White Paper Business Immigration Conference
1 October 2019

Sponsor Compliance

Joe Middleton

doughty street chambers

What is realistic and achievable when minimising the damage for clients who are in breach of Tier 2 compliance obligations?

- What's realistic and achievable obviously depends on how bad the breaches are.
- But it also depends on:
  - When the mitigation will take place:
    - pre-suspension stage
    - suspension stage
    - revocation stage.
  - The quality of the mitigation.
  - The sponsor's compliance history.
  - Who the sponsor is.
  - Luck.

- Practical advice requires a thorough investigation of the overall compliance process.
- The client will need realistic and early advice on costs.
- However much analysis you do, there's also a significant element of unpredictability.
  - Some licences get revoked, and stay revoked, on relatively minor issues.
  - Some licences are saved from revocation, with a lot of work, despite serious compliance issues.

- Be realistic about how much minimising you're likely to achieve.
- It may involve saving the licence, for now.
- It may involve making revocation as painless as possible and planning life without a licence, or this licence, for the time being, with a view to re-applying in due course.

- Different considerations apply depending on where you are in the compliance process.
- But there are some common themes.
- Legally, the cards are stacked against sponsors.
- The Guidance is mean and strict, and revocation is lawful even for relatively minor breaches.
- But the case law suggests that a “light trigger” for revocation is not usually applied.
- So the objective must always be to persuade the HO and restore a relationship of trust, not to rely on persuading a judge in a later judicial review.

Before a suspension/intention to revoke letter arrives

- You or the client have identified compliance breaches.
- Assess the problem: how serious, extensive, recent, systemic are the breaches?
- Examine other compliance areas.
- Consider mitigation responses: what can be done, how quickly, how effectively?
- Voluntary disclosure may be an issue.
- There's no requirement for sponsors to make voluntary disclosure of compliance issues the HO don't already know about.
- Whether they do so may require careful exploration of the alternatives.

Responding to suspension/intention to revoke letter

- Priorities
  - Client to allocate resources for rapid and effective response.
  - Preliminary assessment of merits of JR.
  - Analyse HO data.
  - Agree public and internal message. Be wary of crying foul.

- Response to suspension will be:
  - reassuring
  - detailed
  - comprehensive
  - respectful
  - on time.

- The response should:
  - Address every point in the suspension decision.
  - Challenge every arguable flaw.
  - Support factual assertions with cogent evidence.
  - Acknowledge undeniable failures but put them in perspective (minor and/or historic; previous history of compliance).
  - If relevant, set out systemic compliance enhancements to prevent future breaches (already done, ongoing and/or prospective).

Responding to revocation

- It’s probably too late by now to do any persuading.
- Basic choice: embark on judicial review or give up.
- Advise clients on merits of JR, prospects of interim relief and likely timescales.
- Get pre-action letter out asap.

Common compliance issues

Mandatory revocation grounds: Guidance, Annex 5; e.g.

- actual role doesn't match SOC or CoS;
- salary paid not the same as stated on CoS;
- incorrect claim to have carried out RLMT;
- acting as an employment agency supplying sponsored migrants as labour;
- owner/director/key personnel convicted of a relevant offence, e.g. theft.

Discretionary revocation grounds, with presumption of revocation absent exceptional circumstances: Guidance, Annex 6; e.g.

- failure to comply with any sponsor duties;
- HO not satisfied that sponsor has processes in place to fully comply with sponsor duties.

Stages in the judicial review process

1. Pre-action letter
   - To be sent asap.
2. Issue claim and apply for interim relief and expedition
   - Usual 3-month longstop deadline for JR is far too late in sponsor cases.
   - JR may have no practical benefit without interim stay on revocation.

3. Hearing for interim relief

4. Decision on permission (with or without a hearing)

5. Hearing on the merits

Application of public law principles to sponsorship

- In a passage cited in many submissions to the HO, Lord Sumption said in ***New London College*** [2013] UKSC 51:

"[The Secretary of State] *cannot adopt measures which are coercive; or which infringe the legal rights of others… or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law*".

- But Lord Sumption said in the same case:

"There are substantial advantages for sponsors in participating [in the Tier 4 scheme], but they are not obliged to do so. The rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them."

The key principles

- In ***Raj & Knoll*** (CA, below), Haddon-Cave J derived 8 principles from Tier 4 cases:

(1) SoS imposes "a high degree of trust" in sponsors.

(2) Authority to grant a CAS [or CoS] is a privilege carrying great responsibilities, which must be carried out "with all the rigour and vigilance of the immigration control authorities".

(3) Sponsor “must maintain its own records with assiduity”.

(4) Emphasis in PBS is on “certainty in place of discretion, on detail rather than broad guidance”.

(5) Possession of a CAS is strong but not conclusive evidence of eligibility for leave to enter or remain.

(6) SoS does not need to wait for a breach of immigration control caused by the sponsor before suspending or revoking the licence. Reasonable grounds for suspecting a breach might occur will suffice

(7) SoS is the primary judge of appropriate responses to compliances breaches. Courts exercise a merely supervisory role. SoS is entitled to maintain a fairly high index of suspicion and a "light trigger" in deciding when and with what level of firmness she should act.

(8) Courts will respect SoS's experience and expertise when reaching conclusions on sponsor compliance, which is vitally necessary to ensure effective immigration control.

- The same principles apply with suitable modifications in Tiers 2 and 5.

