Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Shrestha and others) v Secretary of State for the Home Department (*Hamid* jurisdiction: nature and purposes) [2018] UKUT 242 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Before

MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE QUEEN ON THE APPLICATION OF
DEEPA ADHIKARI SHRESTHA & OTHERS

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearance:

Mr Syed Wasif Ali, of Harrow Solicitors

(1) The "Hamid" jurisdiction of the High Court and the Upper Tribunal exists to ensure that lawyers conduct themselves according to proper standards of behaviour. The bringing of hopeless applications for judicial review wastes judicial time and risks delaying the prompt examination of other cases, which may have merit. In many cases, the only tangible result of such an application is that the applicant incurs significant expense.

(2) Solicitors who practise in the difficult and demanding area of immigration

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law and who are properly discharging their professional responsibilities can only safely enjoy the recognition they deserve if the public is confident appropriate steps are being taken to deal with the minority who are failing in their professional responsibilities.

DECISION

1. This is the judgment of the Tribunal, to which we have both contributed.

1. The "Hamid" jurisdiction

2. The Upper Tribunal, like the High Court, has inherent jurisdiction to govern its own procedure. Part of that jurisdiction includes ensuring that lawyers conduct themselves according to proper standards of behaviour: R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin). In (R (on the application of Butt) v Secretary of State for the Home Department [2014] EWHC 264 (Admin), a subsequent case concerning the Hamid jurisdiction, Sir Brian Leveson, President of the Queen's Bench Division, pointed out that "in these days of austerity, the court simply cannot afford to spend unnecessary time on processing abusive applications …" (paragraph 4).

3. A solicitor who engages in a systematic course of conduct involving the bringing of judicial review applications that are totally without merit is not complying with his or her duty to uphold proper administration of justice; to act with integrity; and to behave in a way that maintains public trust in the profession. The bringing of hopeless applications wastes judicial time, which is at a premium, and risks delaying the prompt examination of other cases, which may have merit. The fact that a person with no entitlement to remain in the United Kingdom may, in practice, be able to remain in the country a little longer, as a result of bringing a meritless application, serves to reinforce the view that the procedure is being abused. In any event, it is doubtful whether such an applicant will gain a material advantage by making the application. In many cases, the only tangible result is that the applicant (or the applicant's friends or family) incurs significant professional fees, as well as the fees payable to the Tribunal. In such cases, the only real beneficiary is the solicitor.

4. In Vay Sui Ip v Solicitors Regulation Authority [2018] EWHC 957 (Admin) Irwin LJ said:-

> "180. The Courts well understand the vulnerability of many of those at risk of removal or deportation from the country. They can be desperate to remain. They are often prepared to grasp at straws. The Courts are also fully alive to the technicality and difficulty of immigration law, and of the Immigration Rules. These factors add to the difficulty of representing such clients. However, they also add to the responsibility of solicitors engaged for such clients.

181. It is critical that solicitors, and others, representing such clients, are scrupulous in observing professional standards. The cost of not doing so to the system is obvious and has been emphasised many times. Spurious, or merely hopeless, applications to courts and tribunals add greatly to the burden on the system of justice, and to the costs of government. However, it should not be forgotten that such applications also cost the applicants, both financially and in engendering prolonged and unjustified expectations. In addition, poor, and where it arises unscrupulous, representation must, to some degree at least, overshadow careful and expert immigration lawyers. The Solicitors Disciplinary Tribunal is entirely justified in taking very seriously cases such as this."

5. The exercise of the Hamid jurisdiction has an additional purpose. Solicitors who practise in the difficult and demanding area of immigration law and who are properly discharging their professional responsibilities can only safely enjoy the recognition they deserve if the public is confident that appropriate steps are being taken to deal with the minority who are failing in their professional responsibilities. In short, the reputations of the former must not be tainted by the activities of the latter.

