Upper Tribunal
(Immigration and Asylum Chamber)

Akhtar (Designated Qualifying Regulator: s 84(3A)(b) restrictions) Pakistan
[2022] UKUT 00038 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 23 November 2021

Decision & Reasons Promulgated

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Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

NASREEN AKHTAR

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M. Biggs, instructed by Mamoon Solicitors.
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer.

The restriction imposed by s 84(3A)(b) of the 1999 Act on those representatives whose authorisation derives from a designated qualifying regulator applies where the representative in question is outside England and Wales and does not apply where the representative is within England and Wales

DECISION AND REASONS

1. This decision falls into two parts. In this main part we give our decision on this appeal. In the Annex we determine a procedural issue that arose during it. The numbering of the paragraphs is intentionally continuous.

2. The appellant is a national of Pakistan. She appealed to the First-tier Tribunal on human rights grounds against the decision of the respondent on 9 January 2020 refusing her application for entry clearance for settlement as a dependent relative. In the first-tier Tribunal her appeal was heard by Judge Devlin.

3. At the beginning of that hearing, the appellant's representative (not Mr Biggs) told the judge that she proposed to call oral evidence from a doctor in Pakistan, who would give evidence by video-link from Pakistan. The Presenting Officer (not Mr Melvin) objected on the ground that no notice had been given of the appellant's intentions and that the guidance in Nare [2011] UKUT 443 (IAC); [2012] Imm AR 207 had not been followed: in particular, it appeared that no permission had been obtained or even sought from the Pakistan authorities. The appellant's representative made a number of unsubstantiated submissions on the issue; the Presenting Officer confirmed that if the evidence was to be led he would seek an adjournment to give proper consideration to cross-examination and the possibility of further evidence.

4. The judge considered the authorities and the facts of the case before him and declined to allow oral evidence to be given from Pakistan. He heard oral evidence from a member of the appellant's family, and took into account written evidence, including evidence from the doctor in Pakistan. In an exhaustive examination of the evidence before him (paragraphs 93-234 of his decision) the judge concluded that the appellant did not meet the requirements of the relevant immigration rules. He gave a number of reasons, among which were that neither the sponsor's oral evidence nor the doctor's written evidence were reliable in portraying the appellant's life and needs. He went on to conclude that there was in this case no proper ground for thinking that the appellant had a right to entry clearance despite not meeting the requirements of the rules. He dismissed the appeal.

5. An application for permission to appeal argued that the judge erred in his consideration of the doctor's evidence. The doctor was ready to give oral evidence and could, if asked, have clarified any difficulties which the judge saw in his report. Thus the decision to refuse to allow the doctor to give oral evidence was both wrong in itself and led to an error in the consideration of the evidence. Permission was granted by Judge Nightingale in the First-tier Tribunal, apparently on the basis that although neither party produced it before the judge, there was evidence that might have been available that would have dispelled the judge's concerns about obtaining permission from the Pakistan authorities, in the form of a list of countries said not to raise objections to the taking of live evidence from their territories. For that reason she regarded all the grounds as arguably demonstrating an error of law by the judge. There is a reply on behalf of

the Secretary of State apparently acknowledging that the judge made an error in the application of Nare, but submitting that any continuing procedural problems derived from the appellant's not seeking an adjournment to substantiate her position and persuade the judge of the propriety of taking the oral evidence, and that the judge's treatment of the evidence that as a result was before him showed no error.

6. Before us, Mr Biggs made it clear that the only ground upon which he relied was that the judge's decision not to permit the doctor to give oral evidence remotely from Pakistan was irrational. As the judge had placed substantial reliance on the lack of confirmation that Pakistan did not object to such a course, 'the FCO's position that there was no such objection was a material matter that FTT overlooked. The decision not to permit Dr Ishtiaq to give oral evidence was therefore irrational because it overlooked a material matter'. That is a quotation from para 4 of Mr Biggs' written skeleton argument. It is not clear from that argument or from his oral submissions what his position is on the undoubted fact that, whether or not the matter was now conceded, the fact (if it be a fact) of Pakistan's position appears to have been wholly outside the knowledge of the judge or either party.

