



Economic migration issues during the coronavirus crisis

Adrian Berry, Garden Court Chambers (Chair)

Miranda Butler, Garden Court Chambers

Mark Symes, Garden Court Chambers

Emma Fitzsimons, Garden Court Chambers



GARDEN COURT CHAMBERS



6 May 2020



@gardencourtlaw

Economic migration issues during the coronavirus crisis

Adrian Berry, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

Overview



Overview

How is Leave Extended?

- Can leave be extended automatically?
- To an individual or to a class of persons?
- 17 February 2020 announcement to Chinese Citizens
- COVID-19 UK Visas & Immigration form - visa extension to 31 May 2020



Overview

How is Leave Extended?

- Section 3 of the Immigration Act 1971, power to vary leave
- Section 4 of the Immigration Act 1971, Mode of variation by the Secretary of State giving notice in writing to the person affected, or generally to any class of persons by Order/Statutory Instrument
- Example of Section 4 Order: Immigration (Variation of Leave) Order 2016 for certain people who may be victims of modern slavery
- No other Order made



Overview

How is Leave Extended?

- Immigration (Notices) Regulations 2003 govern formalities for making an appealable decision; they include provisions for ‘service’
- But all a Section 4 Notice varying leave requires is written notice to be ‘given’ to the person affected; so could be ‘given’ in number of ways, it does not say ‘by hand’



Overview

How is Leave Extended?

- Avoid being an overstayer
- Apply in-time where possible
- But what is an ‘application’?
- Use the on-line form for short-term extensions but beware



Sponsor Licences

- Remember applications can be made now in preparation for the Immigration Rules to be applied to EU Citizens/EEA nationals from 2021
- Send Supporting Documents Electronically
- Reporting Requirements: (i) Delay to start date (although students/employees can start if application is pending; (ii) Termination of Sponsorship (note due to COVID 19); (iii) Change of Job Title; (iv) Change of Salary; and (v) if business ceases trading/insolvent
- Relaxation of Reporting: (i) Authorised absence (10 days+, or 60 days+ Tier 4) (note due to COVID19); (ii) Unpaid leave (4 week+) (note due to COVID19); and (iii) Working from home/distance learning (Tier 4 sponsors to monitor attendance if possible)



Tier 2

- Sponsors can reduce the pay of sponsees to 80% of salary or £2,500/month, whichever is lower
- Reductions must be part of a company-wide policy to avoid redundancies
- Reductions must be temporary, and pay must return to at least previous levels once these arrangements have ended
- SMS report: (i) amount salary reduced; (ii) period of reduction; (iii) part of company policy to avoid redundancy due to COVID19



Tier 2 and Tier 5

Sponsors can allow a worker to commence work whilst awaiting decision on application if:

- They have been assigned a CoS
- The worker produces evidence that they submitted their application before their leave expired
- The job they start is stated on their CoS

Remember: Changes that may impact upon an application will need to be updated on the CoS by sponsor note

Note: If the application is eventually rejected as invalid/ refused the worker will need to stop working

Tier 4

Tier 4 Higher Education Providers can:

- Self-assess English language at B1 if student cannot take a SELT due to overseas closures
- Allow a student to commence their studies whilst application is pending if: (i) they hold a Tier 4 sponsor licence; (ii) They have assigned a CAS to the student; (iii) The student produces evidence that they submitted their application before their leave expired; (iv) The course they start is stated on their CAS; and (v) They have a valid ATAS certificate (if applicable)



CoS/CAS Validity

- Home Office will take “pragmatic approach” to considering applications where start date is significantly different to that stated on CAS/expired CAS
- Where CoS/CAS has become “invalid” and individual has been unable to travel due to COVID19, it may exceptionally still be accepted in a new visa application
- Sponsors should update the start date if CoS/CAS is still showing as “Assigned” by adding a sponsor note
- Applicant should put in confirmation that they were unable to travel due to COVID19 but still individual decision



