DRYSTONE
CHAMBERS

"STRATAGEMS AND SPOILS: NAVIGATING THE PRE- AND POST-BREXIT LANDSCAPE"

The title of this talk, Stratagems and Spoils, comes from the words spoken by Lorenzo to his lover Jessica in Shakespeare's Merchant of Venice*

**"The man that hath no music in himself,
Nor is not mov'd with concord of sweet sounds,
Is fit for treasons, stratagems, and spoils."**

You might think it's a rather strange choice of title, but the pre-Brexit landscape bears some striking similarities to the Venice of the play. Two of the main characters, the Moorish Othello and the Jewish Shylock, are held in huge suspicion as foreigners by a society which forgets quite how much it depends upon their labour for its security – Othello is a soldier – and economy – Shylock is a moneylender. Their foreignness marks them out as Other throughout. It is certainly arguable that our current government, apparently unmoved by the Syrian refugee crisis, is unlikely to be moved by concord of sweet sounds. And there are those in our society who regard the promotion, or facilitation, of immigration as suspicious bordering on the treasonous. Which is a rather roundabout way of getting to the point of the talk: what are our strategems? And how best to reap the spoils?

Strategy is underrated in immigration law. Simply making an application and awaiting the result is a perfectly good modus operandi as far as it goes. But what happens in more complex cases? And to what extent should we take into account likely changes or challenges when considering strategy?

I am looking this evening at EEA applications in the context of the immediate future, the pre-Brexit landscape, and towards the longer term of post-Brexit. At the moment we have the referendum behind us, the near certainty of Article 50 being triggered ahead. What we do not know is what the post-Brexit changes will be, or how far the government will be willing to go in terms of restricting European migration.

I shall pause here, since I have the luxury of being the one talking, to offer my own guess – and it is only a guess. We have a service economy, up to 80% of our economic stability rests on the provision of services. What the Brexiteers hope for is to retain the freedom of movement of services on which we rely while cutting adrift the freedom of movement of workers and their families which accompanies it. It is pretty unlikely that the rest of Europe will allow that to happen. My guess is that we will essentially follow the Norwegian model of retaining most EU law in practice while being outside the Union in name, and that we will retain some

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*This is the transcript of the speech given by Julian Norman to the Society of Danish Engineers

version of freedom of movement, although where the current EEA Regulations are more relaxed than the Citizens' Directive, they are likely to be tightened.

A good rule of thumb though is to hope for the best, but prepare for the worst. There remains a possibility that EEA migration will be stopped altogether and the Immigration Rules, including the Points Based System will apply. For those who haven't heard of this – non-EEA, non-family migration is governed by the Points Based System. Tier 1 is for high net worth individuals: investors and entrepreneurs. Tier 2 replaced the old work permit scheme for skilled workers. Tier 4 is for students and Tier 5 for gap year or temporary workers. The keen mathematician will notice the absence of number 3: Tier 3 was intended for low-skilled workers but has never been implemented, because the UK gets its low-skilled immigrant workforce from within the EU. Should that happen, then employers will need to become registered sponsors in order to take on EEA migrants and will only be permitted to sponsor a set number of EEA employees according to what UKVI considers necessary.

Likewise for family migration: the EEA Regulations are significantly more generous than the Immigration Rules. For a European national working in the UK who has a spouse from outside the EU, they need only show that they are exercising Treaty rights and that they are married. A British national seeking admission of a foreign national spouse must complete an extremely lengthy application form, prove that the marriage is genuine and subsisting, that they meet a minimum income requirement, have adequate accommodation, and that they satisfy the suitability requirements. In the event of a "hard Brexit" where free movement ends, European nationals in the UK would need to meet the same higher threshold.

So much for conjecture: let us turn now to the more immediate pre-Brexit landscape. What we do know is that there has been an increase in state attention to EEA migrants. Marriages are being closely scrutinised for signs of "marriage of convenience," employers are being checked for any signs of employing irregular migrants. While there have been indications that those who are already here will be permitted to stay post-Brexit, this seems to be going hand in hand with a crackdown on anybody who might not be entitled to stay.

I am going to look at potential loss of residence rights by EEA nationals, the implications for employers, and then finally management of Home Office scrutiny in both scenarios.

So: how can an EEA migrant lose their right to remain? The most obvious one is through criminal activity. However, unlike the deportation provisions of the Immigration Rules, which provide that a person will be deported if they receive a sentence of 12 months or more, the EEA Regulations restrict deportation to those who represent a present threat, as per Regulation 21.

You should also be aware of Regulation 21B. This is an "abuse of rights or fraud" and essentially means that an EEA national who enters a Marriage Of Convenience is also sanctioned with what amounts to a 12 month deportation.

This is being expanded with the new Regulations to include people who enter in the Surinder Singh route. This only applies to British nationals who go to live and work in another member state for a period of time, usually six months, in order then to be treated as EEA nationals for the purposes of immigration law. The new Regulations suggest that someone who moves abroad *solely* to take advantage of this loophole will be unable to take advantage of it, which would seem to conflict with the CJEU's judgment in *Akrich;* however, it remains to be seen how this will be implemented.

A residence card may of course also be revoked if a person ceases to be a "qualified person." This sounds far more simple than it is. If a person loses their job they do not immediately, or automatically, cease to be a qualified person; see Regulation 6.

There are a large number of people in the UK who may have a permanent right of residence having spent five years in the UK but who are unsure about whether their five years have all been as a 'qualified person.'

I am not going to go through each and every possibility, but both lawyers and lay clients should be alive to the possibility that someone who has been here for five years may have acquired PR even if they have not been employed for five continuous years. For example, if someone entered the UK six years ago and spent

3 months as a jobseeker
2 years employed
3 months unemployed
6 months employed
They then get an inheritance and give up their job
They have just begun studying and working 6 hours a week in a library

Provided they have had comprehensive medical insurance while they were self-sufficient and studying, they are entitled to PR. It is always worth combing back through a chronology to establish whether PR has been acquired.

