Upper Tribunal
(Immigration and Asylum Chamber)

Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 00274 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 2 July 2018

Decision & Reasons Promulgated

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Before

MR JUSTICE LANE, PRESIDENT

Between

ABDULLA AL MANSUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, instructed by Nova Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

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(1) Poor professional immigration advice or other services given to P cannot give P a stronger form of protected private or family life than P would otherwise have.

(2) The correct way of approaching the matter is to ask whether the poor advice etc that P has received constitutes a reason to qualify the weight to be placed on the public interest in maintaining firm and effective immigration control.

(3) It will be only in a rare case that an adviser's failings will constitute such a reason. The weight that would otherwise need to be given to that interest 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 such advice will normally have to live with the consequences.

(4) A blatant failure by an immigration adviser to follow P's instructions, as found by the relevant professional regulator, which led directly to P's application for leave being invalid when it would otherwise have been likely to have been granted, can, however, amount to such a rare case.

DECISION AND REASONS

A. Introduction

1. The appellant, a citizen of Bangladesh born in 1980, appeals against the decision of First-tier Tribunal Judge Hunter who, following a hearing held at Hatton Cross on 16 December 2016, dismissed the appellant's appeal against the decision of the respondent dated 15 July 2015 to refuse the appellant's human rights claim.

2. The fact that the judge considered he was deciding an appeal against a decision to refuse the appellant indefinite leave to remain, though wrong, is immaterial for present purposes. So too is the fact that the judge ended his decision by purporting to dismiss the appeal "under the immigration rules and on human rights grounds". This was a human rights appeal. Accordingly, the sole ground of challenge was that the respondent's decision was unlawful under section 6 of the Human Rights Act 1998 (section 84(2) of the Nationality, Immigration and Asylum Act 2002).

B. Immigration history

3. The immigration history of the appellant is essentially as follows. In April 2005 he arrived in the United Kingdom as a student. Further leave in that capacity was granted to him by the respondent until 2010. In that year, he was granted leave to remain until March 2012 for post-study work. In

March 2012 he applied again as a student and leave was granted for that purpose until 31 July 2013.

4. In July 2013, the appellant applied, during the currency of his leave, for leave to remain as a Tier 2 General Migrant. That application was refused by the respondent on 2 October 2013.

5. The appellant appealed against the refusal. His appeal was dismissed by the First-tier Tribunal on 7 August 2014.

6. At this point, the chronology becomes crucial.

7. Following the refusal of an application to the First-tier Tribunal for permission to appeal to the Upper Tribunal, the appellant made an application to the Upper Tribunal for such permission. As a result, the leave which the appellant had been granted in March 2012, until 31 July 2013, continued to be extended by reason of the operation of section 3C of the Immigration Act 1971. Section 3A(2)(c) provides that leave is extended during any period when an appeal is pending within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002. Section 104(2)(a) provides that an appeal is pending while an application for permission to appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination.

8. Thus, on 7 October 2014, the appellant enjoyed section 3C leave. However, subsection (4) of section 3C contains an important restriction upon what a person with section 3C leave can do:

> "(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section."

9. On 7 October 2014, the appellant instructed an organisation called Immigration & Work Permit Ltd ("IWP"), which was registered with the Office of the Immigration Services Commissioner ("OISC").

10. On 7 October 2014, the appellant made an online application to the respondent for leave to remain as a Tier 4 General Student. The appellant's case is that, on the same day, he instructed IWP to withdraw his application to the Upper Tribunal for permission to appeal against the decision of the First-tier Tribunal. IWP, however, did not withdraw the application for permission until 10 October 2014.

11. For the appellant, the result of this sequence of events was profound. The application for leave which he had made on 7 October 2014 was invalid because it fell foul of section 3C(4) of the 1971 Act.

12. The invalidity of the application was not, however, drawn to the appellant's attention by the respondent until 29 March 2015. In fact, on 4 November 2014 the respondent had written to the appellant to confirm that "your application is now valid". Had the appellant be informed at that

point of the fact that the respondent was treating the application as invalid because of the section 3C(4) issue, rather than several months later, the appellant's contention is that he would have been able to take steps to regularise his position.

