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# VISA BYTES

## Tier 2: The cap bites

The effects of the cap are now beginning to bite. Employers who applied to the Managers for allocation of Certificates for Chefs (who are recognised to be in short supply) are being turned down on the basis that priority is being given to those who are applying for extensions with their current employers within a 60 day period. This effectively means that new staff are not being considered nor are staff who want to move within the UK to other employers. This is a restrictive measure which is likely to be regarded as unlawful under employment law provisions as it has the effect of preventing staff from leaving their employment. It is also a signal to new restaurants that they will not be able to bring in staff to enable them to develop their businesses despite the fact that there are acute shortages. There is currently a potential challenge in the higher court on the legality of these latest changes as there is no clear indication of the legal authority for the measures. The higher courts have in recent times criticised the UKBA for introducing guidance which has no clear legal basis and this looks like the next provision to be challenged. At a time when the growth of businesses is critical and creates employment these provisions will have a negative impact.

Employers are asked to contact the author with their experiences of

the cap.

## Human rights

A recent case has succeeded on the basis of a human rights claim under Article 8 where the student could not meet the Immigration Rules. In the case of Pankina, Sedley LJ giving the lead judgment in the Court of Appeal recognised the fact that the Home Secretary must have regard and give effect to applicants' Convention rights. The recent case applying Pankina has stated that it is necessary to look at the wider impact of the guidance. This will mean in most cases evaluating the extent and quality of their family and private life in the United Kingdom. It recognised the impact on the applicant where he/she falls marginally or momentarily short of a financial criterion.

### It is worth reproducing the comments of LJ Sedley in Pankina:

"The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible.... If the Home Secretary wishes the rules to be black letter law, she needs to achieve this by an established legislative route.

The recent case

accepts that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of Article 8 and requires that this must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference must call for careful assessment.

The case makes the point that those who have been "admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connections with the course, the institution, will be aiming for a professional qualification sought, as well as have social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfulfilled, and discretionary factors such as mis-representation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay."

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