2. The present proceedings

6. On 26 March 2018, the Upper Tribunal wrote to Harrow Solicitors to say the Tribunal's records showed that out of 36 applications for judicial review brought by the firm since January 2017, eleven have been found to be totally without merit; a further nine had not been admitted; and one was subject to severe criticism at the oral renewal hearing.

7. The details of the 21 cases were set out briefly in the Tribunal's letter:-

"1. JR/1842/2017: not admitted and certified as totally without merit; in the decision it is said that the claim was an abuse of process.

2. JR/2179/2017: refused and certified as totally without merit; in the decision it is said that letter challenged was not a decision of the respondent.

3. JR/2183/2017: not admitted and certified as totally without merit; in the decision it is said that the application is said to be lodged out of time because the client instructed Harrow Solicitors after the due date but in fact the decision was served on yourselves.

4. JR/2252/2017: refused and certified as totally without merit.

5. JR/2879/2017: refused and certified as totally without merit; in the decision it is said that the further submissions were a repeat of previous submissions and the application was hopeless and bound to fail.

6. JR/3648/2017: refused and certified as totally without merit; in the decision it is also said that the challenge is out of time.

7. JR/4490/2017: not admitted and certified as totally without merit.

8. JR/4497/2017: not admitted and certified as totally without merit.

9. JR/5442/2017: refused and certified as totally without merit; in the decision it is said that the claim is presented in a wholly incoherent way and that it is not even clear what decision the applicant seeks to challenge.

10. JR/6566/2017: not admitted and certified as totally without merit; it is said in the decision that the letter challenged was not a decision of the respondent and the claim was presented in a totally unparticularised fashion.

11. JR/337/2018: refused and certified as totally without merit; it is said in the decision that the grounds are poorly drafted.

12. JR/3236/2017: not admitted; it is said in the decision that the challenge is hopelessly out of time and explanation was wholly inadequate and lacking in merit, and further that the case was devoid of any discernible merit.

13. JR/3239/2017: not admitted; it is said in the decision there was serious and substantial delay and there was no application to extend time.

14. JR/3685/2017: not admitted; it is said in the decision there was a significant delay and no particularisation of the reasons for this and that the action was not brought against a substantive decision of the respondent.

15. JR/4492/2017 (decision on the papers): not admitted; it is said in the decision that the grounds do not properly indentify the decision challenged and there was no application to extend time; in the decision on oral renewal it is said the matter was wholly without substance.

16. JR/5009/2017 (decision on the papers) not admitted; it is said in the decision that there was no challenge to a decision of the respondent and no reason given to extend time, and that the grounds are formulaic.

17. JR/5180/2017 (decision on the papers) not admitted; it is said in the decision that there was no explanation of the delay and that the challenge was hopeless. At the first oral renewal hearing it was found that the grounds were poorly pleaded and the matter was adjourned to amend grounds of appeal.

18. JR/5436/2017: not admitted; it is said in the decision that the challenge was brought well outside the 3 month time limit and that the grounds were only a vague disagreement.

19. JR/6357/2017: not admitted; it is said in the decision that no good reasons for lateness were identified and no arguable merit was found in the grounds.

20. JR/7786/2017: not admitted; it is said in the decision that there was no application to extend time and this was also not a challenge to a decision of the respondent.

21. JR/6351/2017: refusal of permission at an oral hearing following a refusal on the papers, it was said in the decision of 9th March 2018 that the claim is wholly without merit and there was not proper basis upon which the claim should have been issued let alone pursued to an oral hearing.

8. These cases display a number of disturbing features. In almost all, the decision said to be challenged in the claim form and grounds is the Home Office's response to the applicant's pre-action protocol letter. That PAP response is not, as is obvious, the decision with which the judicial review application is concerned. The PAP response is a reply to a letter from the applicant, which puts the Secretary of State on notice of the applicant's alleged concerns regarding a particular decision (or failure to take a decision). A PAP response which defends the position taken in a decision cannot (without more) constitute a discrete decision, which can be separately challenged by judicial review.