13. In the event, on 21 April 2015, the appellant applied for indefinite leave to remain in the United Kingdom. The appellant relied on paragraph 276B of the Immigration Rules, which reads as follows:-

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
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> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
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> (a) age; and
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> (b) strength of connections in the United Kingdom; and
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> (c) personal history, including character, conduct, associations and employment record; and
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> (d) domestic circumstances; and
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> (e) compassionate circumstances; and
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> (f) any representations received on the person's behalf; and
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> (iii) the applicant does not fall for refusal under the general grounds for refusal.
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> (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
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> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –
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> (a) the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

14. In the respondent's decision of 15 July 2015, refusing the application for indefinite leave and, additionally, refusing the appellant's human rights claim, the respondent explained why the appellant had failed to satisfy the requirements of paragraph 276B:-

> "Your immigration history above confirms that you were without any valid leave from 21 October 2014 until 20 April 2015.
>
> Your application for indefinite leave to remain on the basis of having completed a period of 10 years continuous lawful residence is refused under paragraph 276ADE with reference to Paragraph 276B(i)(a) and 276B(v)."

C. The First-tier Tribunal Judge's decision

15. The First-tier Tribunal Judge noted that, whilst in the United Kingdom, the appellant had obtained an MSc in International Marketing Strategy at the University of East London and a Bachelor of Business Administration degree from the London Commonwealth College. The appellant told the judge that if he had been permitted to stay in the United Kingdom, he planned to set up his own business.

16. The judge was informed that the appellant had complained to OISC about the services he had received from IWP and that he had received the outcome of his complaint in May 2015.

17. At this stage, it is necessary to set out the relevant conclusions of the OISC investigation:

> "26. In response to the Complainant's allegation that IWP did not withdraw his application for permission to appeal on the agreed date i.e. 7 October 2014, the organisation explained that the Complainant did not contact them following the meeting of 7 October 2014 and that he only contacted them on 10 October 2014 and told them to withdraw the application. In support of their rebuttal IWP provided a typewritten attendance note dated 7 October 2010 and a client care letter of the same date. In both documents it is stated that the Complainant had told IWP that he had made an online application and wanted the organisation to withdraw his application for permission to appeal to the Upper Tribunal. The wording in both documents therefore appears to support the Complainant's allegation that he had asked IWP on 7 October 2014 to withdraw his application for permission. Furthermore in a copy of a cover letter dated 7 October 2014 addressed to the Home Office, IWP explains, "He (referring to the Complainant) applied before under Tier 2 General, the application was refused and his appeal will be withdraw [sic] on 8 October 2014". Therefore the Commissioner is satisfied that although the Complainant instructed IWP on 7 October 2014 to withdraw his application for permission to

appeal to the Upper Tribunal, IWP did not withdraw the appeal until 10 October 2014. And in addition to failing to act as instructed by the Complainant, IWP attempted to mislead the Commissioner by claiming that the Complainant only told the organisation on 10 October 2014 to withdraw the appeal. The organisation has thus breached Code 4 and 13(iv) of the Commissioner's Code of Standards.

…

29. The Commissioner is not satisfied that IWP provided competent and diligent representation to the Complainant. Firstly, IWP advised the Complainant on 7 October 2014 to make a new application for leave to remain notwithstanding that the Complainant's leave had been extended under Section 3C of the Immigration Act 1971 and therefore he was not permitted to make such an application. Secondly, the Tier 4 application submitted whilst the appeal was outstanding was flawed in law as section 3C and 3D of the Immigration Act 1971 clearly states that no fresh application may be made whilst an appeal is pending. Thirdly, although IWP claimed to have advised the Complainant that his appeal against the decision to refuse his Tier 2 application would not be successful as there was no valid CoS, they have provided no documentary evidence to corroborate this claim. Therefore the Commissioner does not accept that IWP have been able to demonstrate that competent and diligent representation was provided to the Complainant. The organisation has thus breached Code 17 of the Commissioner's Code of Standards."

