



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18997/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2019

Decision & Reasons Promulgated
On 12 September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR HOME DEPARTMENT

Appellant

and

SARSHAR AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:

Ms S Jones, Senior Home Office Presenting Officer

For the Respondent/Claimant: Mr Richard Singer, Counsel instructed by M&K Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals from the decision of the First-tier Tribunal (Judge Thomas sitting at Birmingham on 9 April 2019) allowing the claimant's human rights appeal on the ground that there were exceptional circumstances in his particular case which lessened the public interest in immigration control to a point where it was outweighed by his protected right to private life.

The Reasons for the Grant of Permission to Appeal

2. On 31 July 2019 Judge Pooler granted the Secretary of State permission to appeal for the following reasons: *“It is arguable that although the [claimant’s] former representatives did not give him good advice, they did not blatantly fail to follow his instructions and so the Judge misapplied the decision in **Mansur (Immigration Adviser’s failings: Article 8) Bangladesh [2018] UKUT 00274 (IAC)**; and that she failed to give adequate reasons for explaining why this was one of the rare cases in which the representative’s failings constituted reason to qualify the public interest in immigration control.”*

Relevant Background

3. The claimant entered the UK on 24 September 2003 with valid entry clearance as a student, and he thereafter had continuous lawful leave until 22 August 2013, when his appeal rights were exhausted in respect of an in-time application for leave to remain as a Tier 4 (General) student migrant made on 18 February 2013, which was refused on 25 March 2013, and dismissed on appeal on 11 August 2013.
4. On 28 February 2014 the claimant applied for indefinite leave to remain in the UK on the basis of having accrued 10 years’ lawful residence in the UK. The application was refused on 1 July 2014 with a right of appeal.
5. In the decision promulgated on 12 November 2014, First-tier Tribunal Judge Stott allowed the claimant’s appeal as he accepted the argument of his legal representative that the effect of the decision made by First-tier Tribunal Judge Talbot on 11 August 2013 (dismissing the appeal against the refusal of further leave to remain as a student) was that there had been no final determination of the application, and consequently the claimant’s leave had been extended to 28 February 2014 under section 3C of the Immigration Act 1971. While Judge Talbot had dismissed the appeal under the Rules on account of the claimant not having a valid CAS at the date of application and not having passed the English language test stipulated in the conditional offer, Judge Talbot had ruled that the concomitant removal decision under section 47 was not in accordance with the law, and had remitted the application to the respondent for further consideration under the Immigration Rules *“in the light of my above findings.”*
6. The Secretary of State applied for permission to appeal. In a decision promulgated on 5 May 2015, Deputy Upper Tribunal Judge Harris set aside the decision of the First-tier Tribunal as being erroneous in law. He held that Judge Talbot’s direction did not have the effect of extending the claimant’s leave under section 3C. The removal decision was not a variation of leave, and therefore the claimant’s appeal had been finally determined on 11 August 2013.
7. The claimant sought permission to appeal to the Court of Appeal. In the meantime, on 18 August 2015 he obtained an adjudication from a Legal Ombudsman (“LO”) that his previous representatives had provided him with poor service, for which she awarded him compensation in the sum of £900.

8. Permission to appeal was refused by the Upper Tribunal and by the Court of Appeal on paper. A renewed oral application for permission came before Lord Justice Vos sitting at the Royal Courts of Justice on 19 May 2016. Mr Singh, instructed on a direct access basis, appeared on behalf of the claimant. One of the arguments advanced by Mr Singh was that the Secretary of State ought to have exercised her discretion to allow a late application for indefinite leave to remain beyond the 28 days from 22 August 2013, when his appeal rights were exhausted, *“when there were good reasons for the delay, particularly that he had been badly advised and that it was through no fault of his own that he was placed in the invidious position of making a series of wrong, misguided applications.”* Mr Singh relied upon the LO’s decision.
9. In his judgment, Vos LJ said at [18] that the alleged negligence of the solicitors was a matter of grave concern. But it was very hard to say that the fact that the claimant had received bad advice from a solicitor and had thereby failed to comply with the Rules, made it a reason why the claimant should be regarded as having made an application in exceptional circumstances.
10. He observed at [19] that the claimant had a problem in that his 10 years did not expire until 23 September 2013. So, had he been properly advised, he might have appealed the First-tier Tribunal’s decision in time, and then withdrawn that appeal and made a further application on 24 September 2013: *“Had that been the scenario, he might have been alright.”*
11. At [22], he said that it would have required *“some quite canny advice”* for the claimant to be in a better position for certain. The question, however, was not whether the claimant could have been so advised that he could have succeeded under the Rules in getting permission to remain. The question was rather whether the argument that he was unfairly treated gave rise to an important point of principle or practice (the second appeal test). At [23], he answered this question in the negative. Exceptional circumstances were rarely applied, for good reasons, and it would not be possible for the Secretary of State to know when bad advice had been given in order to find exceptional circumstances or where it had not been given. He continued in paragraph [24]: *“It was also clear that the guidance to which Mr Singh referred, relating as it does to exceptional circumstances like the ill-health of the appellant or the situation that the appellant may be in a coma, is not comparable to the [claimant’s] situation, where he was able to make what applications he wanted and made them on the advice of solicitors he instructed.”*
12. Vos LJ went on to ask himself whether the decisions made by the Secretary of State were unfair. At paragraph [25], he said that they could not be described as legally unfair. Nor could it be said that the Secretary of State had, even arguably, fallen below the standards that she set herself in her guidance.
13. The claimant applied for leave to remain on human rights grounds on 1 November 2016, relying on the findings of the LO issued on 18 August 2015. On 5 September 2018 the Department gave their reasons for refusing the application. On the topic of exceptional circumstances, at no point in the report from the ombudsman was any blame placed on the Home Office, and therefore the Home Office was not obliged to