7. Mr Biggs made passing reference in his skeleton argument to the recent decision of this Tribunal in Agbabiaka [2021] UKUT 00286 (IAC), a comprehensive review of the 'Nare guidance' undertaken with extensive input on behalf of the FCDO. At the hearing we directed Mr Biggs to paragraph 48 in particular. It reads as follows:

> "Although the FCDO has expressly stated that no reliance is to be placed upon any list of the kind recently seen (and perhaps acted upon) by judges of the First-tier Tribunal, and although Ms Broughton's proposed scheme makes no provision for publication of a list, we agree with Mr Bazini that it should be practicable at an early stage for such a list to be produced and, thereafter, maintained. This is particularly so, given the five year period referred to in paragraph (ii) of Ms Broughton's description of the outline process. In reply, Mr Holborn was sympathetic to this suggestion."

8. Mr Biggs submitted that at the time that Judge Devlin heard this case there was an understanding that the lists should be acted upon, and that his failure to act on the lists as his colleagues might have done amounted to irrationality: in the circumstances as they were at the time, failure to consider the list amounted to an error of law.

9. We are not persuaded. Use of the lists to which reference has been made was the result of a misapprehension of their import, not least because, as explained in Agbabiaka at [14]-[19] and [26]-[27], they were never intended to have any application to proceedings in tribunals. As the decision makes clear at [48], the FCDO has expressly stated that no reliance is to be placed on this kind of list, and it is for the FCDO alone to determine such questions (para [23]). Judge Devlin's taking no notice of the contents of the list meant simply that, for whatever reason, he did not

share a misapprehension. Failure to act on a misapprehension is not an error of law.

10. For these reasons, the sole ground of appeal fails and we affirm the decision of Judge Devlin dismissing the appeal.

ANNEX

11. As we indicated, this appeal raises a procedural question. The appellant is represented by solicitors in Manchester, and the sponsor lives in Manchester. For the appeal, the solicitors instructed an English barrister, Mr Biggs. Because of the continuing consequences of the Covid-19 pandemic, the hearing, on 25 August 2021, was to be by remote means. Shortly before the hearing, Mr Biggs discovered that the judge of the Upper Tribunal hearing the appeal was in Scotland. Being aware of the provisions of Part 5 of the Immigration and Asylum Act 1999 he sought an adjournment on the ground that in the circumstances he might be committing a criminal offence by making his submissions, and that it would be unethical for him to appear for the appellant in circumstances in which he could not be satisfied that he was entitled to do so. He was, apparently, supported in that view by the Bar Council. Judge Macleman granted the adjournment. The hearing before us was in person, in England. We wish to put on record that Mr Biggs is not to be criticised for the position he took on the material available to him.

12. The question raised is this: can an English barrister appear in an immigration appeal if the barrister is in England but the judge, hearing the appeal by remote means, is in Scotland? The question, and the answer, apply equally to any person regulated in England and Wales by the Bar Council, the Law Society, or the Institute of Legal Executives, and requires examination of the wider meaning of the relevant statutory provisions.

The Regulatory regime

13. Prior to the coming into force of the 1999 Act, there was no regulation of immigration practitioners save in three respects. First, if the practitioner was a member of one of the legal professions, regulation was through the regulation of that profession. Secondly, it occasionally happened that immigration practitioners were convicted in criminal proceedings of offences committed in the course of acting for a person in immigration matters. Thirdly, the Procedure Rules of the Immigration Appellate Authority and the Immigration Appeal Tribunal made provision for an appellant to be represented by an unqualified person, but only with leave; so the Adjudicator or the Tribunal had power, by refusing leave, to prevent an individual acting as a representative. That power was rarely exercised. It became apparent, however, that abuses were taking place both with the consent of appellants and by exploitation of them.

14. Part V of the Immigration and Asylum Act 1999 regulates the provision of 'immigration advice' and 'immigration services' through a raft of provisions overseen and administered by a regulator, the Immigration Services Commissioner, appointed (s 93) and funded (Schedule 5) by the Secretary of State for the Home Department. The regulation of immigration advice and immigration services is in principle entirely independent of the regulation of legal practice; and it remains the case that the provision of immigration advice or immigration services is not as such a 'reserved legal activity' within the meaning of the Legal Services Act 2007 or any similar legislation. The 1999 Act therefore applies to activities to which the general provisions regulating legal practice do not apply; and, where it does apply, it applies even to the members of the regulated legal professions. All those engaging in the provision of immigration advice or immigration services are subject to the regime of the 1999 Act, with the exception only of certain persons exercising functions on behalf of the Crown as specified in s 84(6): this exception certainly includes Home Office Presenting Officers, and probably includes other legal representatives of the Secretary of State.