18. The First-tier Tribunal Judge held as follows:-

"26. The effect of sections 3C and 3D of the Immigration Act 1971 is that the Appellant's leave was extended until such time as his appeal rights are exhausted, however whilst while (sic) a person's leave is extended in this way they cannot make any further application for leave to remain. In the Appellant's case he did not withdraw his appeal until the letter from Immigration & Work Permit Ltd on the 10th October 2014, the effect of this is twofold firstly the Appellant's Tier 4 application made on the 7th October 2014 is invalid and secondly once his appeal rights were exhausted in October 2014, he no longer had valid leave, until he submitted his current application on the 21st April 2015. He has not therefore completed a period of 10 years continuous lawful residence in the UK and accordingly does not meet the requirements of paragraph 276B of the Immigration Rules.

27. I have gone on to consider the Appellant's position in relation to any family or private life he may have established in the UK. There is no evidence before me to indicate the Appellant has a partner or child in the UK and as such he is unable to satisfy the requirements of Appendix FM of the Immigration Rules.

28. The Appellant's private life I have considered under paragraph 276ADE(1), he has not lived continuously in the UK for 20 years and does not therefore satisfy paragraph 276ADE(1)(iii). In relation to

paragraph 276ADE(1)(vi), although the Appellant has been in the UK since 2005, he has spent most of his life in Bangladesh. In his oral evidence the Appellant told me his parents, brother and sister are still living in Bangladesh and he has visited Bangladesh in 2008 and 2011. The Appellant has studied whilst in the UK and obtained qualifications, and has also had work experience, I was not told why the skills the Appellant has acquired in the UK could not assist him in obtaining employment in Bangladesh. In all circumstances I do not find that there would be very significant obstacles to the Appellant's integration into Bangladesh. He does not therefore meet the requirements of paragraph 276ADE(1) of the Immigration Rules.

29. I have also considered whether there are any exceptional circumstances in the Appellant's case in relation to his private life which might necessitate granting leave outside the Immigration Rules under Article 8 of the ECHR. Whilst I have considerable sympathy with the Appellant's situation, given the position in which he has been placed by his previous advisers. I should perhaps mention at this stage that the OISC when determining the Appellant's complaint found that Immigration & Work Permit Ltd did not provide competent and diligent representation for the Appellant.

30. The Appellant raises the issue of fairness and refers in particular refers (sic) to the initial indication given by the Respondent in an e-mail dated the 4th November 2014, that the Tier 4 application submitted on the 7th October 2014 was valid. I accept in the context of this case the wording of the e-mail is potentially misleading, however it appears to be a standard form of wording, which is simply acknowledging that biometric enrolment has taken place and the application form has been correctly completed. As the e-mail goes on to indicate the file is then passed to a caseworker. It can only be when a caseworker has been able to investigate an applicant's immigration history that, as in the Appellant's case, they are able to ascertain whether the requirements of the Immigration Rules have been met.

31. The other point the Appellant makes is that there was an undue delay by the Respondent in making a decision on his application. The Appellant submits if a decision had been taking more expeditiously, he could have remedied the position. The application was submitted on the 7th October 2014 and determined on the 16th July 2015, some 8 months later. Whilst I acknowledge there is some delay I do not consider it to be of a magnitude which renders the process unfair. The responsibility to ensure the application was submitted in accordance with the Immigration Rules rests with the Appellant and his advisers. In so far as the Appellant has suffered unfairness that has been due to his advisers not providing competent advice rather than any unfairness or action taken by the Respondent.

32. The Appellant came to the UK to study and was granted various periods of leave to enable him to complete those studies he cannot have had the expectation that he would necessarily be allowed to remain in the UK once those studies were complete. He has family in Bangladesh and in so far as he has established friendships whilst he has been in the UK, I have been provided [sic] with any reason to

suggest he would not be able to continue those friendships through the usual modern means of communication.

33 In conclusion I do not find there to be any exceptional circumstances in this case which require me to consider the Appellant's position outside the Immigration Rules under Article 8 of the ECHR."

D. Discussion

(a) The validity of the application for leave

19. At the hearing before me, Mr Duffy stated that, according to the respondent's records, at the time the respondent informed the appellant that his application was valid, the respondent's computer system, accessible to caseworkers, recorded that the application for leave had, in fact, been submitted during the currency of section 3C leave.

