will be facing in the coming months.

**GOC:** In my opinion, the key challenge in this jurisdiction remains dealing with the unrelenting flow of badly thought through legislation and policy. This year the other most important challenge will be helping clients, European or not, navigate the choppy waters of Brexit and the continuing fallout from IA 2016.

*Interviewed by Kate Beaumont.*

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