deviate from considering his application in accordance with the Rules currently in place. Due to his representative's poor service, he failed to be able to meet 10 years' lawful residence in the UK, and he had remained in the UK without lawful leave.

The Hearing Before, and the Decision of, the First-tier Tribunal

14. At the hearing of Judge Thomas, both parties were legally represented. In her subsequent decision, the Judge found at [20] that the claimant was let down by his previous representatives in that, had they given good advice, it was likely that he would have been able to make a valid application for ILR soon after 24 September 2013.
15. At [21], the Judge set out the guidance given by Lane J in **Mansur** as to the general rule and the circumstances in which the Tribunal could depart from the general rule. At paragraph [30] of **Mansur** Lane J held:

“Once the issue is analysed in this way, it can readily be seen why it will be only rarely that an adviser's failings will constitute such a reason [to qualify the public interest in firm and effective immigration control]. As a general matter, poor legal advice from an immigration field will have no correlation with the relevant public interest. The weight that would otherwise need to be given to the maintenance of effective immigration controls is not to be reduced just because there happen to be immigration advisers who offer poor advice and other services. Consequently, a person who takes advice to do X when doing Y might have produced a more favourable outcome normally would have to live with the consequences.”

16. At [22] the Judge said:

“Unlike in the case of **Mansur**, the LO in the [claimant's] case does not find the claimant's representatives blatantly failed to follow his instructions, but rather that they gave bad advice and indeed failed to advise him of options as his circumstances changed. The [claimant's] situation does not fall within the type referred to by Lane J at paragraph 30. It is relevant that the {Secretary of State} accepts the decision, due to the [claimant's] representative's poor service, that the [claimant] failed to meet the 10 years' lawful residency, and subsequently remained in the UK without lawful leave. In this case, there is a finding of culpability by a relevant professional regulator, which in my view, applying fairness, cannot count for nothing, and therefore must affect the weight given to the public interest in maintaining effective immigration control.”

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Ms Jones submitted that the Judge had misapplied **Mansur** and/or had failed to give adequate reasons why the claimant's case was distinguishable from the generality of cases in which poor legal advice in the immigration field had no correlation with the relevant public interest. On behalf of the claimant, Mr Singer developed his Rule 24 response opposing the appeal. He submitted that the Judge had mistakenly referred to the wrong paragraph of Lane J's judgment in her discussion at paragraph [22].

18. Having heard from both representatives, I ruled that an error of law was made out, for reasons which I gave in short form. The representatives were in agreement that I could and should remake the decision without hearing any further evidence. Mr Singer invited me to remake the decision in the claimant's favour on the ground that, on analysis, the negligence of his previous representatives was so gross that their conduct was akin to a blatant failure to follow their client's instructions.

Reasons for Finding an Error of Law

19. As I explored with Mr Singer in oral argument, the scenario described by the Judge at the beginning of paragraph [22] fell full square within the type of situation described by Lane J at paragraph 30 of **Mansur**. The claimant had been the recipient of poor advice. He had been advised to do X while doing Y might have produced a more favourable outcome. So it was, on the face of it, oxymoronic for the Judge to find that his situation did not fall within the type described at [30] of **Mansur**, and hence within the general rule that this was a case where the adviser's failings did not qualify the public interest in firm and effective controls.
20. It is true that there had been a finding of culpability by the relevant professional regulator. But this did not of itself take the claimant's situation outside the scope of the type of situation described in **Mansur** at [30].
21. The Judge held that a finding of culpability by the LO could not count for nothing, "*applying fairness*". However, as rehearsed in the judgment of Vos LJ, to which the Judge had earlier made reference in paragraph [19], this was not a case where the common law principle of fairness was engaged, as there had been no unfairness on the part of the Home Office.
22. Accordingly, Ground 2 is also made out. The Judge did not give adequate reasons for finding that this was one of those rare cases where the poor advice that the claimant had received constituted a reason to qualify the weight to be placed on the public interest in maintaining firm and effective immigration controls.