20. Unlike the First-tier Tribunal Judge, I am unpersuaded that the respondent's confirmation of the validity of the application fell to be read by the appellant as being specifically confined to the issue of biometrics. The thrust of the communication was that validity in general had been accepted and that the application would be substantively considered.

21. The real issue, however, is whether in the circumstances of this case the respondent should have informed the appellant in early November 2014 that his application was not, in fact, valid for section 3C(4) reasons. If the appellant had then acted promptly, making the respondent aware of all relevant matters, then, bearing in mind that he had not at that point overstayed by 28 days, his position could, in practice, have been regularised by the making of a new application. The respondent has not at any stage sought to contend that the application made on 7 October 2014 fell to be refused or rejected for any reason other than the section 3C(4) issue.

22. The First-tier Tribunal judge was wrong in law to approach the matter as if it were merely one of delay in reaching a substantive decision on an application. If the judge had checked with the presenting officer, he would have discovered, as I did, that when the respondent wrote to the appellant to say his application was valid, the respondent's computer system ("CID"), which would have been accessible by the caseworker, showed that the application had, in fact, been made during the currency of section 3C leave, and was, in fact, invalid. The judge ought to have realised that this was a relevant issue, affecting the weight to be given to the importance of effective immigration controls.

23. In the particular circumstances of this case (which are admittedly unusual), the importance to be given to immigration control, in determining the proportionality of the appellant's hypothetical removal in relation to his protected Article 8 private life, fell to be reduced by reason

of the respondent's failure to tell the appellant that his application was not, in fact, valid.

(b) The actions of the appellant's immigration advisers

24. I turn to the actions of the appellant's immigration advisers, IWP. Mr Turner sought to rely upon FP (Iran) & Another v Secretary of State for the Home Department [2007] EWCA Civ 13. But that case is far removed from the circumstances of the present one. FP (Iran) concerned two appellants who had not attended the hearings of their respective asylum appeals because they had not received notice of the time and place of those hearings. What was therefore at issue was the right to a fair hearing. Furthermore, the court was at pains to stress the fact that the cases before it involved international protection. Finally, the essential mischief identified by the court was the interaction of two provisions of the Asylum and Immigration Tribunal Rules 2005, which compelled the AIT to proceed with the hearing in the absence of a party, if satisfied that notice of hearing had been given in accordance with those Rules.

25. The following passage from the judgment of Sedley LJ explains the court's approach:-

> "42. In a well-known passage of his speech in *Al Mehdawi v Home Secretary* [1990] 1 AC 876, Lord Bridge said (at 898):
>
> > It has traditionally been thought that a Tribunal which denies natural justice to one of the parties before it deprives itself of jurisdiction. Whether this view is correct or not, a breach of the rules of natural justice is certainly a sufficiently grave matter to entitle the party who complains of it to a remedy ex debito justitiae. But there are many familiar situations where one party to litigation will effectively lose the opportunity to have his case heard through the failure of his own legal advisers, but will be left with no remedy at all except against those legal advisers. I need only instance judgments signed in default, actions dismissed for want of prosecution and claims which are not made within a fixed time limit which the Tribunal has no power to extend. In each of these situations a litigant who wishes his case to be heard and who has fully instructed his solicitor to take the necessary steps may never in fact be heard because of his solicitor's neglect and through no fault of his own. But in any of these cases it would surely be fanciful to say that there had been a breach of the audi alteram partem rule. Again, take the case of a county court action where a litigant fails to appear at the hearing because his solicitor has neglected to inform him of the date and consequently judgment is given against him. He can at best invite the court in its discretion to set aside the judgment and it is likely to do so only on the terms that he should pay the costs thrown away. Yet, if it can be said that he has been denied natural justice, he ought in principle to be able to apply for certiorari to quash the judgment which, if he is personally blameless, should be granted as a matter of course.
> >
> > These considerations lead me to the conclusions that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the

dispute on his behalf cannot complain that he has been a victim of a procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle that can be invoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a lis inter partes? I cannot discover any such principle and none has been suggested in the course of argument."