Economic migration issues during the coronavirus crisis

Out of country and in-country applications

Miranda Butler, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

Outline

1. Overseas applications
2. Applicants in the UK
 1. Temporary extension scheme
 2. Switching
 3. NHS workers
3. Coronavirus Immigration Help Centre



Guidance

Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents

<https://www.gov.uk/guidance/coronavirus-covid-19-advice-for-uk-visa-applicants-and-temporary-uk-residents>



(1) Overseas applications



Overseas applications during coronavirus

- All UK Visa and Citizenship Application Centres and Service Support Centres are **temporarily closed**
 - Still possible to submit online application form
 - No biometric appointments
 - Booked appointments will not take place
 - New appointments cannot currently be booked
 - Removal of deadline to submit biometrics



Expired vignettes

- Those whose 30-day vignette to travel to the UK for work study or to join family is about to expire or has expired can request a **free replacement visa** with revised validity **until the end of the year**
- Email the Coronavirus Immigration Help Centre
 - Subject line: REPLACEMENT 30 DAY VISA
 - Include: name, nationality, DOB, GWF reference number
- Local VAC will contact applicant when it opens to arrange for a new endorsement
 - No penalty for failure to collect BRP in time until **end of 2020**



Issues sending documents

- In some areas UKVI cannot send vignettes / passports across borders and along certain routes
 - Contact the VAC to check whether courier return is available in that location



Impact of absences?

- What about excess absences for ILR / naturalisation caused by coronavirus?
 - The Home Office has a discretion to waive these.
 - Kevin Foster, Under-Secretary for the Home Office, Hansard, 23 March 2020: *“We are very clear that no one will have a negative outcome through the immigration system due to a circumstance that was beyond their control.”*



(2) Applicants in the UK



Temporary extension scheme

If you're in the UK and your leave expires between 24 January 2020 and 31 May 2020

Your visa will be extended to 31 May 2020 if you cannot leave the UK because of travel restrictions or self-isolation related to coronavirus (COVID-19).

You must request an extension by [updating your records with the Coronavirus Immigration Team \(CIT\)](#) if your visa is expiring and you cannot leave the UK at present but are not planning to stay in the UK in the long term.



Temporary extension scheme

- Leave expiring between 24 January 2020 and 31 May 2020 **and** cannot leave the UK due to coronavirus travel restrictions or self-isolation
- Free, online application to the Coronavirus Immigration Team (‘CIT’)
 - Need to specify reasons when applying
- No BRP
- Applicant will not be treated as overstayer / suffer detriment in future application
 - Not intended for those intending to stay in the UK long term



Tier 1 (Entrepreneur)

- Tier 1 Entrepreneur visa-holders
 - Such visa-holders must employ at least 2 people for 12 months
 - Time when employees were furloughed will not count towards 12 month period
 - If applicants have not been able to employ staff for 12 months, can temporarily extend their visas to obtain time to meet the requirement
 - Even after 31 May 2020



Switching

If you're applying to stay in the UK long-term

You can apply from the UK to switch to a long-term UK visa until 31 May 2020. This includes applications where you would usually need to apply for a visa from your home country.

You'll need to meet the requirements of the route you are applying for and pay the UK application fee.

This includes those whose leave has already been automatically extended to 31 March 2020.

You can apply online. The terms of your leave will remain the same until your application is decided.



Switching

- Limited to those whose leave expires between 24 January 2020 and 31 May 2020.
- May apply to switch to a '*long term route*'
- Must apply online by **31 May 2020**
- Must meet all other criteria of the category applicant is switching to
 - No need to fulfil entry clearance requirements



NHS frontline workers visas extended so they can focus on fighting coronavirus

Doctors, nurses and paramedics with visas due to expire before 1 October 2020 will have them automatically extended for one year.

Home Secretary Priti Patel said:

- “ Doctors, nurses and paramedics from all over the world are playing a leading role in the NHS’s efforts to tackle coronavirus and save lives. We owe them a great deal of gratitude for all that they do.
- “ I don’t want them distracted by the visa process. That is why I have automatically extended their visas – free of charge – for a further year.”