9. Any solicitor specialising in immigration law would be expected to know this. In any event, it would have become apparent, following receipt of the first judicial review decision from the Upper Tribunal, making this point plain, that the approach taken by Harrow Solicitors was fundamentally misconceived.

10. By reason of rule 28(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, an application for judicial review "must be made promptly" and, in the case of immigration judicial reviews, must be sent "so that it is received no later than 3 months after the date of the decision, action or omission to which the application relates". Accordingly, it matters when the decision under challenge was taken. If the challenge to the decision is mounted outside the time limit in section 28(2), then the application must explain why and seek an extension of time.

11. It may, as a result, be in an applicant's interest to portray the decision under challenge as a later one than is, in reality, the case.

12. The second general and disturbing feature of the applications is that they are poorly particularised. The No attempt is made to grapple with the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 or with the relevant case law on Article 8 of the ECHR.

13. For example, we find this in JR/329/2017:-

> "10. The claimants informed us that it is very difficult for them to restart their life back home. They have relocated from India to make their future and career in the UK. The Indian currency value much longer than that of the UK (sic).
>
> 11. They informed us that now they have mentally setup in the environment of UK. They have a private, family and social life in the United Kingdom.
>
> 12. They informed us that it is very difficult for them to restart their life in ther back home (sic).

13. They informed us that now they have mentally setup in the environment of UK. They have private, family and social life in the United Kingdom (sic repetition).

14. The claimants further state that they have no criminal record and that there are nothing which could be regarded, as detrimental to have character and request to be able to remain in the UK (sic).

15. The claimant states that to all intents and purposes that UK is now their home and they would very much like to be allowed to continue with building a life in the UK.

16. Now it is almost impossible for claimants to return to their home country as they have been away for a long time. They have friends and social life in the UK."

14. The relief sought in these cases can only be described as intensely problematic. For example, in JR/3685/2017:-

> "There are five grounds/issues:
>
> First, whether the SSHD's decision is not in accordance with the Immigration Rules.
>
> Second, whether the SSHD's decision dated 15 November 2016 is not unlawful/unreasonable.
>
> Third, whether the SSHD's refusal is not unlawful for being inconsistent with paragraph 276(vi) of the Immigration Rules and Articles 3, 5 and 8 of the ECHR.
>
> Fourth, whether the SSHD's did use his discretionary power as per settled principle of natural justice (sic).
>
> Fifth, whether the SSHD's can issue removal directions in spite of claimant's right of appeal inside the United Kingdom (sic)."

15. In five of the cases that were judged by the Upper Tribunal to be totally without merit, Harrow Solicitors filed an application for permission to appeal to the Court of Appeal. At least, that is what the covering letters indicated. In each case, however, the grounds of application for permission to appeal were no more than a replication of the grounds of challenge that accompanied the application for permission to bring judicial review proceedings. No attempt whatsoever was made to engage with the reasoning of the Upper Tribunal Judge, notwithstanding that, by virtue of section 13 of the Tribunals, Courts, and Enforcement Act 2007, a right of appeal lies to the Court of Appeal against a decision of the Upper Tribunal "only on a point of law arising from a decision made by the Upper Tribunal". In none of these cases was there any indication that any thought had been given to whether it was in any sense appropriate to apply for permission to appeal to the Court of Appeal. It is hard to see how this is anything other than an abuse of process.

3. Discussion

16. Mr Ali has not attempted to defend any of this problematic behaviour. On the contrary, both in his witness statement of 6 June 2018 and in his oral submissions, he took sole responsibility for what he described as his "mistakes".

17. Mr Ali said that he has one case officer who works for him. It transpired that this case officer is Mr Ali's wife, who has a psychology qualification but who is not, it seems, legally qualified. Mr Ali said that his practice was almost exclusively in immigration. He had done one or two family cases.

18. Mr Ali told us that, in addition to judicial review, he prepared applications to the Home Office and appeals to the First-tier Tribunal. He had been working in the immigration judicial review field since 2008/2009.

