GIS/2475/2016

NOTICE OF DETERMINATION OF

APPLICATION FOR PERMISSION TO APPEAL

The application for permission to appeal to the Upper Tribunal was made later than the time allowed and I refuse to extend that time under rule 5(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Had I decided to extend time, I would nevertheless have refused permission to appeal.

REASONS

Background

1. On 18 January 2016 the Immigration Services Commissioner ["the Commissioner"] applied to the First-tier Tribunal ["the tribunal"] to suspend the registration of the Applicant, Mr X, ["the Applicant"] as a level 3 immigration adviser, pursuant to paragraph 4B of Schedule 6 to the Immigration and Asylum Act 1999 ["the 1999 Act"]. As is apparent from this ruling, the Applicant has been charged with but not convicted of a criminal offence contrary to section 25 of the Immigration Act 1971. In those circumstances I do not consider that disclosing his full name in this ruling adds anything to my reasoning.

2. Paragraph 4B(1) reads as follows:

"(1) The First-tier Tribunal may, on an application made to it by the Commissioner, suspend a person's registration if the person is for the time being charged with –

(a) an offence involving dishonesty or deception;

(b) an indictable offence; or

(c) an offence under section 25 or 26(1)(d) of the 1971 Act."

Paragraph 4B(2) reads as follows:

"(2) The suspension of the person's registration ceases to have effect if one of these occurs –

(a) the person is acquitted of the offence;

(b) the charge is withdrawn;

(c) the proceedings in respect of the charge are discontinued;

(d) an order is made for the charge to lie on file, or in relation to Scotland, the diet is deserted pro loco et tempore."

3. The Commissioner made his application because, in November 2015, the Applicant was charged with one offence contrary to section 25(1) and 25(6) of the Immigration Act 1971. The charge alleged that, on 28 October 2011, the Applicant provided false details in an Affidavit of Relationship thereby facilitating the commission of a breach of immigration law by an individual who was not a citizen of the European Union and that the Applicant knew or had reasonable cause to believe that this act facilitated the commission of a breach of immigration law by a person who was not a citizen of the European Union.

4. As the Applicant had been charged with a breach of UK immigration law, the Commissioner took the view that this had serious implications for the Applicant's fitness to act as an immigration adviser. Were he to be convicted of an offence under section 25, the Applicant's registration must be cancelled pursuant to the 1999 Act. The Applicant vigorously contested the charge against him and had pleaded not guilty to it. A criminal trial was scheduled to take place in October 2016.

5. On 18 February 2016 the tribunal held an oral hearing of the Commissioner's application. Both parties were legally represented at that hearing and made submissions to the tribunal.

The Decision of the Tribunal

6. The tribunal decided to suspend the Applicant's registration as an immigration services adviser with effect from 5 pm on 18 February 2016. It gave full written Reasons for its decision.

7. The tribunal set out the background to the application before it and summarised the factual basis upon which the Applicant had been charged. In deciding whether or not to suspend the Applicant, it approached matters on the basis of the evidence before it, even though it might later turn out that the allegations against the Applicant were not proved. Having regard to the limited case law, it stated that its task was one which "*essentially involves an assessment of proportionality*".

8. It considered, first, the seriousness of the risk to the public if the adviser in question was allowed to continue to practise. The public comprised not just those who were clients of the adviser but also the general public who needed to be protected against misfeasance by immigration practitioners.

9. Second, it considered whether public confidence in the regulation of immigration practitioners would be seriously damaged if the adviser in question was allowed to continue to practise.

10. Third, it considered the effect on the adviser of suspension and the effect on persons who may be receiving immigration services from him/her.

11. The ultimate question, weighing and balancing those matters was whether suspension would be proportionate.

12. Against each factor, the tribunal considered the submissions made by the parties and explained in detail the view it took with respect to those matters. It concluded that suspension of the Applicant was appropriate.

Proceedings Before the Upper Tribunal

13. An appeal to the Upper Tribunal lies on “any point of law arising from a decision” [section 11(1) of the Tribunals, Courts and Enforcement Act 2007]. The Upper Tribunal has discretion to give permission to appeal if there is a realistic prospect of success or if there is some other good reason to do so.

