IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05732/2015

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 15 January 2021	**On 15 February 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

DULGUUNMURUN JAMSRANJAV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Reid, instructed via Direct Access
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Mongolia. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 28 April 2015 refusing an application for further leave to remain on private and family life grounds.

2. A Judge of the First-tier Tribunal dismissed his appeal, permission was granted ultimately by the Upper Tribunal against that decision and at a rehearing the appeal was dismissed.

3. Thereafter the appellant sought permission to appeal that decision to the Court of Appeal and an extension of time and permission to appeal were granted by Sir Stephen Silber on 26 September 2018. Subsequently the appeal was allowed by consent on 12 March 2019 and the matter was remitted to the Upper Tribunal for reconsideration in line with an agreed statement of reasons.

4. Thereafter there was a series of CMRs, arising particularly as a consequence of a complaint raised by the appellant with the Office of the Immigration Service Commissioner ("OISC") against his previous representatives. The essence of that complaint was that the previous representatives had lodged his application for permission to appeal to the Court of Appeal one day out of time, on 17 January 2019 rather than on 16 January 2019. It might be thought that that was of no consequence since the Court of Appeal considered the matter anyway, but the difficulty that the appellant experienced as a consequence of this was that he lost his section 3C leave since he had no leave after 16 January 2019.

5. The OISC investigated the appellant's complaint and reached a conclusion in a letter of 10 December 2019. The matter was reviewed by the respondent, who gave the matter appropriate consideration but ultimately concluded that she was not minded to grant leave to remain and the matter should be set down for a full hearing. Thus the matter came before me for hearing on 15 January 2021.

6. Mr Deller relied on the skeleton argument/position statement that he had put in. The issue was an essentially straightforward one. It was a question of whether the circumstances were sufficient to compel a grant of leave with reference to Article 8. The appellant could not succeed under the substantive Article 8 Rules under Appendix FM or paragraph 276A. There had been a breach in his lawful residence and the question was whether the claim was good enough and the respondent thought not, based on the factors referred to by Ms Reid in her skeleton. The appellant had not been on a path under the Immigration Rules leading to settlement in the ordinary course of events. He had relied on statutorily extended leave to quite an extent, so there was no great weight to the argument that he should be allowed to stay. Ms Reid had made it clear that she was not arguing historic injustice, which was a matter that Mr Deller had addressed in the skeleton in case that was to be argued.

7. It was in essence a hard luck story. In different circumstances it would have been entirely possible that the appellant would have resided for the ten years. As he had attained the age of 18 after initial entry a different regime applied to him from the rest of his family. His father had been granted settled status on a different basis by the time the appellant made his application and his mother had left the United Kingdom by then. These matters were all in the past and it was not a case of compelling circumstances.

8. In her submissions Ms Reid relied on the skeleton argument she had put in. The factual background was set out in the skeleton at paragraphs 3 to

21. It was not in dispute that the appellant had lawful leave to 16 January 2019 and also that if his then representatives had made the application for permission to appeal to the Court of Appeal on or before that date section 3C leave would have continued and he would have reached the ten years as the application had not been considered for some time and was granted and his appeal was remitted to the Upper Tribunal by consent. Hence the Secretary of State had accepted that the Upper Tribunal had erred. Had it not been for the error by the representatives the appellant would have had section 3C leave up to the date of today's hearing.

9. The central issue was whether the representatives' error diminished or operated to reduce the public interest in the operation of immigration control. Mr Deller placed reliance on what had been said by the President in Mansur [2018] UKUT 00274 (IAC). It was observed there that the correct approach was not to ask whether the failure by the representative in that case to withdraw the appellant's application for permission to appeal in some way gave him a stronger form of protected private (or family) life than he would otherwise have. It was said that plainly, it could not but rather, one needed to ask whether in the particular circumstances the misfeasance by the representative affected the weight that would otherwise be given to the importance of maintaining the respondent's policy of immigration control.

10. Ms Reid referred also to paragraph 29 in Mansur where it was said that even where the person concerned was 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 constituted a reason to qualify the public interest in firm and effective immigration control.