NHS workers (i)

- **Extension** for certain NHS workers / those working for independent healthcare providers in an “*eligible profession*”.
- Leave due to expire before **1 October 2020**.
- Leave extended for **12 months** (for applicant and dependents)
- **Free**, no IHS
- **Automatic** (no application)
- Once notified, applicants should send BRPs to UKVI
- If eligible (+ not sent in biometrics), can withdraw paid extension application
 - Email UKVINHSTeam@homeoffice.gov.uk



NHS workers (ii)

- **‘Eligible profession’**
 - Initially: Tier 2 migrants only?
 - 29 April 2020: Home Office and Department of Health outline expansion of the scheme to include: **NHS and private healthcare workers**
 - **Broad range of healthcare workers, including social workers**
 - Not restricted to Tier 2



NHS workers (iii): eligible professions

- biochemist
- biological scientist
- dental practitioner
- health professional
- medical practitioner
- medical radiographer
- midwife
- nurse
- occupational therapist

- ophthalmologist
- paramedic
- pharmacist
- physiotherapist
- podiatrist
- psychologist
- social worker
- speech and language therapist
- therapy professional



NHS workers (iv)

- Removal of restrictions on number of hours' work / volunteering
 - Tier 4 student
 - Tier 2 worker (NHS job is second job)
 - Visiting academic researcher
 - Holder of a short-term visa permitted to volunteer.
- Pre-registration nurse in the UK
 - Deadline to sit Occupational Structures Clinical Examination (OSCE) extended to 31 December 2020.



(3) Coronavirus Immigration Help Centre



Coronavirus Immigration Help Centre

- Deals with immigration queries related to coronavirus
- Email (CIH@homeoffice.gov.uk) – response in 5 working days (not always in practice)
 - Some responses have been of poor quality (cut and paste / applying guidance incorrectly) – anecdotal evidence of improvement
- Telephone helpline: 0800 678 1767 (Monday to Friday, 9 a.m. – 5 p.m.)
 - Free
 - Signposting only; substantive queries must be emailed



Entrepreneurs, Innovators and Start-ups

Mark Symes, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

Entrepreneurs

- Entrepreneurs face job creation requirements for extensions and ILR
- The requirement to have employed at least 2 people for 12 months could be threatened by current economic circumstances



Entrepreneurs: job creation concession 1

- *SSHD announcement*
- *You no longer need to employ at least 2 people for 12 consecutive months each. The 12 month period you are required to employ someone for can be made up of multiple jobs across different months.*
- *Time when your employees were furloughed will not count towards the 12 month period.*
- *If you have not been able to employ staff for 12 months in total by the time your visa expires, you will be allowed to temporarily extend your stay to give you time to meet the requirement.*



Entrepreneurs: job creation concession 2

- *Slightly confusing as under Appendix A one does not “need to employ at least 2 people for 12 consecutive months each” in the first place, eg jobs can be aggregated where they last 6 months in one year and 6 months in the next*
- So does this represent a further relaxation of the job aggregation requirement?
- Or does it only represent a concession that one can apply without meeting the job creation requirement in the Rules, and that discretion will be exercised, all else being equal and the problem being down to lockdown, and a further short grant of limited leave will give an opportunity to rectify the shortfall?



Innovators 1

- Guidance for endorsing bodies addresses these scenarios:
 - **Endorsement pending:** the guidance suggests “frank discussions” as to the reality of current plans: endorsement should be delayed if travel unrealistic
 - **Endorsement granted but no visa application:** new endorsements will be necessary if the 3-month validity period of an existing one lapses



Innovators 2

- **Visa granted but applicant unable to travel:** cross refers to general Covid guidance: *“You should make your application as planned and we will consider all applications on a case by case basis.”*
- **Checkpoint pending:** these should be maintained and can be executed via phone or video conference; allowance should be made for the present situation but future contingencies must be discussed; unauthorised missed checkpoints must still be notified to UKVI
- **Extending leave to remain** – switching into Start-up and Innovator remains possible, as is upgrading from former to latter, and business plans situation should be assessed in the current context