43. The result in *Al Mehdawi* was that a foreign student whose leave to remain had expired forfeited his entitlement to an appeal hearing because of his solicitors' errors. Not only did the case not concern the possibility of returning somebody to persecution, torture or death; it left to the Home Secretary, if he thought the application had merit, a power to invite an adjudicator to hear the applicant's evidence and report whether in his opinion it would have made a difference to the decision: see p.901. Although Lord Bridge's opinion is carefully framed in terms of principle and not of pragmatism, the case before the House was far distant from the kind of case we are concerned with. These cases do not only involve asylum-seekers who are either making a first appeal or have lost their first appeal and are making a second endeavour to establish their claim: they include asylum-seekers who have won their initial appeal before an immigration judge and are seeking to hold the decision against the Home Secretary's appeal. For some of these, the exercise of the right to be heard may literally be a matter of life and death; for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here. The remedial discretion which afforded Mr Al Mehdawi a fallback is absent from asylum law."

26. Having reviewed a number of other cases, Sedley LJ held at paragraph 46:-

"… that there is no general principle of law which fixes a party with the procedural errors of his or her representative."

27. As can be seen, none of this has any material bearing on the appellant's case. The appellant is not contending that, as a result of his advisers' shortcomings, he was denied a hearing before an independent tribunal. His case is (indeed, can only be) that the misfeasance of IWP falls to be weighed in the balance in determining whether his hypothetical removal from the United Kingdom (see section 113 of the 2002 Act) would violate his Article 8 ECHR rights.

28. The correct way of looking at the matter is not to ask whether IWP's failure on 7 October 2014 to withdraw the appellant's application for permission to appeal in some way gives the appellant a stronger form of protected private (or family) life than he would otherwise have. Plainly, it cannot. Rather, one needs to ask whether in the particular circumstances I have set out, IWP's misfeasance affects the weight that would otherwise be given to the importance of maintaining the respondent's policy of immigration control.

29. Mr Duffy submitted that the appellant's "lack of culpability" reduces the weight to be placed on that public interest. A lack of culpability is, however, a necessary but not a sufficient factor. Even where the person concerned is not to be taken as sharing the blame with his or her legal adviser, it will still be necessary to show that the adviser's failure constitutes a reason to qualify the public interest in firm and effective immigration control.

30. 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. As a general matter, poor legal advice in the 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 will normally have to live with the consequences.

31. The facts of the present case are, however, strikingly different. The OISC decision shows that IWP did not give the appellant poor advice. The organisation blatantly failed to follow the appellant's specific instructions regarding the timing of the withdrawal of the application for permission to appeal. That failure was the sole reason why the appellant's application for leave fell to be treated as invalid.

32. The conclusions of the OISC investigation are highly material in determining whether this really is a rare case in which the misfeasance of a legal adviser can affect the weight to be given to the public interest in maintaining an effective system of immigration control. The OISC findings are clear and categorical. The position is far removed from that which we frequently see in this jurisdiction, where legal advisers are belatedly blamed but where there has been no admission of guilt and no finding of culpability by a relevant professional regulator.

33. Would confidence in the respondent's system of immigration controls be diminished if, in the particular circumstances of this case, regard was to be had to the fact that, if IWP had complied with their client's instructions, the appellant would have made a valid application for leave that is likely to have been successful? It seems to me plain that the answer to that question must be in the negative. On the contrary, public confidence in the system could be said to be enhanced if it were known that the system is able, albeit exceptionally, to take account of such a matter.

(c) Setting aside and re-making

34. Accordingly, on this issue also I find that the First-tier Tribunal judge erred in law. I set aside his decision and proceed to re-make the decision in the appeal.

35. I am conscious of the fact that the appellant does not assert a family life in the United Kingdom. His private life is, however, a significant one, built over the last ten years, involving academic achievement and prolonged lawful work. The appellant has at all times strived to maintain adherence to immigration law.

36. The combined effect of the matters discussed at paragraphs 18 to 33 above affects the weight to be given to the maintenance of immigration controls to the point where the appellant's protected private life outweighs what is on the respondent's side of the balance. Removal of the appellant would, therefore, amount to a disproportionate interference with his Article 8 rights.

Notice of Decision

37. The First-tier Tribunal Judge's decision contains errors of law. I set it aside and re-make the decision by allowing the appellant's appeal on human rights grounds.

No anonymity direction is made.

Signed Date 12 July 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber