Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20075/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th July 2019	**On 06th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MOHAMMED ATIQUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, Counsel instructed by Londonium Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mr Mohammed Atiqul Islam against a decision of Judge McIntosh who, on 1st May 2019, decided to dismiss his appeal against the Respondent's refusal of his human rights claim based on his private life in the United Kingdom.

2. The background to the appeal is as follows. Mr Islam is a citizen of Bangladesh who was born on 29th April 1981. He arrived in the United Kingdom on 10th November 2007, with limited leave to remain as a student until 28th February 2009. There followed a succession of grants of limited leave to remain, the last of which expired on 27th June 2015.

3. I am very grateful to Mr Sharma who appeared on behalf of the Appellant for the chronology that follows. On 10th October 2014, Mr Islam made an application for limited leave to remain as a student. On 5th April 2015, he made a human rights claim based on his established private life in the United Kingdom. That application, as a matter of law acted as a variation of the earlier application made on 10th October 2014. It is not entirely clear whether it acted as a variation to substitute the human rights claim for the earlier application for leave to remain as a student, or whether it was intended to add the human rights claim to the extant application for leave to remain as a student. Be that as it may, the Respondent's refusal of the application, on 23rd April 2015, addressed only the application for limited leave to remain as a student. On 20th May 2015, Mr Islam appealed against that refusal. Again, it is not entirely clear whether that appeal was confined to an appeal on the ground that the decision was "not in accordance with immigration rules" (a ground that would at that time still have been available to him) or whether it was also brought on the ground that the decision was incompatible with his right to respect to private and family life under Article 8 of the Human Rights Convention. On 1st June 2015, the appellant's then representative purported to withdraw the application that had been made on 5th April 2015. I say that they "purported" to do so because it is Mr Islam's case (as yet unproven) that he had not given them the req

4. For the sake of completeness, I should mention that on 6th July 2015 that the Appellant also made an application for a residence card as a family member of a citizen of the European Economic Area exercising treaty rights in the United Kingdom. However, that application is not relevant to the point that is taken in the present appeal.

5. On the 23rd July 2015, the appeal against the decision of 23rd April 2015 (launched on 20th May 2015) was withdrawn.

6. I turn now to the decision of Judge McIntosh. He noted, at paragraph 28 of his decision, that the Appellant had argued that he ought to be treated as having constructively fulfilled the requirements of paragraph 276B of the Immigration Rules. That paragraph, it will be recalled, may in certain circumstances lead to a grant of leave to remain in the United Kingdom if the applicant has lived lawfully in the United Kingdom for a continuous period of ten years. The essence of the case that was then being argued then, and which it is now argued the judge failed to take into account in the Article 8 balancing exercise, was the 'historic injustice' that is said to have been suffered to Mr Islam due to (a) the Secretary of State failing to consider his human rights claim in the decision of 23rd April 2015, and (b) his then representative purporting to withdraw his human rights claim on 1st June without his knowledge and consent.

7. The judge explained why the Appellant did fulfil the requirements of paragraph 276B of the Immigration Rules, as a matter of strict law, at paragraph 33 of his decision:-

> "As at 1st June 2015, the Appellant had not been present and resident in the United Kingdom for a continuous period of ten years. The Appellant arrived in the United Kingdom on 10th November 2007 and therefore without a continuous period of lawful residence from that date cannot meet the requirements of the Immigration Rules."

8. Mr Sharma who appeared before me (but not in the First-tier Tribunal) accepted that the above statement is true so far as it goes. However, the error of law contended for in grounds 1, 2 and 4 of the instant appeal, is that the judge erred in failing to go on to consider what the position would have been were it not for the fact that the Secretary of State had failed to consider the human rights claim and/or his representative had not purported to withdraw that claim without his authority. If neither of those things had happened, he argued, the appellant would have acquired continuous lawful residence through the operation of Section 3C of the Immigration Act 1971 (statutory leave to remain pending the determination of an extant application or appeal against refusal) and would thus have fulfilled the requirements under paragraph 276B of the Immigration Rules. It is argued that this is a matter to which the judge ought to have attached considerable weight when assessing the Appellant's rights under Article 8 of the Convention.

9. Whilst it is undoubtedly correct that Judge McIntosh did not consider these arguments, I have concluded that they are in any event unsound. This is for the following reasons.

10. It will be recalled that prior to the commencement of the amendments to section 84 of the Nationality, Immigration and Asylum Act 2002, made by the Immigration Act 2014 with effect from the 5th April 2015, it was a ground of appeal against an 'immigration decision' that discretion under the Immigration Rules ought to have been exercised differently. It was however never the case that the Secretary of State's discretion to grant leave to remain outside the Immigration Rules was something which the Tribunal could exercise, either directly, or indirectly, through the operation of Article 8. This was for the simple reason that the wording of the former ground of appeal expressly stated that the discretion that was subject to review by the Tribunal had to be one "conferred" by the Rules. The reason that the discretion could not then (and cannot now) be exercised by the Tribunal outside the Immigration Rules, is that Article 8 does not confer a dispensing power (see Patel v The Secretary of State for the Home Department [2013] UKSC 72, per Lord Carnwath at paragraph 57).