Economic migration issues during the coronavirus crisis

Emma Fitzsimons, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

Practical issues: testing and certificates



Biometrics

- *‘Coronavirus (COVID-19) advice for UK Visa Applicants and Temporary UK Residents’*– guidance published on 24 March 2020, updated 1 May 2020
- For in-country applicants?
 - UK and Citizenship Application Centres (UKVCAS) and Service and Support Centres (SSCs) are temporarily closed
 - Cannot book a new appointment
 - Existing appointment? – will be contacted by UKVCAS or SSC, informed of cancellation and book a new appointment
 - Home Office states “Your immigration status in the UK will not change as a result of you not being able to attend an appointment.”
- For out-of-country applicants?
 - All UK Visa Application Centres (VACs) are closed
 - If had an appointment and VAC now closed? – Should be contacted and told not taking place.



Life in the UK test

- Applications should still be made – consider making representations to SSHD on test date and make a prospective appointment
- Life in the UK Test Centres closed until 11 May 2020 due to COVID-19
- UKVI website states that tests booked up until that period will be automatically rescheduled to a date after 11 May 2020
- New test dates are available for after **11 May 2020**
 - Query if 11 May 2020 is realistic timeframe



English language testing

- SELT Testing centers are affected.
- IETLS published guidance on 4 May 2020
 - <https://www.ielts.org/news/2020/covid19-information-for-our-global-test-taker-community>
 - Introduced an online tool to help students progress studies remotely
 - some testing going ahead in certain countries where safe to do so.
 - Operational changes in place – social distancing.
 - List of countries where testing remains suspended due to COVID-19, with timeframes for suspensions.
- Tier 4 Higher Education Providers can self-assess English at B1 if student cannot take SELT due to overseas closures – see paras 2.21-2.25 of the ‘*COVID-19: Guidance for Tier 4 Sponsors and Migrants and for short-term students – Temporary Concessions in response to COVID-19.*’

Other issues

- **TB certificates:** Nothing clear from Home Office as yet, understand it is under consideration.
- **ATAS certificates:** ATAS is currently unavailable due to COVID-19. Applications submitted before 6 April 2020 will be processed. Scheme to re-open 'as soon as possible'.
<https://www.gov.uk/guidance/academic-technology-approval-scheme#history>
- **Criminal Records certificates:** ACRO states it is still open for business
https://www.acro.police.uk/police_certificates.aspx
- **OVRO (police registration):** Registration services are currently suspended. Those with existing appointments should be notified by email. No penalty action will be taken against those unable to attend/book a new appointment <https://www.met.police.uk/advice/advice-and-information/ov/registering-overseas-visitor/>



Hostile environment checks: work, study and rent



Right to work – in outline

- Immigration, Asylum and Nationality Act 2002, ss15-25; Immigration Act 1971, s 24B and Immigration Act 2016, Sch 6
- Regime of checks backed up by criminal offence and civil penalties
- Key guidance documents:
 - An employer's guide to right to work checks;
 - Code of practice on preventing illegal working;
 - Avoiding discrimination while preventing illegal working;
 - Quick guide to checking a job applicant's work documents.



Details

Because of coronavirus (COVID-19) there are temporary changes to the way you can check documents. Read [guidance about the adjusted process](#), including asking for documents digitally, making checks on a video call, and what to do if someone cannot provide any accepted documents.



Right to work and impact of COVID-19

- Right to work checks have been temporarily adjusted to reflect difficulties employers face
- Guidance published by the Home Office on 30 March 2020 – <https://www.gov.uk/guidance/coronavirus-covid-19-right-to-work-checks>:
 - Checks can now be carried out over video calls;
 - Job applicants and existing workers can send scanned documents or photo of documents for checks using email or mobile app, rather than sending originals
 - Employers should use the Employer Checking Service if a prospective or existing employee cannot provide any of the accepting documents.