15. So far as concerns the content of the regulatory provision, the starting-point is s 84. The section is headed 'The general prohibition', and subsection (1) reads as follows:

> "No person may provide immigration advice or immigration services unless he is a qualified person."

16. Section 91 makes it an offence to contravene the general prohibition in s 84. In order to avoid committing such an offence or otherwise falling foul of the prohibition, it is necessary to know what precisely is meant by providing immigration advice or immigration services, and who is a qualified person.

<u>What is regulated?</u>

17. So far as concerns the first of those issues, the definitions are in s 82, which, so far as relevant, reads as follows:

> "82 (1) In this Part –
> …
> "immigration advice" means advice which—
> (a) relates to a particular individual;
> (b) is given in connection with one or more relevant matters;
> (c) is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and
> (d) is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings;
> "immigration services" means the making of representations on behalf of a particular individual—

(a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or
(b) in correspondence with a Minister of the Crown or government department,
in connection with one or more relevant matters;

…

"relevant matters" means any of the following—
(a) a claim for asylum;
(b) an application for, or for the variation of, entry clearance or leave to enter or
remain in the United Kingdom;
(ba) an application for an immigration employment document;
(c) unlawful entry into the United Kingdom;
(d) nationality and citizenship under the law of the United Kingdom;
(h) removal or deportation from the United Kingdom;
(i) an application for bail under the Immigration Acts or under the Special
Immigration Appeals Commission Act 1997;
(j) an appeal against, or an application for judicial review in relation to, any
decision taken in connection with a matter referred to in paragraphs (a) to (i);

(2) In this Part, references to the provision of immigration advice or immigration
services are to the provision of such advice or services by a person—
(a) in the United Kingdom (regardless of whether the persons to whom they are
provided are in the United Kingdom or elsewhere); and
(b) in the course of a business carried on (whether or not for profit) by him or by
another person."

Who is qualified?

18. The scheme of the Act is that qualification to provide immigration advice or services has to be derived either directly from the Commissioner by registration or indirectly by authorisation as a member of one of the recognised (and specified) legal professions. The Commissioner's registration process is selective and may authorise an individual to undertake certain activities but not others, but qualification derived from membership of one of the professions does not have that feature. It looks, therefore, as though a person who is a member of one of the professions can look to that membership to provide the qualification necessary to comply with s 84. That was indeed the position for some years after the coming into force of the 1999 Act, and remains the case for the professions with regulators outside England and Wales.

19. The legal professions in England and Wales are now regulated by or under the Legal Services Act 2007 and the introduction of the regime under that Act caused changes to be made to Part V of the 1999 Act. Section 186 of the 2007 Act provides as follows:

"(1) Schedule 18 makes provision relating to Part 5 of the Immigration and Asylum Act 1999 (c. 33) (immigration advisers and immigration service providers).

(2) In that Schedule—

(a) Part 1 makes provision for approved regulators to become qualifying regulators for the purposes of Part 5 of the Immigration and Asylum Act 1999,

(b) Part 2 contains amendments of that Act (which amongst other things enable persons authorised by qualifying regulators to provide immigration advice and immigration services in England and Wales) ... ."

20. Thus the clear intention of the 2007 Act was that the new regulatory system it introduced entailed a modification of the previous position of those regulated by the professions in England and Wales: in future they would be authorised to provide immigration advice and services in England and Wales, not in the (whole) United Kingdom.

21. The relevant provisions of the 1999 Act as amended are these:

"84 Provision of immigration services.

(1) No person may provide immigration advice or immigration services unless he is a qualified person.

(2) A person is a qualified person if he is—

(a) a registered person,

(b) authorised by a designated professional body to practise as a member of the profession whose members the body regulates,

(ba) a person authorised to provide immigration advice or immigration services by a designated qualifying regulator,

(d) ... or

(e) acting on behalf of, and under the supervision of, a person within any of paragraphs (a) to (ba) (whether or not under a contract of employment).

(3) Subsection (2)(a) and (e) are subject to—

(a) any limitation on the effect of a person's registration imposed under paragraph 2(2) of Schedule 6.

