IN THE UPPER TRIBUNAL **Case No.** GIS/1740/2018
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 17 May 2018 under reference IMS/2018/0005) involved the making of an error of law, it is set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Further, the case is remitted to the First-tier Tribunal under section 12(2)(b)(i) of the same Act for reconsideration by a differently constituted tribunal.

REASONS FOR DECISION

Introduction

1. The appellant in this appeal to the Upper Tribunal is an intended Immigration Law Practice which I shall simply call the "O Practice". The O Practice is owned by a sole trader whom I shall simply refer to as "E". In reality, therefore, E is the appellant. Any references to the appellant are to E or to the O Practice as the context requires. The respondent to the appeal is the Immigration Services Commissioner ("the Commissioner").

2. E has brought this appeal from a decision of the First-tier Tribunal "the tribunal" which it made on 17 May 2018, whereupon it struck out his appeal to it against a decision made by the Commissioner on 21 March 2018 to refuse his application for registration as a provider of immigration advice or immigration services. He has done so with my permission which I gave on limited grounds after an oral hearing of 9 October 2018.

3. I have, for the reasons which are set out below, decided to allow this appeal, to set aside the decision of the tribunal and to remit for reconsideration.

The background

4. The Commissioner has a general duty to promote good practice by those who provide immigration advice or immigration services (see section 83(3) of the Immigration and Asylum Act 1999). Further, the Commissioner is required to exercise his functions so as to secure so far as is reasonably practicable that those who provide immigration advice or immigration services are, amongst other things, fit and competent to do so (section 83(5)(a)). Only a "qualified person" may provide such advice or services under the auspices of the Commissioner and a person is a qualified person if he is "a registered person" (see section 84(2)(a)). If the Commissioner considers an applicant for registration to be fit and competent he must register that applicant (Schedule 6 Paragraph 1). There are certain other persons who fall into the category of qualified persons but this appeal is only concerned with the "registered person" category.

5. E, it is not disputed, was awarded a Second-Class Honours Degree in Law by the University of London on 31 July 2016. Further, he was subsequently (on a date

in 2017) awarded a Masters Degree in Human Rights Law by the same educational institution. He has attended various training courses in the field of immigration law and has worked for a firm of solicitors in that same field.

6. On 12 December 2017 the Commissioner received an application made by E to be registered as a provider of immigration advice or immigration services. The Commissioner, pursuant to his above powers and duties has, unsurprisingly, devised various methods for assessing whether applicants are fit and competent. One such method involves requiring applicants to pass what has been referred to as a "competence assessment" and which is really a written examination in two parts. The first part consists of multiple choice questions and the second consists of scenario based questions. The pass mark is 65% for each part. The requisite pass mark must be obtained for each part. There is no averaging out. The Commissioner, it appears, requires all applicants to take the competence assessment. So, that requirement was applied to E. E's application was for registration at Level 1. There is also Level 2 and Level 3. Level 3 relates to more complex immigration work whereas Level 1 relates to less complex work. Level 2, at the risk of stating the very obvious, falls somewhere in between. E wanted to practice at Level 3 but accepts that the scheme is such that he has, first of all, to demonstrate fitness and competence to be registered at Level 1. The significance of all of this is that if E were to be registered he would be able to operate his business in the field of immigration advice and immigration services but, if not, he would not.

7. E passed the first part of the competence assessment. But he failed the second part, attaining a mark of only 50%. In accordance with normal practice he was afforded an opportunity to resit the second part of the assessment. He did so on 23 February 2018 and achieved a mark of 62% which was, albeit narrowly, below the required pass mark. I should at this stage point out that the marking and moderating was undertaken not by those directly employed by the Commissioner but by a third party organisation called HJT Training Limited. On 21 March 2018, the Commissioner wrote to E explaining that his application had been refused in consequence of his failure to pass the competence assessment. It subsequently transpired, however, that E had contacted HJT Training Limited by e-mail on 20 March 2018 (having received the results of his competence assessment resit on 16 March 2018) asking for a reconsideration of the marking. The Commissioner, however, did not become aware of that request having been made until 22 March 2018. When the Commissioner did become aware of it he authorised a further marking of the second part and that was done on 20 April 2018. It led to the claimant being awarded a revised mark of 63% which was once again narrowly below the required pass mark. So, the Commissioner simply maintained and relied upon the original decision of 21 March 2018.