Conducting a right to work check during temporary COVID-19 measures

From Home Office guidance:

- Ask the worker to submit a scanned copy or a photo of their original documents via email or using a mobile app
- Arrange a video call with the worker – ask them to hold up the original documents to the camera and check them against the digital copy of the documents
- Record the date you made the check and mark it as “*adjusted check undertaken on [insert date] due to COVID-19*”
- If the worker has a current Biometric Residence Permit or Biometric Residence Card or status under the EU Settlement Scheme you can use the [online right to work checking service](#) while doing a video call - the applicant must [give you permission to view their details](#)
- If worker does not have the documents? – Employer must contact Employer Checking Service – if a person has the right to work, will be sent a ‘Positive Verification Notice.’



After the COVID-19 measures end?

- Home Office will inform employers when the temporary measures will end
- After that date – undetermined at present – employers need to revert to the process set out in the 'Right to Work Checks: An Employer's Guide'
- Retrospective checks will need to be carried out on
 - Existing employers who started work during this period
 - Existing employers who required a follow up check during this period
- Retrospective checks should be carried out within 8 weeks of COVID-19 measures ending.
- Employer to mark their records as follow: “the individual’s contract commenced on [insert date]. The prescribed right to work check was undertaken on [insert date] due to COVID-19.”
- Keep all checks!



Right to study

- New guidance published on 20 April 2020.
- “The Home Office and its Ministers are very clear that no one will have a negative outcome through the immigration system due to a circumstance that was beyond their control” – statement of purported intent.
- Contains temporary policy concessions for Tier 4 Sponsors, Tier 4 students and short-term study students in response to COVID-19.
- Will be kept under regular review and withdrawn when circumstances return to normal.
- To be read in line with:
 - For T4 sponsors – the T4 Sponsor Guidance;
 - For T4 students – the T4 Student policy guidance;
 - For short-term students – Part 3 of the Immigration Rules and the Short-Term Study Guidance.



Home Office

Covid-19: Guidance for Tier 4 Sponsors and Migrants and for Short-term students

Temporary concessions in response to Covid-19

Version 04/2020 - This guidance is to be used from 17 April 2020

This guidance covers temporary concessions for:

- Tier 4 sponsors
- Tier 4 migrants
- Short-term study migrants



Impact of COVID-19 on Tier 4 Sponsors and right to study

- **Tier 4 PBS Document 2 Sponsorship Duties** at paragraph 2.3 notes that sponsors are under a duty to “comply with all aspects of the Immigration Rules and sponsor guidance, and support immigration control, including by taking steps to ensure that every student at their institution has permission to study in the UK throughout the whole period of their study”
- Paragraph 2.2 of the **Temporary COVID-19 Guidance** provides in respect of **original documents**, “Tier 4 sponsors are required to see certain documents from students and keep records as set out in Appendix D. Where it is no longer practical or safe for a student to submit these documents in person, or where sponsor sites are closed due to Covid-19 social distancing measures, it is acceptable for a digital copy such as a photograph to be provided and kept on file.”



Right to rent – in outline

- Immigration Act 2014, Part 3, Chapt 1, ss 20-37 - currently only applies to England.
- Prohibits landlords from letting properties to those who are not British, EEA or Swiss citizens and who require but do not have leave to remain, or whose conditions of leave does not permit them to rent.
- Key guidance documents:
 - Right to Rent Code of Practice
 - Right to Rent User's Guide
 - A Short Guide on the Rent to Rent
- Recent challenge - ***R (JCWI) v SSHD and (1) National Residential Landlords (2) EHRC (3) Liberty [2020] EWCA Civ 542***: CoA concluded that although the right to rent scheme could result in discrimination, it was capable of being operated by landlords in a proportionate way in all cases and was justified. JCWI are appealing to Supreme Court.



Details

Because of coronavirus (COVID-19) there are temporary changes to the way you can check documents. Read [guidance about the adjusted process](#), including asking for documents digitally, making checks on a video call, and what to do if someone cannot provide any accepted documents.