(b) paragraph 4B(5) of that Schedule (effect of suspension of registration).

(3A) A person's entitlement to provide immigration advice or immigration services by virtue of subsection (2)(ba)—

(a) is subject to any limitation on that person's authorisation imposed by the regulatory arrangements of the designated qualifying regulator in question, and

(b) does not extend to the provision of such advice or services by the person other
than in England and Wales (regardless of whether the persons to whom they
are provided are in England and Wales or elsewhere).

86 Designated professional bodies.
(1) "Designated professional body" means—
(b)The Law Society of Scotland;
(c)The Law Society of Northern Ireland;
(f)The Faculty of Advocates; or
(g)The General Council of the Bar of Northern Ireland.

86A Designated qualifying regulators
(1) "Designated qualifying regulator" means a body which is a qualifying regulator and is listed in subsection (2).
(2) The listed bodies are—
(a) the Law Society;
(b) the Institute of Legal Executives;
(c) the General Council of the Bar."

22. The effect is that for the purposes of s 84(1) the "qualification" of Barristers, Solicitors and Legal Executives regulated in England and Wales is restricted. It is not easy to see any logical reason for the restriction: the qualification (and the resultant exemption from the need to seek registration with the Commissioner) appears to derive from the general expertise recognised by the regulator, rather than from the exact territorial reach of the regulator's regulation. That remains the position in relation to those regulated from Scotland and Northern Ireland, and was not seen as a problem in England and Wales before 2007. We explore this a little further below; but whatever the reason, the position is undoubtedly that authorisation by membership of the professions in Scotland and Northern Ireland still extends to the whole of the United Kingdom, but authorisation by membership of the professions in England and Wales "does not extend to the provision of such advice or services by the person other than in England and Wales".

Deciding the question

23. In the meantime, the Procedure Rules to which we referred in paragraph 13 above have been replaced a number of times. Since the coming into force of the 1999 Act, the relevant provisions in the case of the Upper Tribunal are in rule 11(1), which, by reason of the definitions of 'asylum case' and 'immigration case' in rule 1, applies only to appeals:

> "Subject to paragraph 5A [which relates to immigration judicial reviews] a party my appoint a representative (whether a legal representative or not) to represent that party in the proceedings save that a party in an immigration or asylum case may not be represented by any person prohibited from representing by section 84 of the Immigration and Asylum Act 1999."

24. In the First-tier Tribunal, rule 10(1) is to the same effect; but rule 10(2) provides that representation by a person so prohibited does not of itself render void the proceedings or any step taken in the proceedings.

25. The effect of rule 11 is that the interpretation of Part 5 of the 1999 Act is a matter affecting the jurisdiction of this Tribunal. A purported representative who is a person prohibited by s 84 cannot be a representative and cannot be heard; a representative not so prohibited must be heard. Thus it is right for us to determine the issue before us.

26. At the hearing we were greatly assisted by Mr Biggs, who had researched the materials on a pro bono basis and who, for the purposes of testing the arguments, took a position adverse to that of the Bar, by submitting that an English barrister was prohibited from appearing remotely before a Tribunal sitting in Scotland. He also provided a post-hearing note with his comments on some of the matters discussed at the hearing.

27. The Secretary of State, as we have indicated, has the ultimate statutory responsibility for the Immigration Services Commissioner and hence for the regulatory system as a whole (because those not regulated through the professions need to seek registration from the Commissioner). Mr Melvin, who appeared for the Secretary of State, told us, however, that his instructions were to make no submissions on this issue. Prior to the hearing the Tribunal's lawyers had contacted the Commissioner's office, whose legal adviser had responded as follows:

> "We do not have any guidance on whether representatives qualified in England & Wales are prohibited from appearing by remote means in a hearing conducted by a Judge in Scotland.
> By the wording of the question, I assume this concerns Solicitors and Barristers; not OISC advisers.
>
> <u>Assuming the representative is not regulated by the OISC</u>
>
> For the purposes of the Immigration and Asylum Act 1999 (as amended) ("the Act"), a Solicitor or Barrister is considered a qualified person.
> Therefore, under the provisions of the Act, Solicitors and Barristers are permitted to provide immigration advice and/or services within the UK.
> However, Solicitors and Barristers, by virtue of their regulation with the SRA and BSB (respectively), are restricted to providing legal advice in England & Wales only.
> It would be for the Solicitor and Barrister themselves to determine whether they can appear before a Judge in Scotland without contravening the provisions of their registration with their regulator and without contravening the laws of Scotland.
>
> However, there is no issue in respect of the Act."