11. The OISC had found that the appellant had been unaware of the late application and did not realise this until 7 September 2019, a year after the application was put in. Mr Deller had rightly highlighted that it would be rare to reduce the public interest on the basis that a representative makes a mistake. Mansur was a similar case to this although in a different context. In that case reliance on section 3C leave and the approaching ten years' lawful residence was the background and the appellant had sought withdrawal of his appeal. In this case the representatives had been instructed to apply for permission to appeal and had done this a day late. The OISC had found that a competent legal adviser should have been aware of the deadline and lawful leave was lost as a consequence. It was not a case of following bad legal advice but loss as a result of a failure to follow instructions. In this regard paragraph 30 of Mansur also assisted. There was an issue as to whether confidence in the system of immigration control would be diminished. The findings in the OISC report were strong. There was also the reference at paragraph 35 in Mansur to the significance of the private life of the appellant in that case. It should be noted that this was not a case where there was a spurious permission to appeal application to get over the ten year line. The Secretary of State had agreed that there was error by the Upper Tribunal and agreed to remittal. There was no public interest in denying further grant of leave to remain to the appellant.

12. I reserved my decision.

Discussion

13. The appellant entered the United Kingdom on 10 June 2008 at the age of 13, having been born on 7 January 1995. He arrived with the status of a visitor and subsequently applied for further leave as the dependent child of his father, who at that time was a points-based system migrant. Prior to the expiry of his leave, which would have been on 8 May 2015, he applied on 28 April 2015 for indefinite leave to remain. That application was refused on the same day. Again, prior to the expiry of his leave, he made an application for further leave to remain on private and family life grounds, on 7 May 2015. At that time his immediate family were all resident in the United Kingdom with the intention of remaining. His sister and father were both British citizens.

14. That application was refused by the respondent on 28 April 2015. The appellant's leave to remain was extended by operation of section 3C(2)(a), and subsequently section 3C(2)(b) of the Immigration Act 1971. As he appealed against the refusal of his application his leave was therefore extended by section 3C(2)(c). Thereafter we have the chronology set out above of the appeal to the First-tier Tribunal, the dismissal of that appeal, the dismissal of the subsequent appeal against that decision in the Upper Tribunal and the application one day out of time for permission to appeal to the Court of Appeal. As noted above, that appeal was allowed by consent and the matter was remitted to the Upper Tribunal for the consideration set out above.

15. It can be seen from the OISC report of 10 December 2019 that it was admitted by the previous representatives that the one day delay in applying for permission to appeal to the Court of Appeal was due to clerical and administrative errors. It was said at paragraph 26 that the Commissioner would expect a competent adviser to be fully aware of the time limits in order to submit an in-time application, thus ensuring a client's continued lawful leave. There was a breach by the previous representative of Code 4 of the Commissioner's Code of Standard and a failure to act in the best interests of the appellant and in breach of Code 12 of the Code of Standard. There was also a breach of Code 31 in failing to notify the appellant of the repercussions on his continued leave of submitting the application for permission to appeal late.

16. Mr Deller has acknowledged in his skeleton argument that the appellant had accrued nine years and seven months' continuous lawful residence, that his application to the Court of Appeal was only a day late due to no fault of his own, that he might well have accrued the additional five months' lawful residence had that application not been made late. As Ms Reid pointed out, it was accepted by the Secretary of State that the Upper Tribunal had erred in its dismissal of the appeal and I accept her argument that the appellant would have reached the ten years lawful leave as the application to the Court of Appeal was not considered for some time and was granted and remitted to the Upper Tribunal, as a consequence of

which the appellant would continue to have section 3C leave up to today but for a lapse by his previous representative which meant that the application for the Court of Appeal was a day late, hence entailing the loss of the section 3C leave.

17. As pointed out by Mr Deller, it is not suggested that the appellant meets any requirement of Appendix FM or paragraph 276ADE and therefore the case rests on the assertion that his circumstances compel an Article 8 decision in the appellant's favour.

18. At the hearing the appellant endorsed all that was said in his updated witness statement of 26 July 2019. Among other things, he refers to his closeness to his father and younger sister, who are both naturalised British citizens. His mother left the United Kingdom in September 2015, separating from his father, and returned to Mongolia. The appellant has obtained GCSE and BTEC qualifications and a foundation degree in engineering from Birkbeck College and has subsequently completed a three year Bachelors degree course in civil engineering at City University. He has been working subsequently as an executive sales assistant though he is currently furloughed from that position. He speaks fluent English and says that his family life is established in the United Kingdom. He has firmly established social and cultural ties with the United Kingdom and all his interests, comforts and friends are here. He is in a long-term relationship with his girlfriend, with whom he has been for nearly three years. He makes the point also that he came to the United Kingdom as a 13 year old boy and has spent the most important years of his life in the United Kingdom and considers the United Kingdom to be his only home. He would be forced to start his studies all over again if he returned to Mongolia and would find it difficult to reintegrate there as he no longer has any real connections with the country. He says that he was unable to read Mongolian properly and has become less fluent in speaking the language and has no longer any friends living there.