Right to rent and impact of COVID-19

- Right to rent checks have been temporarily adjusted to reflect difficulties landlords face
- Guidance published by the Home Office on 30 March 2020: <https://www.gov.uk/guidance/coronavirus-covid-19-landlord-right-to-rent-checks>:
 - Checks can now be carried out over video calls
 - Tenants can send scanned documents or photo of documents for checks using email or a mobile app, rather than sending originals
 - Landlords should use the the Landlords Checking Service if a prospective or existing tenant cannot provide any of the existing documents
- NB: Checks continue to be required – landlords must continue to check the prescribed documents in the Code of Practice and the Users Guide.
- Remains an offence to knowingly lease premises to a person who is not lawfully in the UK.



Conducting a right to rent check during temporary COVID-19 measures

From Home Office guidance:

- Ask the tenant to submit a scanned copy or a photo of their original documents via email or using a mobile app.
- Arrange a video call with the tenant – ask them to hold up the original documents to the camera and check them against the digital copy of the documents.
- Record the date you made the check and mark it as “*an adjusted check has been undertaken on [insert date] due to COVID-19*”
- If tenant does not have the documents? – Landlord must contact the Landlord Checking Service. Landlord should receive an answer in 2 working days. Landlord must keep their response to protect against civil penalty.



After the COVID-19 measures end?

- No date as yet when the temporary measures will end – Home Office to notify in advance.
- After the end date, landlords *must* go back to the checking process set out in the Code of Practice and the User Guide.
- Landlords should carry out retrospective checks on:
 - Tenants who started their tenancy in this period;
 - Tenants who required a follow-up check during this period.
- Retrospective checks *must* be carried out within 8 weeks of the COVID-19 measures ending.
- Landlord should mark the retrospective check: “*the individual’s tenancy agreement commenced on [insert date]. The prescribed right to rent check was undertaken on [insert date] due to COVID-19.*”
- Home Office has stated that they “will not take any enforcement action against you if you carried out the adjusted check set out in this guidance, or a check via the Home Office, and follow this up with the retrospective check.”



Practical issues for compliance

- Record keeping systems
- Digital and remote solutions for checks
- Stay up to date – dates are being reviewed all the time
- Encourage pro-active queries from clients
- Contacting Coronavirus Helpline and keeping records:
 - Email cih@homeoffice.gov.uk
 - Telephone: 0800 678 1767 (Mon to Fri, 9am to 5pm, freephone)



NHS Charging and COVID-19

- The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2020 came into force on 29 January 2020.
- Regulation 2 provides, *“In Schedule 1 to the National Health Service (Charges to Overseas Visitors) Regulations 2015, in the appropriate alphabetical position insert “Wuhan novel coronavirus (2019-nCoV)”*.
- [Published guidance](#) from the Department of Health and Social Care to the NHS staff makes clear that:
 - For public health protection, overseas visitors must not be deterred from seeking treatment
 - No charge applies to a diagnostic test even if negative
 - No charge can apply to any treatment provided for suspected COVID-19 up to the point that it is negatively diagnosed.
 - No immigration checks are needed if a person only has testing or treatment for coronavirus.

NB: Groundswell of opinion, including paper from Royal College of Paediatrics and Child Health published in BMJ April 2020, that NHS charging is ‘unworkable’. SSHD has indicated there may be a review for NHS workers.