28. It is, we have to say, disappointing that the regulator and the Secretary of State appear unwilling to assist on the scope of the regulatory power and offences. There is, as we understand it, a clear "issue in respect of the Act", that is to say its interpretation and enforcement. The

Commissioner's response, as we read it, is that the Commissioner would not under any circumstances regard a "qualified person" (as concept we have not been able to discover in the Act itself) as contravening the prohibition in s 84 of the Act by providing immigration advice or immigration services to which the person's authorisation by the designated qualifying regulator did not extend. If that is what is meant, with respect, we do not think that can be right.

Analysis

29. In order to discover the ambit of both the prohibition and its converse, a person's authorisation, we must begin by reminding ourselves of the activity that is regulated. Immigration advice is defined inter alia as advice in relation to an individual, and immigration services means making representations on behalf of an individual. The notion of a practitioner–client relationship is clearly at the heart of the definition of the latter, and is obviously not alien to the former.

30. The next thing to note (and it is important for what follows) is that making representations is capable of being immigration services when the representations are made in correspondence with the government, that is to say representations can be made in writing. A question arises whether the use of the word 'before' in the definition as it relates to representations in civil proceedings has the effect of limiting the prohibition to oral process. We are confident that it does not have that effect. In the context of this regulatory scheme it would serve no useful purpose for there to be no regulation of written representations to a court or Tribunal on matters on which oral representations are regulated, and on which written representations to the government are regulated. The word "before" does not therefore mean 'in the face of': it is used simply to indicate that proceedings are on foot.

31. The conclusion that written representations are included within both the limbs of the definition of immigration services is, further, what one would expect from the structure of the definition, in which the phrase "the making of representations" occurs before the division between the two contexts in which such representations are regulated, one of those contexts certainly including written representations.

32. We now turn to s 82(2) which provides a definition of what is meant, for the purposes of the Act, by "providing" immigration advice or services. We are not primarily concerned with paragraph (b). We are concerned with paragraph (a), and we note that the wording is, mutatis mutandis, the same as that used in s 84(3A)(b). We will explore the consequences of that after looking at the present provision.

33. We observe as follows. First, the section does not use any wording suggesting a differentiation in the meaning of "providing" between providing immigration advice and providing immigration services. Secondly, the word "person" is used both of the provider and the object of

the provision. The position of juridical persons is not perhaps clear; but what is clear is that there is no room for a suggestion that in the case (only) of immigration services the "persons" to whom the services are provided are, or include, a court or Tribunal, or the addressee of correspondence. That conclusion indeed also flows from the use of the word "before" rather than "to" in the definition of immigration services, to which we alluded above: the representations are made before the court or Tribunal, not to it. The service provided by a person providing immigration services is making a representation on behalf of an individual, and it is that individual, together possibly with others interested in the outcome of the case, to whom the service of representation is provided. We emphasise this because Mr Biggs submitted that the Tribunal should be regarded as the persons to whom the service is provided. We reject that submission.

34. Thirdly, the dash before the division of the definition into paragraphs (a) and (b) does not affect the continuous reading of the words used; the reference is to the provision of services "by a person in the United Kingdom". The phrase "in the United Kingdom" must relate to the "person": it cannot govern merely the word "provision", because if it did it would conflict with the words in brackets, which clearly indicate that the destination (if we may so describe it) of the provision is irrelevant. If the relevant concept was "provision in the United Kingdom" in any sense implying that "provision" meant both giving and receiving, the words in the brackets would lose a great deal of their effect, because giving advice in (from) the United Kingdom to a person outside the United Kingdom would not be providing the service in the United Kingdom, so would not be regulated at all.