The Remaking of the Decision

23. The only issue in this appeal is whether there are exceptional circumstances which outweigh the public interest in the claimant's removal in circumstances where he does not meet the requirements of the Rules for the grant of further leave to remain. The exceptional circumstances relied on by the claimant are that, but for the poor advice which he received from his representatives, he would have accrued 10 years' lawful leave as of 23 September 2013, thereby qualifying for settlement. Conversely, the effect of the refusal decision is to leave him without a right to settlement and liable to removal.
24. In the case of **Mansur**, the key feature was that the OISC decision showed that IWP did not give the appellant poor advice, but that the organisation "*blatantly failed to follow the appellant's specific instructions regarding the timing of the withdrawal of the application for permission to appeal.*" Lane J found that this failure was the sole reason

why his application for leave fell to be treated as invalid. The misfeasance of OISC was then aggravated by the Home Office negligently misinforming the appellant that his application was valid, when in fact it was invalid as the Home Office should have known: see Mansur at [22]. Conversely, in the present case there is no failure by the representatives to follow instructions given by the claimant. I am also not persuaded that the conduct of the claimant's previous representatives is equivalent to the misfeasance found in Mansur.

25. The claimant's situation in the period leading up to the 10-year anniversary on 23 September 2013 was far from straightforward. This is apparent from the decision of Judge Talbot on 11 August 2013. The application for further leave to remain as a student made in February 2013 (the first application) was doomed to fail under the Rules, as he did not have a valid CAS at the date of application and he was simply relying on a conditional offer under which he also had to pass a relevant English Language test. In order to ensure the continuity of his lawful residence, the appellant needed to make the application when he did, but this did not change the fact that this was not a meritorious application under the Rules, and he also did not have a meritorious appeal under the Rules.
26. The LO found that the firm advising the claimant had acted reasonably up until the end of July 2013, and in assessing the amount of compensation she took into account that they had followed his instructions in making the first application "*even though he knew he did not meet the criteria at that time*".
27. The firm followed his instructions in making a second Tier 4 application on 23 July 2013 while his unmeritorious appeal against the refusal of the first application was pending. The LO held that by this time the claimant met the criteria of the Rules. Accordingly, if he had waited until he met the criteria of the Rules before making a meritorious application for leave to remain, he would have been an overstayer from 19 February 2013.
28. In the covering letter, the firm sought to withdraw the pending appeal, which was the necessary prerequisite for the second application being valid as opposed to being void under section 3C(4) of the Immigration Act 1971. However, the Home Office did not accept that the letter constituted sufficient notice of withdrawal. The LO found that the firm had provided poor service in not taking positive steps to clarify the position and to ensure that the appeal was withdrawn, once they realised that the Home Office did not accept their attempt to withdraw it.
29. Following the dismissal of the appeal against the refusal of the first application, the claimant could have extended his leave under section 3C by applying for permission to appeal to the Upper Tribunal. But the failure by the firm to advise him of this option does not disclose misfeasance for two reasons. Firstly, an application for permission to appeal would have been wholly without merit. Secondly, as Judge Talbot indicated that the effect of his decision was to extend the claimant's leave, and his legal error in this regard – subsequently replicated by Judge Stott in November 2014 – was only cleared up by the Upper Tribunal long after the event, the argument

that the firm was seriously at fault in not giving advice at the time which anticipated the ruling of the Upper Tribunal is unsustainable. Similarly, it is only with the benefit of hindsight that the firm can be criticised for not advising the claimant in the alternative to make a third application for leave to remain immediately after his appeal against the first application had been finally determined.

30. The knock-on effect of the firm's poor service in not ensuring that the appeal was treated as withdrawn when making the second application was that the second application was rightly rejected as void on 30 September 2013. The LO found that the firm had provided poor service in not discussing with the claimant at this time - after the second application had been rejected - the option of applying for ILR "*at this point*". The LO did not find that the firm was negligent in not advising the claimant after 11 August 2013 of the option of pursuing an onward appeal or of making a third application for leave to remain as soon as possible so as to prevent him from becoming an overstayer after 22 August 2013.
31. At paragraph [23] of **Mansur**, Lane J held that the importance to be given to immigration control fell to be reduced by reason of the respondent's failure to tell the appellant that his application for leave was not valid - and instead lulled him into a false sense of security by expressly representing the opposite. Thus, the decision on proportionality was fortified by a finding that the appellant had been the victim of common law unfairness perpetrated by the respondent, which feature is absent from this case.
32. The claimant has not shown that he has established a private life of a special and compelling character such as to justify a departure from the general rule that little weight can be attached to private life which is built up here while a person's status is precarious. He has also not shown that there are exceptional circumstances in his case which outweigh the public interest in the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly I set the decision aside and substitute the following decision:

The claimant's appeal is dismissed.

I make no anonymity direction.

Signed

Date 6 September 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal, there can be no fee award.

Signed

Date 6 September 2019

Deputy Upper Tribunal Judge Monson