19. Most of the clients of Harrow Solicitors are, according to Mr Ali, overstayers. They are not allowed to work. They nevertheless survive by doing various "odd jobs". As we understood it, Mr Ali said that his clients were unwilling to make formal applications to the Home Office for leave to remain because they would be required to submit bank statements, in connection with any request for fee remission. Those bank statements might indicate the proceeds of illegal working. As a result, Harrow Solicitors would, in effect, put forward the substance of such an application in the form of a pre-action protocol letter, following that with judicial review.

20. Mr Ali said that he did charge his clients for the judicial review work undertaken by Harrow Solicitors. That included filing applications for permission to appeal to the Court of Appeal. He would not, however, charge them "too much".

21. In answer to questions from Upper Tribunal Judge Lindsley, it was apparent that Mr Ali was unaware of the obligations of Harrow Solicitors under money-laundering legislation, whereby money received from clients which is considered to come from illegal earnings must be the subject of reporting to the relevant authority.

22. Mr Ali repeated that he was sorry for his "several mistakes"; that he had no excuse; and that he had suspended all immigration judicial review work, upon receipt of the Tribunal's letter of 26 March 2018. Mr Ali intended, for the future, to file a claim for judicial review only if an independent counsel had confirmed that the matter was properly arguable. Before receipt of the letter of 26 March, Mr Ali said that he considered that he had been "doing a good service for my clients".

23. A case worker, Mr Ali's wife, had prepared the grounds but Mr Ali said that he was not in any way blaming her. In some of the cases, Mr Ali had read the grounds, before submission, but did not check the whole of the bundle in question. We were left unsure of Mr Ali's understanding of his duty to supervise unqualified staff.

24. We are concerned that Mr Ali sought to categorise the failings we have described as mistakes, which he came to realise were such, only on receipt of the Tribunal's letter of 26 March. Had that letter not been written, we must accordingly assume that Harrow Solicitors would have continued to file applications for judicial review, challenging pre-action protocol responses that did not constitute discrete decisions; filing poorly particularised grounds, of the kind we have described; and making entirely unwarranted applications for permission to appeal to the Court of Appeal against decisions designated by the Tribunal as wholly without merit.

25. This raises serious concerns about the fitness of Harrow Solicitors to deal with immigration judicial reviews. We have to say that it also raises the question of whether Harrow Solicitors did, in truth, think that nothing was wrong with their activities in this area.

26. Mr Ali was adamant that, henceforth, he would only file an immigration judicial review, where counsel had advised that this was appropriate. It is true that, so far as we are aware, no such judicial reviews have been filed by Harrow Solicitors since the end of March 2018.

27. We were, however, unpersuaded that Mr Ali's proposals make it unnecessary for us to refer these matters to the SRA. On any view, a significant amount of wholly sub-standard work has taken place in Harrow Solicitors. This is not a case of a "one-off" incident.

28. We also harbour serious doubts about Mr Ali's proposals. The routine use of counsel would be bound to increase the cost for would-be applicants, unless Harrow Solicitors bore that cost themselves. In the circumstances, such a scenario strikes us as entirely unrealistic. Furthermore and in any event, there can be no guarantee as to how long any such proposal to use counsel would last.

29. These are, in short, matters that lie firmly within the regulatory realm.

4. Decision

30. In all the circumstances, having considered the matter on 11 June, we informed Mr Ali that we would be referring these cases to the SRA for a full investigation. We will send the Tribunal's files to them for their consideration.

31. At the end of the judgment in R (on the application of Gopinath Sathivel & Others [2018] EWHC 913 (Admin), the Divisional Court said the following:-

> "Finally, we make clear for the avoidance of any doubt that although we have expressed our views on each of the cases before us we are not intending our views to be seen as binding upon the SRA. It is an independent body and will form its own conclusions on these matters in accordance with its own rules and statutory obligations."

32. We adopt that statement.

Signed: ____

Mr Justice Lane, President

Dated: **18 June 2018**