19. Against this it is relevant to bear in mind that of course his mother has returned to Mongolia, and it is somewhat difficult to accept that someone who left the country at the age of 13 is unable to read the language that they grew up reading and writing, though I can accept that he would have become less fluent in speaking Mongolian.

20. Both representatives placed reliance on the guidance set out by the President in Mansur. This was a case where a representative was instructed to withdraw an application to the Upper Tribunal for permission to appeal against a decision of the First-tier Tribunal as a consequence of which an application for leave that the appellant made was rendered invalid by reason of section 3C(4) of the Immigration Act 1971. The point was made at paragraph 28 that it was necessary to ask whether in the particular circumstances that had been set out the representative's misfeasance affected the weight that would otherwise be given to the importance of maintaining the respondent's policy of immigration control. Although a lack of culpability on the part of the appellant was a necessary but not a sufficient factor, it was still necessary to show that the adviser's

failure constituted a reason to qualify the public interest in firm and effective immigration control. As a consequence, it would only be rarely that an adviser's failings would constitute such a reason. As a general matter, poor legal advice in the immigration field would have no correlation with the relevant public interest. The weight that would otherwise need to be given to the maintenance of effective immigration controls was not to be reduced just because there happened 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.

21. The President went on to say at paragraph 31 that the facts of the instant case were strikingly different in that the OISC decision in that case showed that the adviser had not given the appellant poor advice but had blatantly failed to follow his specific instructions regarding the timing of the withdrawal of the application for permission to appeal and that failure was the sole reason why the appellant's application for leave fell to be treated as invalid. The OISC conclusions were highly material in determining whether this was in reality a rare case in which the misfeasance of a legal adviser could affect the weight to be given to the public interest in maintaining an effective system of immigration control. The position was far removed from that which was frequently seen 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. Whereas confidence in the respondent's system of immigration controls would not be diminished if in the particular circumstances of the case regard was to be had to the fact that if the representative had complied with the instructions he would have made a valid application for leave that was likely to be successful. On the contrary, public confidence in the system could be said to be enhanced if it were known that the system was able, albeit exceptionally, to take account of such a matter.

22. In my judgment, this, as in the situation in Mansur, though in the context of rather different facts, is such an exceptional case. There has been a clear finding by the OISC of breach of the previous representative's professional obligations to the appellant. The representative was clearly aware that it was to make an application for permission to appeal to the Court of Appeal and failed to do so within the relevant time limit, thus directly causing the appellant to lose his section 3C protection and as a consequence be unable to complete the ten years' lawful leave in the United Kingdom. I bear in mind the points made by Mr Deller in oral submissions and in his skeleton argument, including the point that the appellant's stay was precarious throughout and his own status was never leading to settlement under the Immigration Rules. He makes the point that the appellant has not shown significant obstacles to integration of being a national of Mongolia with family members to assist him and that no evidence had been provided to show that he would not be able to use his time spent and his qualifications gained in the United Kingdom if returned.

23. That said, I bear in mind what the appellant has set out in his witness statement about the difficulties which I accept he would experience in returning to Mongolia, having left as a young teenager and having spent the subsequent twelve and a half years in the United Kingdom. In my view there is clearly weight to be attached to the fact as noted in Mansur, that it is not a case where legal advisers are belatedly blamed but there has been no admission of guilt and no finding of culpability. There was a clear finding of culpability by a relevant professional regulator, and it also appears to me in line with what was said at paragraph 33 in Mansur, that public confidence in the system can be said to be enhanced if it is known that the system is able, albeit exceptionally, to take account of the fact that, as in this case, the appellant would have been able to complete ten years of lawful leave but for the negligence of the previous representative.

24. As a consequence, I consider that the necessary compelling circumstances are on the very particular facts of this case made out. Accordingly, this appeal is allowed under Article 8 of the European Convention on Human Rights.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Date 2 February 2021
Upper Tribunal Judge Allen