Other case law on revocation

Raj & Knoll in the High Court

[2015] EWHC 1329 (Admin)

- Facts leading to revocation were bad.
- Judge applied principles taken from T4 cases.
- Sponsor was “sloppy and cavalier”.
- Failed to:
  - retain evidence of RLMT;
  - retain copies of qualifications, interview records;
  - retain evidence of right to work;
  - provide correct work addresses.

Raj & Knoll in Court of Appeal

[2016] EWCA Civ 770

- High Court's approach upheld.
- Record-keeping obligations are not onerous or difficult to meet.

"The importance of proper record-keeping and the ability on request to produce documentary evidence of compliance with the relevant procedures is not just obvious but is in any event clearly spelled out in the Guidance".

- Commercial consequences of revocation do not justify a heightened level of judicial scrutiny.
- No unlawfulness where SoS failed to refer in revocation decision to exercise of discretion, given that exceptional circumstances justifying discretion were neither relied upon nor present.
- Court highlighted C's solicitors' "wholly inappropriate and confrontational stance" with SoS, which contributed to compliance concerns rather than alleviating them.

Sri Pathinik Consulting

[2017] EWHC 3204 (Admin)

- Revocation upheld on relatively minor grounds.
  - One worker recruited over 6 months after completion of RLMT.
  - Failure to keep adequate screenshot of advert.
- Held: revocation valid on either ground.

Exmoor Surgery

[2018] EWHC 105 (Admin)

- Essential reading on the RLMT.
- JR of refusal to issue replacement licence.
- Judge accepted 3 out of 4 challenges to HO reasoning.
- But JR failed because HO entitled to conclude that none of applicants had necessary skills and experience. None of other shortlisted applicants did, but sponsor should have looked beyond the shortlist.

Taste of India

[2018] EWHC 414 (Admin)

- Licence revoked re:
  - lack of evidence to show that one employee actually worked as HR manager;
  - workers not being paid properly;
  - certain salaries being paid for convenience.
- Held:
  - standard of review was *Wednesbury* unreasonableness, not disproportionality;
  - SoS entitled to reach conclusions she reached;
  - no breach of art. 8 or A1P1 ECHR.

Liral Veget Training & Recruitment

[2018] EWHC 2941 (Admin)

- Sponsored workers' roles not matching CoS.
- Claim dismissed: clear discrepancies; C was given ample opportunity to provide evidence of actual roles; SoS was not required to spell out the evidence needed to prove that workers were performing the claimed roles.
- Evidence pointed to routine administration roles, not managerial.

London St Andrew's College

[2018] EWCA Civ 2496

- Main basis for revocation: 84 withdrawn ETS certificates.
- Only issue in CA: meaning of "You fail to comply with any of your duties" in list of grounds on which revocation would be considered.
- Sponsor's rather technical argument dismissed as "unarguable".

- Haddon-Cave LJ provided this potentially helpful dictum:

"39. … The Guidance Documents are what they say on the tin, namely guidance documents. As such, they have to be read sensibly, purposefully and holistically. They are not statutes or to be construed rigidly and myopically."

- … But he also said, less helpfully and more questionably:

"66. It follows that even if none of the grounds for revocation were made out, and the SSHD could not establish a breach of any specified duty, the SSHD would still have been entitled to revoke the Appellant's sponsor licence in light of her reasonable, articulated, un-allayed concerns that the Appellant could not be trusted to comply with its duties or act in a manner that was conducive to immigration control."

Timeline of a recent revocation case:

Sri Lalithambika Foods (“*SLF*”)

- 9/8/16: unannounced inspection
- 9/2/17: suspension
- 6/4/17: revocation
- 31/5/17: pre-action letter
- 29/6/17: decision to maintain revocation
- 5/7/17: JR issued
- 15/7/17: revocation stayed at interim relief hearing
- 18/1/18: permission granted
- 27/3/19: claim dismissed

- 13 claimed breaches of sponsor obligations.
- Included several workers not performing roles in CoS/SOC code descriptors (a “known area of risk”).
- E.g.: purchasing manager couldn’t be interviewed during unannounced visit. AO told CO he was visiting the bank then the cash and carry.

***SLF*: interim relief**

[2017] EWHC 2952 (Admin)

- Judge ordered an interim stay on implementation of revocation decision pending a ruling on the merits.
- On “serious issue to be tried”, he emphasised he was not deciding on permission, for which a higher threshold would apply (arguable claim with a realistic prospect of success).

SLF: judgment on merits

[2019] EWHC 761 (Admin), 27/3/19

- Claim “very clearly fails”.
- SoS conceded one breach; won on 13 others.
- No sufficient evidence to displace SoS’s conclusion that purchasing manager was performing a lesser role.
- No procedural unfairness re compliance officer’s failure to go back to interview him.
- That breach alone justified revocation.

- Unsigned employment contracts amounted to breach, even though signed contracts were provided in response to suspension.
- No procedural fairness duty to request a missing CV or a more legible version of a badly copied document.
- Similar problems with the other breaches.

- Absolute compliance with sponsor duties is required:

"155. The case emphasises that, as has been observed in previous judgments, sponsor status is a fragile gift which depends on absolute compliance with the requirements of the Guidance. Those requirements are stringent but not complicated."

- Appellant ordered to pay 25k on account of HO costs.

Any questions?

j.middleton@doughtystreet.co.uk