Once acquired, PR is only lost through absence from the UK for two years or more. That is perhaps best illustrated through example; one recent case I had, someone who worked from 1993 – 2001 but then suffered from bad depression. She was then reliant on a combination of DLA and support from her parents, but did not have comprehensive medical insurance so could not be classed as 'self sufficient.' The HO wanted to revoke her right of residence, but following an appeal she actually ended up with PR as she was able to show she acquired PR in 1998. As always with cases like this the core will be evidence. It is never enough simply to make an assertion, it may involve going back through historic records.

That covers loss of individual rights. What about employers? They may be more concerned with non-EEA family members of EEA nationals. There appears, anecdotally, to have been a surge in the number of penalty notices issued under s.15(1) of the Immigration, Asylum & Nationality Act 2006.

s.15(3) as you will see provides a statutory defence. Even if your employee does turn out to be an irregular migrant, if you have conducted the Employee Checking Service checks online then that is a complete defence.

So where does it get complicated?

Firstly, Article 23 of the Citizens' Directive provides that EEA nationals and their family members MUST be permitted to work. This is unequivocal. An employer who terminates the employment of, say, a Russian national who is married to a French national is breaking the law and will be liable to damages at an employment tribunal, and so it was held in *Okuoimose v City Facilities Management (UK) Ltd (Jurisdictional Points : Fraud and illegality)* [2011] UKEAT 0192_11_1309.

That case concerned a Nigerian employee who was married to a Spanish man. She had held a residence card, and that card had expired. Her employer suspended her without pay at the date of the expiry of the residence card. However, her right to work was not conditional on the recognition of this by the SSHD – she had a right to work throughout under Article 23. You have to feel a little sorry for the employer, who was stuck between the rock of his employee's entitlement to work and the hard place of the SSHD's requirements that he retain evidence of it, but there it is.

The second complication is that the SSHD's own employees don't always apply the law properly. There have been a disturbing number of cases where the penalty seems to be attached to the failure to use the ECS, rather than the legality of the employee in question. Again, perhaps best illustrated through example, a company which was employing a woman who is the spouse of an EEA national exercising Treaty rights, and who is therefore quite entitled to work. The company has been issued a penalty notice as they did not check the register. We were successful in challenging it, but the damage is done to the company which incurred loss of time, energy and resources in an appeal.

Finally, a very brief look at strategy for individuals and employers who find themselves under scrutiny. There is not nearly enough time to do this in detail, perhaps that is a topic for a separate session, so this is given with a caveat that all scenarios are fact specific. If you have any doubts then seek specialist legal advice, that is what we are here for. But in brief:

I will state the obvious first: employers, make sure that you have made 'all reasonable efforts' to ensure that your employees have permission to work. There is no substitute for this.

Immigration officers now have similar powers to the police, and similar responsibilities which are governed by PACE.

Treat them like vampires. In folk lore, a vampire can only come in if invited, and there are numerous folk stories of vampires cunningly managing to get such an invitation. Immigration officers – and indeed any similar officer, right down to

television licensing officers – work in much the same way. Don't let them in! If they have grounds for suspicion then they can apply for a warrant; if this system is good enough for police officers seeking to arrest violent criminals then it is certainly good enough for IOs looking for irregular migrants.

If they have a warrant then you must let them in. And if you are a Tier 2 sponsor then you have an obligation to let them in, so do be alive to the separate obligations of Tier 2 sponsors who must co-operate with record checks and visits.

s.47 of the new IA 2016 allows IOs extensive powers of search and retention of documents once they are on your premises lawfully. If you let them in, or they have a warrant, they are there lawfully.

If the IO considers there is an issue with a worker then they will look to the employer's records. At this stage the employer must show that they have made all reasonable efforts to establish that their employee is in the UK legally. That could include using the ECS, or it could mean retaining a copy of the employee's marriage certificate, a council tax bill showing cohabitation, and evidence that their spouse is working.

If a penalty notice is issued then this should be appealed promptly with cogent evidence and ideally the benefit of legal advice.

Interviews of individuals. This particularly applies to situations where IOs are on work premises or have disrupted a marriage, and it does not apply to a pre-arranged marriage interview at Liverpool. The IOs must comply with PACE which means that they should caution a person they wish to interview and they should tell them whether or not they are under arrest. Unfortunately Home Office guidance at present indicates to IOs that they shouldn't do this initially.

If you are an individual in these circumstances, ask if you are under arrest. If you are not, then leave. If the IO has 'reasonable grounds' to suspect you of unlawful activity then they will arrest you – this sounds bad, but if they have reasonable grounds they were going to do it anyway. At least this way you will have the protection of PACE for the interview. If they do not have reasonable grounds then they must let you go.

If you give a voluntary interview then it will not be recorded. You will not have a lawyer. You may not be offered an interpreter. You may not realise that you do not have to sign any handwritten notes of the interview. And it is very difficult to repair that at an appeal stage. Far better to insist on arrest or release than to be stuck with notes of an interview in a language you did not quite follow and where innocent mistakes may be held evidence of deceit.

I do not say this in any spirit of defiance. IOs have been given these powers by the government and they are, of course, doing their jobs. This is not intended as a counsel of obstruction. It is however vital that people who are increasingly scrutinised are aware of their rights throughout the process. Only then will the system work as intended, to remove those who have no right to be here and to protect those who do. Brexit has given us an uncertain landscape, and the path through it is not a one-way street for the Home Office. We navigate it together, and I hope that this brief talk has been a useful introductory roadmap.

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