14. In accordance with the rules, the Applicant sought permission to appeal from the tribunal. This was refused on 23 March 2016. He then renewed his application to the Upper Tribunal on 12 August 2016, well in excess of the applicable time limit of one month for such an application to be made. The Applicant explained the delay in making his application as follows. He said that he had learned on 4 July 2016 that the original criminal charge was not to be pursued and, according to him, had been amended. In effect, he was saying that he could not pursue any grounds of appeal until 4 July 2016.

15. In summary, the grounds of appeal set out in the application form to the Upper Tribunal were that, in the light of the amended charge, the tribunal erred in law as there was no valid criminal charge against the Applicant on 18 February 2016 when he was suspended. The criminal charge was false and thus there was a miscarriage of justice. However an attachment to that form stated that the original charge had been withdrawn by the prosecution and the proceedings in respect of the original charge had been discontinued.

16. On 15 September 2016 Upper Tribunal Judge Hemingway refused to admit the application for permission to appeal and explained that, even if he had done so, he would have refused permission to appeal. The Applicant stated that he wished to have a hearing of his application for permission to appeal and on 3 October 2016 I gave directions to that effect. A hearing took place before me on 14 December 2016 at which the Applicant appeared in person. The Commissioner was, with my permission, was not represented though I had the benefit of a short written submission from him. A representative of his, Mr Hussain, attended the hearing but took no part in the argument before me.

17. At the conclusion of that hearing I told the Applicant that I would give him more time so that he could produce to me evidence from the Crown Prosecution Service confirming his assertion that the original criminal charge against him had been either amended or withdrawn and a new charge substituted in its place. I permitted the Commissioner to file information from the Crown Prosecution Service on this issue if it was available to him. I also directed the Commissioner file additional submissions on some legal issues arising from my perusal of this application.

18. Both parties complied with my directions though the Applicant complained that the Commissioner had not done so within the time I allowed. He said he had not been sent a copy of a letter from the Crown Prosecution Service dated 16 January 2017 and thus could not make submissions about it. This letter was in fact sent to the Applicant on 15 February 2017 by the office of the Upper Tribunal. Though my timetable for making additional submissions had expired prior to 15 February 2017, I have received no further submissions from the Applicant since that date. The history of this litigation has shown that the Applicant has filed additional material with the Upper Tribunal whether or not there has been a direction to that effect.

19. I also note that the Commissioner’s submissions in response to my direction and the letter from the Crown Prosecution Service dated 16 January 2017 were both emailed to the Applicant by the Commissioner on the same dates that those

documents were emailed to the office of the Upper Tribunal. The email address used for the Applicant was the same email address that was used by him to correspond with the Upper Tribunal. I am thus satisfied that the Applicant has had ample opportunity to comment on both the Commissioner's submissions and the letter dated 16 January 2017.

20. I propose to consider first, whether I should admit this application and then to address the grounds of appeal advanced by the Applicant.

21. I have read the Upper Tribunal file.

Admitting the Application

22. Under the relevant procedural rules, where the tribunal has refused permission to appeal as it did in this case, a party has one month from the date the refusal is sent out to apply direct to the Upper Tribunal for permission to appeal [see rule 21(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008]. Rule 21(3) states that the application must be "*made in writing and received by the Upper Tribunal no later than*" one month from that date.

23. It follows that, in this case and if the refusal was posted on the day it was made namely 23 March 2016, the application for permission to appeal should have been received no later than 20 April 2016. Though it is not clear to me when the tribunal's refusal of permission was sent to the Applicant, I will assume that the tribunal's refusal was not sent until 28 March 2016. Applying that time scale, the application for permission to appeal should have been received by the Upper Tribunal no later than 25 April 2016. It arrived on 12 August 2016, some three and a half months later.

24. There is a general and unfettered discretion for the Upper Tribunal to extend the time limit where it is fair and just and in accordance with the overriding objective to do so [rules 2 and 5(3)(a)].

25. There is no automatic right to an extension of time. In deciding whether to extend the one month time limit and so admit this late application, I must take into account all the circumstances in deciding what is fair and just. Thus, finality in litigation is an important social good. Time limits are there for a purpose and are there to be observed. It is for the Applicant to show why his late application should be admitted. The delay in this case is very significant.