Economic migration issues during the coronavirus crisis

Adrian Berry, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

EU Settled Status Scheme

- No changes to applications made with the EU Exit: ID document check App
- EUSS Resolution Centre telephone line closed on 25 March 2020
- It is possible to use the online contact form but responses take longer than five working days, expect longer decision times too
- Do not send original documents by post



EU Settled Status Scheme

- Applications for non-EEA family members that cannot be completed online
- Biometric centres closed
- Request paper forms via EUSS Resolution Centre contact form
- Paper applications: note to ILPA from Gabi Monk, Head of Euro and Settlement and the EU Settled Status Customer Resolution Centre, UKVI (9 April 2020)
- Don't send original documents



Public law and UKVI Guidance

Mark Symes, Garden Court Chambers

6 May 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

Public law principles and UKVI concessions

- There is always a discretion to depart from the Rules see eg [Sayaniya \[2016\] EWCA Civ 85](#):

“where legislation confers power to make rules, whether by statutory instrument, by-law, or other instrument, and there is also a discretionary power there is no compulsion to enforce any rules so made rather than to exercise the discretionary power provided that no rule restricts the particular exercise of discretionary power”
- So this policy position could be very important: *“No individual of any nationality whose leave has expired or is due to expire between 24 January 2020 and 31 May 2020, and who cannot leave the UK because of COVID-19, will be regarded as an overstayer or suffer any detriment in the future”*



Guidance must be followed 1

- *Abdi and Nadarajah* [2005] EWCA Civ 1363:

“68 ... Accordingly a public body's promise or practice as to future conduct may only be denied ... in circumstances where to do so is the public body's legal duty, or is otherwise ... a proportionate response... having regard to a legitimate aim pursued by the public body in the public interest.”

- *Mandalia* [2015] UKSC 59 §29: “a requirement of good administration [is for] public bodies ought to deal straightforwardly and consistently with the public.”



Guidance must be followed 2

Alliance of Turkish Business People [2020] EWCA Civ 553 (28 April 2020)

If the requirements of the doctrine of legitimate expectation are satisfied, the fact that the relevant statement was made by a public authority on a mistaken view as to what the law is did not make the doctrine's application more difficult



Interpreting Guidance

- Pankina [2010] EWCA Civ 719 §28 whereas Rules are to be applied strictly, Guidance must be interpreted in a common sense way.
“A policy is precisely not a rule: it is required by law to be applied without rigidity, and to be used and adapted in the interests of fairness and good sense.”/
- Though is leaving rights to the sensible exercise of UKVI discretion a good idea? As one judge put it in a similar context (cited for example in Kariharan):
“to remit the maintenance of constitutional right to the region of ... discretion is to shift the foundations of freedom from rock to sand.”



Other public law principles

- SSHD must take account of her own responsibility in any future decision making: *EK (Ivory Coast)* [2015] EWCA Civ 1517 – but not necessarily matters for which third parties are responsible
- *UE (Nigeria)* [2010] EWCA Civ 975 there is a public interest in the retention in this country of someone who is of considerable value to the community which goes to the weight to be attached to the public interest in the proportionality exercise



ECHR Art 8 and Home Office Guidance

- Query whether the relatively mellow approach taken in UKVI Guidance now will be reflected in decision making looking back over this period in years to come. Those whose immigration history comes back to haunt them may have to rely on private and family life issues to generate human rights appeals
- Decisions from *AG Kosovo* [2007] UKAIT 00082 to *MM Lebanon* UKSC show that policy positions should be taken account in the assessment of proportionality where they told in favour of a particular outcome



Extension of leave

- Slight worry about the extensions for those

“not intending to apply to extend your leave and cannot leave the UK because of travel restrictions related to COVID-19, please use the form below to provide us with your details. If you’re eligible for an extension of leave to 31 May 2020, we’ll update your immigration records to reflect your circumstances”
- Query whether this procedure offers appropriate protections: as it is not an *application* as defined by the Immigration Rules, it would not be a valid application such as to attract s3C leave (as form not completed); Rules allow for some flaws to be waived: fee, identity and biometrics



Any Questions?



Get in touch

Lisa O’Leary, Deputy Director of Clerking and Immigration Practice Manager

Tel: 020 7993 7631

lisao@gclaw.co.uk

Adrian Berry

adrianb@gclaw.co.uk

Miranda Butler

mirandab@gclaw.co.uk

Mark Symes

marks@gclaw.co.uk

Emma Fitzsimons

emmafitzsimons@gclaw.co.uk