The proceedings before the First-tier Tribunal

8. E appealed to the tribunal against the Commissioner's decision of 21 March 2018. One point which he was seeking to make was that the Commissioner ought to have had regard not merely to his failure to pass the competence assessment but to his legal qualifications and his experience in working for a firm of solicitors. That was especially so, he said, given that he had failed the

competence assessment only narrowly. He made these points in his written grounds of appeal to the tribunal. He asked for an oral hearing of his appeal.

9. The Commissioner responded to the lodging of the appeal by applying, in writing, for it to be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules"). That was done because the Commissioner took the view that there was no reasonable prospect of E's case succeeding. In the written application which was made on 30 April 2018, after the setting out the history and some background information, this was said:

> "Competence
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> 25. The Respondent's application for Registration Guidance Notes provides that applicants are required to demonstrate satisfactory competence in both parts of the competence assessment and will be allowed one resit at OISC Level 1 if they fail the assessment for the first time. If an applicant fails twice, then their application for regulation is likely to be refused (page 44 of the bundle).
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> 26. All advisers wishing to make an application for regulation must pass the competence assessments at the required levels. This is to ensure that all OISC advisers are sufficiently competent to carry out the work for which they are authorised. The Commissioner will have regard to this failure to demonstrate sufficient competence when considering the application.
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> **Conclusion**
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> 27. The Respondent respectfully submits that there is no merit to this appeal, and the decision of the Respondent to refuse the appellant's application for regulation was reasonable, just and proportionate, as all relevant issues and information had been considered.
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> 28. For these reasons, the respondent respectfully submits that there is no reasonable prospect of the appellant's case succeeding and requests that the appeal be struck out in accordance with Rule 8(3)(c) of the Tribunal Procedure Rules 2009."

10. Pausing there, it will be seen that the word "regulation" rather than "registration" has been used. I see no significance in that and the two can be used interchangeably. I have used the latter because that is the word used in the above legislation. The tribunal, pursuant to rule 8(4) of the Rules, provided E with an opportunity to make representations in relation to the proposed striking out. He made written representations on 9 May 2018. Thereafter, on 17 May 2018, without a hearing, the tribunal ruled in favour of the Commissioner with respect to the strike out application and did strike out the proceedings as had been requested of it. In explaining why it was doing so it relevantly said:

> " 4. The Respondent has a statutory duty under s. 83 of the Immigration and Asylum Act 1999 to *'secure, so far as is reasonably practicable, that those who provide immigration advice or immigration services - (a) are fit and competent to do so'*. As it explains in its submission to the Tribunal, it has re-marked the Appellant's paper, but he still did not meet the standard pass mark. It accepts that the decision to refuse regulation was issued prior to the requested re-marking, but submits that the result was not affected by this, as the re-marking was carried out later and did not result in a pass mark being achieved.
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> 5. I have had regard to the Upper Tribunal's decision in HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation) [2014] UKUT 0329 (TCC), in which it is stated at [41] that

> *… an application to strike out in the FTT under rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing … The Tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all.*
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> 6. Applying this approach, I have concluded that the appellant's prospect of success in this appeal falls into the 'fanciful' rather than 'realistic' category of cases.
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> 7. It does not seem to me that the Appellant's Grounds of Appeal have raised any material issue for the Tribunal to decide. He has not disputed the findings of fact on which the Respondent's decision letter relies and whilst he has suggested some procedural irregularities, he has not begun to show that these affected the Respondent's decision, which relies principally on his performance in the assessment.
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> 8. I conclude that the Appellant has not presented a case which is fit for a hearing. Having regard also to the overriding objective, I have concluded that it would not be a proportionate use of the Tribunal's and the parties' resources to allow the case to continue to a hearing."