26. I must also take account of the explanation for the delay. The Applicant's case is effectively that he only became aware that the original criminal charge was not being pursued and had been amended on 4 July 2016 and thus he was, I infer, in no position to challenge the tribunal's decision before that date. Even if I were to give the Applicant the benefit of the doubt about this matter and to decide that time started to run from 4 July 2016, his application for permission to appeal should have been received no later than 1 August 2016, that date being one month after 4 July 2016. It was not received by the Upper Tribunal until 12 August 2016. That additional delay remains wholly unexplained.

27. I also take into account the strength (or lack of it) of the underlying application on its merits which I consider below. I also bear in mind that the Commissioner has limited resources and should not have to expend them on matters which he reasonably thought were properly disposed of. My conclusion in all the

circumstances is that it is not fair and just to extend the time limit so as to admit this late application.

28. On that basis I refuse to extend time in order to admit this late application.

The Merits of the Application for Permission to Appeal

29. Even if I am wrong about whether I should admit this late application, I am wholly unpersuaded that this is an appropriate case in which to give permission to appeal in any event.

The Applicant's Case

30. In paragraph 15 above, I noted that the Applicant's case was either that the original criminal charge against him had been amended or that it had been withdrawn. In additional grounds of appeal submitted by him on 20 September 2016, the Applicant provided further details of his case. He claimed that, in consequence of a Subject Access Request which was responded to by the Home Office on 19 August 2016, he had established that the case summary provided to support the criminal charge against him was a false document [see page 33 of the Upper Tribunal bundle]. He repeated his submission that the charge which founded the basis of his suspension had been withdrawn or amended by the Crown Prosecution Service and thus, at the time of his suspension, there was no valid charge against him. He alleged that the police officers who were involved in charging him were currently being investigated by West Yorkshire Police Professional Standards, the Independent Police Complaints Commission and the Home Office.

31. On 18 October 2016 the Applicant, in response to my direction asking him for formal confirmation of and the details of the criminal charges against him, stated that his criminal trial had been adjourned. He further alleged that the Office of the Immigration Services Commissioner "*procured*" his suspension on 18 February 2016 on a false charge [page 45, Upper Tribunal bundle].

32. On 5 December 2016 the Applicant provided a bundle of documents in support of his case. Included therein was a witness statement made by him and dated 1 December 2016 in support of his application for permission to appeal. It repeated his assertion that the original charge against him had been withdrawn and had been replaced by another charge. It made allegations of misconduct against the investigating police officers and went into considerable detail about the criminal charge against him. The Applicant asked the Upper Tribunal for permission to appeal "*to reverse the decision of the First-tier Tribunal procured by fraud*" [page 57, Upper Tribunal Bundle].

33. Before me in oral submissions the Applicant maintained the case set out in his witness statement. He stated that the tribunal had been misled by the Commissioner and by the police and had not taken his representations into account. He emphasised the financial hardship he was experiencing in consequence of his suspension.

Legal Issues

34. At the hearing the Applicant accepted that it was difficult to point to any error of law in the tribunal's decision. His application aimed, in my view, to reverse the effect

of the tribunal's decision either by the grant of permission to appeal or by any other available means.

35. Paragraph 4B(1) to Schedule 6 of the 1999 Act, when read in conjunction with paragraph 4B(2), does not empower a First-tier Tribunal to review its decision to suspend an adviser's registration. Suspension would only come to an end if one of the matters set out in paragraph 4B(2) occurred [see paragraph 2 above].

36. Paragraph 4B(7) to Schedule 6 of the 1999 Act provides that, where a suspension ceases to have effect and the person's registration is not cancelled, the Commissioner must as soon as reasonably practicable remove the record of the suspension from the Register. Thus the Commissioner has the power to give effect to paragraph 4B(2).

37. These provisions provide no statutory power to the Commissioner either to review whether the suspension of an immigration adviser remains appropriate or to refer the adviser to the First-tier Tribunal for consideration. Thus, whilst an adviser remains charged with an offence which formed the basis of the application to suspend, the Commissioner lacks statutory authority to consider any fresh developments which might affect the adviser's suspension.

38. It is apparent from the above that, absent any of the matters listed in paragraph 4B(2) occurring, there is no mechanism in the 1999 Act whereby a suspended adviser can seek a review of the appropriateness of his continued suspension.

Discussion and Analysis

39. The Applicant's case was that his suspension had been procured on the basis of an invalid charge which had been either amended or withdrawn.