35. It follows that the s 84 prohibition on providing immigration services does not apply to their provision by a person who is not in the United Kingdom. That is exactly what might be expected as a matter of practicality, and of a scheme to which criminal sanctions are attached. If the provider of immigration advice or services is outside the United Kingdom, provision by that person is not regulated; on the other hand, provision of such services by a person who is in the United Kingdom is regulated, whichever part of the United Kingdom the person is in. A person in the United Kingdom who gives immigration advice to a person in China is the subject of regulation under Part 5; a person in China who gives immigration advice to a person in the United Kingdom is not regulated. The same is inevitably true for immigration services. A person in the United Kingdom who makes representations on behalf of a person in China is regulated; but a person in China who makes representations on behalf of a person is not regulated even if the person on behalf of whom the representations are made is in the United Kingdom. Mr Biggs' post-hearing note suggests that that result cannot have been intended. In our view it must have been intended: otherwise, the Immigration Services Commissioner would have had the task of considering the authorisation of anybody, anywhere in the world, who proposed to write to the Tribunal or to an officer of the United Kingdom government about an immigration matter concerning a

professional client; under the legislative scheme such a person would need qualification under s 84 before the letter or representation could be sent.

36. These observations clearly apply to written representations. Do they also apply to oral representations? There seems no good reason why they should not. We have seen that representations whether written or oral are within the regulatory scheme, and no distinction is drawn here or in the definition of immigration services between oral and written representations before a court or Tribunal. That means that, not surprisingly, a person in the United Kingdom who makes oral representations before a court or Tribunal in the United Kingdom is within the regulatory scheme but, slightly more surprisingly, a person who does so without being in the United Kingdom is not. The surprise, however, arises only from the potential difficulties of making oral representations to a court or Tribunal in the United Kingdom without oneself being in the United Kingdom. But it has not required the Covid-19 pandemic to show that such representations can be made by remote means; for many years the procedure rules and practice of various courts and tribunals have allowed proceedings to be conducted, or partly conducted, "by electronic means". Once that difficulty is dealt with, it seems not at all surprising that the same regulatory rules should apply to oral representations as to written representations. If the person making them is outside the United Kingdom, the making of the representations before a court or Tribunal in the United Kingdom is not regulated. It is the geographical location of the person providing the advice or services that counts.

37. We can now look at the meaning of s 84(3A)(b), remembering that the phrasing is in all material respects the same as that in s 82(2)(a), no doubt intentionally so. It is likely to be difficult to see any good reason for thinking that any of the concepts dealt with in the one is different from that governed by the same wording in the other. Mr Biggs suggested that the key concern of the provision in s 84(3A) is "where the services are provided". To an extent we agree. But it is not right to test that as he suggests by seeing what the meaning of the subsection would be if the words "by the person" were omitted, or to look at the words in this subsection in isolation. Instead, it is to be tested by comparison with the words of s 82(2). We have explained above why "provision" there means giving, and cannot include the receiving, of the advice or service, and the same phrase must have the same meaning here.

38. But then the way forward is clear. It is, again, the geographical location of the person providing the immigration advice or services that counts. The authorisation by the designated qualifying regulator does not provide authorisation to "a person other than in England and Wales": again, the location of the destination of the provision is irrelevant.

39. That means that an English barrister in England may provide immigration advice to a client in Scotland by writing, by telephone or by video link, and may make representations before the Tribunal on behalf of the Scottish client in writing or by "electronic means". The barrister's authorisation by

the Bar Council does not, however, qualify the barrister to provide immigration advice or services outside England and Wales. If the barrister went to Scotland and made representations before the Tribunal in Scotland there would be a breach of s 84(1) unless the barrister had some further effective route to being a "qualified person" in Scotland, for example by registering with the Commissioner or obtaining authorisation from one of the designated professional bodies (as distinct from the designated qualifying regulators).