11. E then sought the tribunal's permission to appeal its decision but such was refused.

The proceedings before the Upper Tribunal

12. E renewed his application for permission to appeal to the Upper Tribunal. He asked for an oral hearing of his application. I directed a hearing and it took place on 9 October 2018. E had already provided written grounds of appeal and sought to elaborate upon them before me. Indeed, on my charactisation, he advanced seven distinct grounds of appeal, six of which I concluded were unarguable. I did consider one ground to be arguable and I granted permission on that particular ground but limited my grant to that ground. I expressly refused permission on the unarguable ones. I do not propose to revisit the unsuccessful grounds in this decision because they form no part of this appeal and because I have already explained to E and the Commissioner why I did not consider them to be arguable in my permission decision of 26 October 2018 which was sent to them on 7 November 2018. In granting permission on the limited basis that I did, I pointed out that the written material before me did not seem to clearly indicate whether the Commissioner regards the passing of the competence assessment as being mandatory or whether there might be circumstances in which he would register someone who had failed that assessment. With respect to E's argument that the Commissioner ought to have made a more holistic assessment rather than one which seemed to rely solely upon the failure to pass the second part of the competence assessment I said this:

> "… in those circumstances and given the specific qualifications and experience upon which the applicant was seeking to rely, there might be an argument for saying his case was not one which had no reasonable prospect of success. At least, it may be that when deciding to strike out, the tribunal was required to deal with his specific argument on the point and to explain why it was, nevertheless, thought that this was a case where the prospects of success were no more than fanciful."

13. I then directed and received written submissions from the parties.

14. The Commissioner, through Mr C Mopas, who is a legal adviser with the Office of the Commissioner, provided a helpful written response to the appeal, which was sent to the Upper Tribunal on 6 December 2018. It was contended, therein, that the tribunal had not erred in law when deciding to strike out the proceedings. As to the above matter about which I had been uncertain, Mr Mopas sought to clarify. He said that undertaking the competence assessment was a mandatory requirement but passing was not though he added that passing or failing "will be a highly determinative and compelling factor in reaching a decision on competence. As a result, should an applicant fail the competence assessment, it is likely that their application will be refused, unless there are exceptional circumstances". E, in his reply to that response, sought to re-argue matters rather than attempt to further his contention that the tribunal had erred in law.

15. Neither party asked for an oral hearing of the appeal before the Upper Tribunal and I did not find it necessary to hold one.

My reasoning on the appeal

16. The tribunal, as is apparent from the passage of its written decision which I have set out above, explained its decision clearly and succinctly. It is obvious (despite E arguing to the contrary in one of his unsuccessful proposed grounds of appeal) that it properly directed itself as to the test it had to apply in deciding whether or not to strike out E's case (see paragraph 5 of the tribunal's written reasons of 14 June 2018). But it is, of course, a stringent test. It is a test which is there to weed out hopeless cases but not cases that are merely weak.

17. There is a general principle (see rule 32(1) of the above Rules) that a party has a right to a hearing. That means "an oral hearing" according to rule 1(3). Rule 32(3) provides an exception to that general principle in that it says that the tribunal "may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case)". But care must be taken to ensure that the exercise of the power to strike out a case without a hearing does not undermine the general right to a hearing of an appeal. It is also worth pointing out in passing that it is open to a tribunal to hold a hearing in order to decide whether a case should be struck out or not.

18. The tribunal here noted that there were no disputed issues of fact. It was entitled to take the lack of any meaningful potentially material factual dispute into account when deciding whether to strike out or not, as indeed it did (paragraph 7 of the decision). That was relevant in the sense that where there is such a factual dispute it will not be appropriate to strike out and it will probably be appropriate to hold a full oral hearing to resolve that dispute and then the appeal itself. Indeed, in *AW v Information Commissioner* [2013] UKUT 30 (AAC) it was decided that striking out a case on the basis of the lack of a reasonable prospect of success was not appropriate where there were unresolved issues of fact requiring the hearing of evidence. But the converse does not automatically apply at all. That is to say, if there is no dispute as to fact that is not a positive indicator that striking out will be appropriate. The issue is whether there is enough merit in the appeal for it not to be

hopeless or, put another way, for its prospects of success not to be only fanciful. But the tribunal in this case knew that.