40. I have considered a variety of documents relating to the criminal charge faced by the Applicant.

41. First it is clear that the Applicant remains charged with an offence contrary to section 25 of the Immigration Act 1971. That is plain from the details of the amended particulars of charge contained in a document supplied by the Applicant and found at page 47 of the Upper Tribunal bundle.

42. Second it is also clear that the particulars of the charge have been amended. The documents provided by the Applicant confirm this. It is not necessary for me to consider the differences between the former particulars and the current particulars.

43. The letter from the Crown Prosecution Service dated 16 January 2017 (received by the Applicant and the Upper Tribunal via email on 18 January 2017) confirmed that the Applicant had appeared before the Crown Court on 27 January 2016 and pleaded not guilty to an offence charged under section 25(1) of the Immigration Act 1971. An application to dismiss that charge was lodged on the Applicant's behalf on 15 June 2016 and listed before HHJ Bayliss QC on 4 July 2016. The application was out of time as the Applicant had already been arraigned so it did not proceed. The prosecution had amended the particulars of the charge and the trial was listed to begin on 8 May 2017.

44. I accept the contents of that letter. They accord, insofar as the charge itself is concerned, with other material supplied by the Applicant.

45. I conclude that the Applicant remains charged with an offence contrary to section 25 of the Immigration Act 1971. The original charge remains in place and

forms the basis on which he is to be tried in May 2017. It has neither been withdrawn nor discontinued. Whilst the particulars of the charge have been amended, this cannot in my view equate to either a withdrawal or a discontinuance so as to trigger either of the relevant provisions of paragraph 4B(2) of Schedule 6 to the 1999 Act. Had revision/amendment of the particulars of the charge been a matter which Parliament considered should bring an adviser's suspension to an end, paragraph 4B(2) would read differently. It does not because (a) it is not generally uncommon for the particulars of a charge to be amended during the course of criminal proceedings, for example, as new evidence emerges and (b) the charge itself remains in place. The criminal charge faced by the Applicant goes to the very heart of the system of regulation that Parliament has entrusted to the Commissioner and to the tribunal. It would be entirely at odds with that system if the Applicant's suspension were to be rendered ineffective by changes to the particulars of charge in circumstances where the Applicant remained charged with one of the offences listed in paragraph 4B(1).

46. It follows that I must dismiss this ground of appeal. I note that, given the Applicant remains charged with an offence pursuant to section 25 of the Immigration Act 1999, consideration of the appropriateness of his suspension as an immigration adviser is not a matter either the Commissioner or the tribunal can consider afresh. Nothing has changed to invalidate the very careful basis – including careful consideration of the financial effect on the Applicant - upon which the tribunal came to its decision to suspend him in February 2016.

47. The Applicant conceded at the hearing that it was difficult to point to an error of law in the tribunal's decision. I agree. The tribunal's reasons explained how it arrived at the decision it did and it directed itself to the relevant law. The tribunal reached a decision that was plainly one reasonably open to it. In my view the Applicant was, in reality, seeking to re-argue the case on its merits which is not permissible where the right of appeal to the Upper Tribunal is confined to points of law.

48. The Applicant has made a variety of allegations about the police and made detailed submissions about the evidence which underpins the criminal charge. It is not for me to evaluate that material – that is a matter for the criminal trial and for others to investigate. These were matters not canvassed before the tribunal in February 2016.

49. The Applicant has also made allegations about the conduct of the Commissioner's staff. At the hearing before me he accepted that they were not acting fraudulently but said the police had done so. I am grateful that he made this concession and record that I have found no evidence in my perusal of the material to suggest such allegations might be remotely plausible let alone arguable.

50. Finally and for the avoidance of doubt, I reject the Applicant's contention that the tribunal had not taken his representations into account at the hearing. The Applicant was legally represented at that hearing and perusal of the decision makes plain the variety of submissions made on his behalf, each of which was addressed by the tribunal. I find that there was no unfairness to the Applicant in the manner in which the tribunal hearing was conducted.

51. In conclusion and for the reasons given, I dismiss each of the Applicant's grounds of appeal.

Conclusions

52. As this proposed appeal has, in my view, no realistic prospects of success and there is no other good reason to give permission, I therefore must refuse this application for permission to appeal.

Gwynneth Knowles QC

Judge of the Upper Tribunal

1 March 2017

[Signed on original on the date stated]