40. Mr Biggs submitted that it is absurd that as an English barrister he should be permitted to make representations from England but be prohibited from travelling to Scotland and making the same representations in the same forum there. It is not of course right to say that he is prohibited from so doing: the position is that the scheme of regulation to which he is subject, through the Bar Council and the Bar Standards Board does not, by deliberate statutory provision, extend outside England and Wales. Nothing prevents him seeking the appropriate authorisation if he wishes to operate in Scotland. But there are in any event oddities in the scheme as it stands. There cannot be any doubt that those authorised in England and Wales by the designated qualifying regulators are subject to a restriction that does not apply to those authorised by the regulators for the rest of the United Kingdom. It is distinctly surprising that one way in which Mr Biggs could secure qualification to appear in Scotland would be by obtaining call to the Bar of Northern Ireland (and vice-versa). Evidently the effect of the passing of the Legal Services Act 2007 is that those qualified in England and Wales have lost the United-Kingdom-wide competence that they had before 2007 and which their colleagues from Scotland and Northern Ireland still share. As we have indicated above, it is very difficult to understand why that is so. It is not because of the need for authorisation to undertake a "reserved legal activity" under the 2007 Act. In relation to immigration advice, the activities regulated by Part 5 of the 1999 Act are not reserved legal activities within the meaning of the 2007 Act. In relation to immigration services, the activities regulated by Part 5 of the 1999 Act are not reserved legal activities within the meaning of the 2007 Act except in relation to a court (because sub-paragraphs 3(2) and 4(2) of Schedule 2 to that Act have the effect of excluding them in relation to tribunals). Further, immigration law is the same throughout the United Kingdom, and it is supervised by Tribunals with jurisdiction over the whole United Kingdom. The provisions of s 84(3A)(b) ought to be reconsidered. But we have to interpret and apply them as they are.

41. If it be correct, as Mr Biggs submitted, that a barrister in England is not authorised to provide immigration services by appearing remotely from England before a Tribunal in Scotland, it would be equally the case that the barrister is not authorised to provide written representations in the same circumstances. But there is no Scottish immigration tribunal: the Immigration and Asylum Chambers of both the First-tier Tribunal and the Upper Tribunal operate throughout the United Kingdom and at any particular time a judge of either tribunal might be in any part of the United Kingdom, and working there. It cannot be the case that as a judicial file

containing written submissions for consideration, or a judge dealing with such submissions, crosses the Tweed, the barrister making the submissions becomes prohibited by s 84(1) from doing so, and the Tribunal from treating the barrister as a representative. Apart from anything else, the barrister will not know what has happened, and it is not the barrister's business to know. The advantage of the interpretation which we have adopted, and which we do anyway consider is the proper interpretation of the statutory provisions, is that as a barrister Mr Biggs knows the extent of his authorisation by knowing where he himself is. The authorisation is limited by something within the knowledge of the person providing the immigration advice or immigration services, not by something likely to be outside that person's knowledge.

42. Mr Biggs also submitted that, in a hearing by remote means, the place where the tribunal is located should be decided by where certain administrative aspects of the hearing had been settled or initiated. That is wholly unviable. In fact First-tier Tribunal IAC hearings are administered in Scotland if the judge is going to sit in Scotland (or, we believe, in Northern Ireland), but Upper Tribunal hearings are administered from London. The actual video link is likely to be initiated in Scotland if the judge is in a hearing centre in Scotland, but that is all. There is, however, no reason why such a link could not be initiated from London, sending "joining instructions" to the parties and the judge (the latter being in a court in Scotland). Those arrangements would be outside the control of the parties and in all probability outside their knowledge. The question of conflict with s 84(1) and the more important issue of whether the appellant had representation, could not be left to be the casualties of administrative arrangements of this sort.

CONCLUSION

43. As it appears to us, the alternative interpretations proposed by Mr Biggs do not decrease the difficulties and their implications do introduce an element of absurdity or impracticability. They confirm us in our view that the interpretation we have adopted is the proper interpretation of the statutory provisions. The limitation introduced by s 84(3A)(b) means that authorisation by a designated qualifying regulator amounts to qualification within the meaning of s 84(1) while the person so authorised is in England and Wales, but not otherwise.

NOTE

44. We add one further observation. As a consequence of the amendments made by the 2007 Act, a person authorised by a designated qualifying regulator can make oral submissions before a tribunal sitting in Scotland or Northern Ireland only by remote means. Special considerations have

applied during the pandemic, when numerous hearings have been held by remote means for no reason other than the desirability of avoiding physical co-location. In more normal circumstances, however, and as the Senior Judiciary have made clear, the norm is for proceedings to be in person, in court. No doubt there will be reasons why in an individual case proceedings should be dealt with remotely, or partially remotely. But in an appeal whose natural base is in Scotland or Northern Ireland, we do not envisage that instructing a person authorised only by a designated qualifying regulator should be regarded as a good reason to have a remote or partially remote hearing when but for that fact the hearing would be fully in person, in court. There are ample facilities for representation by those authorised by approved regulators, who can appear in person in tribunals in Scotland and Northern Ireland.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 5 January 2022