19. In *R(AM) v First-tier Tribunal (CIC)* [2013] UKUT 0333 (AAC) the view was taken that striking out under rule 8(3)(c) or an equivalent provision would not be appropriate where there was a discretion to be exercised upon which oral argument might be appropriate (see paragraph 19 of that decision of the Upper Tribunal). But that does not mean a case cannot be struck out merely because the party bringing it has something or even a lot to say about a discretion which a first instance decision-maker may have exercised. Again, the issue is really one of merit.

20. I shall now get to the point. The Commissioner recognises that there will be cases, albeit only exceptional ones, where the failure to pass the competence assessment will not itself be determinative of the result of an application for registration. That does in fact seem to be what had been indicated to the tribunal albeit that I thought it wise to obtain the clarity which has now been given. Although E might disagree, it seems to me that there is nothing wrong at all in the Commissioner devising a system which incorporates testing or examinations as a way of checking for aspects of an applicant's competence and fitness. There is nothing in general wrong with the Commissioner setting very considerable store (as he does) by the results of such tests or examinations. Nor is there anything wrong in the Commissioner affording himself a discretion in very limited circumstances to register notwithstanding failure. In this case, on my reading, the cornerstone of E's argument in his original grounds of appeal to the tribunal was his contention that his was an exceptional case. In truth, although those grounds were lengthy, he did not really end up saying anything more than that. It was the Commissioner's strike out request which led him, in his reply to it, to broaden out his arguments so that they then encompassed what he described at that point as "procedural impropriety". The tribunal, in explaining why it was acceding to the strike out request, noted he was arguing that, but did not note his specific contention (really the only contention in the original grounds to it) that, in light of all the circumstances, his was an exceptional case that called for the exercise of discretion in his favour. I do not know, but perhaps when making its decision it focused more upon what was said by him in his reply rather than in his original grounds. That would explain why it mentioned the procedural impropriety point but not the discretion point.

21. The tribunal, had it heard the appeal, would have been standing in the shoes of the Commissioner in reaching its own decision on the merits of E's appeal. It might be that, had there been a hearing of the appeal, E would have been able to say something of relevance in addition to what he had said in writing, regarding the question of whether or not this was a case where registration ought to be granted notwithstanding the failure to pass the competence assessment. At least, in my judgment, in giving its reasons as to why it was taking a step which denied him such an opportunity, the tribunal was required to demonstrate that it had had regard to what was the centrepiece of his appeal to it and to explain, perhaps only briefly or even very briefly, why it thought that particular argument lacked sufficient merit to demonstrate that the appeal was hopeless. So, whilst this is to my mind a borderline case, I have concluded that the tribunal did err in law and that its decision should be set aside.

22. Since the parties have not suggested that there ought to be a hearing of the appeal before the Upper Tribunal, I have decided to remit so that matters may be considered afresh by the tribunal.

23. Since I have decided to remit, I am required to give directions to the tribunal concerning its reconsideration of the appeal (see section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007). Given the basis upon which I have decided to set aside the tribunal's decision I direct that the reconsideration be undertaken by way of an oral hearing of the appeal. So, the tribunal will consider all aspects of the case entirely afresh. It will not be limited to the evidence and submissions before it when it decided to strike out the appeal. It will decide the case on the basis of all of the evidence and arguments before it, including any further written or oral evidence or argument it may receive. I do not know but it occurs to me that the hearing is unlikely to be lengthy given the absence of any material factual dispute as noted above and bearing in mind that, accordingly, it is unlikely that there will be a need for evidence as opposed to oral argument.

24. E, though, should not assume that merely because I have decided to set aside the tribunal's decision, he is ultimately likely to succeed in his appeal. It remains the case that he did not manage to pass his competence assessment but the significance or otherwise of that will now be a matter for the good judgment of the tribunal which conducts the reconsideration.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **9 January 2019**