11. Mr Sharma sought to persuade me that there was discretion under paragraph 276B to treat certain periods of residence as 'lawful' when it would otherwise not be considered as such. However, it is clear from the Home Office Guidance on which he relied, that such discretion does in fact lie outside the Rules (See footnote 2 to the Appellant's Skeleton Argument that was submitted in the First-tier Tribunal). Moreover, even if it were possible to construe paragraph 276B as containing such a discretion, it seems to me that Mr Sharma's argument in truth amounts to the

reintroduction of a former ground of appeal (that discretion conferred by the Rules ought to have been exercised differently) under the guise of Article 8 of the Human Rights Convention. Finally, even if the above analysis is flawed, it remains the case that Mr Sharma's argument is ultimately dependent upon assuming a favourable exercise of discretion in an application for leave to remain under paragraph 276B that has never been made. The exercise of that discretion in turn depends upon an assumed factual matrix that has yet to be proven. It is this to which I now turn.

12. It is right to say that in very limited circumstances the negligence of a representative can be relevant to the exercise of the judgment under Article 8. Those circumstances were considered in Mansur (Immigration adviser's findings, Article 8) [2017] UKUT (IAC) 274, the relevant passage from which is helpfully set out at paragraph 7 of the Grounds of Appeal. In short, a blatant failure by an immigration advisor to follow P's instructions as found by the 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 amount to such a rare case of negligent advice being relevant to the Article 8 consideration. However, this case does not come close to that situation. Before any responsible regulator (or indeed any judge of the Tribunal) could say that there had been such negligence, it would be necessary to give the representative the opportunity to respond to the allegation, which may of course be disputed. In this case, the judge had only the Appellant's word to support his claim that his former representative had acted without instructions. That is not to say that the Appellant is being untruthful in making that claim. However, it would be quite inappropriate, and of itself an error of law, for the Tribunal to find an allegation of professional malpractice proved without giving the accused representative an opportunity to respond to such a grave allegation.

13. I can deal with Grounds 3 and 5 rather more shortly.

14. Ground 3 is what Mr Sharma appropriately characterised as a procedural ground. It arises from what the judge said about the burden and standard of proof at paragraph 10 of the decision: "The burden is upon the Appellant to show that he is able to meet the requirements of the Immigration Rules". That direction is challenged on the basis that the judge ought to have directed himself that, whilst the burden under Article 8(1) rests with the Appellant, the burden under Article 8(2) shifts to the Respondent.

15. Use of the term "burden of proof" is often, as it seems to me, used quite loosely to mean a number of different things. Strictly, it describes which party to the proceedings bears the burden of proving the primary facts. This applies regardless of the context in which it is used, be it the application of the Immigration Rules, Article 8 of the Human Rights Convention, or indeed any other context within a statutory or regulatory framework. The question of who bears the onus of establishing that there is a public in a qualified right under the Human Rights Convention is not

therefore a question of proof at all. Rather, it is a matter of demonstrating the existence of the public interest upon established facts. Thus, as Lord Bingham observed in **R v SSHD ex parte Razgar** [2004] UKHL 27 -

> "Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see Ullah and Do, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
>
> The question of whether there is a legitimate public interest in excluding or removing somebody will normally always be answered affirmatively by reference to the need to maintain consistent immigration controls in furtherance of the economic wellbeing of the country. It is not in truth really a matter of proof at all, and so whilst as I have acknowledged the judge might have expressed the burden and standard of proof more precisely, overall it does not seem to me to be a material consideration in deciding whether or not this was a safe decision." [Emphasis added]

I therefore conclude that whilst Judge McIntosh's self-direction in relation to the burden and standard of proof could perhaps have been more clearly expressed, it did not constitute an error of law.

16. The fifth ground attacks the judge's analysis of the appellant's case under Article 8 of the Human Rights Convection. His conclusion, at paragraph 36, was short and to the point:-

> "I have given consideration whether Article 8 ECHR is engaged in this case. I find having regard to the five stage **Razgar** test [**R v Secretary of State for the Home Department [2004] UKHL 27**] the proposed removal of the Appellant would amount to an interference of the private life the Appellant has established in the UK. I find the Article is engaged and the decision to remove the Appellant is in accordance with the law. On the question of balance of proportionality, I find the interference is necessary and proportionate to the legitimate aims to maintain effective immigration control."

17. The criticism made in the fifth ground concerns the judge's apparent suggestion, at paragraph 35, that the only matter on which the Appellant relied by way of a significant obstacle to his re-integration in Bangladesh was the likely difficulty he would face in obtaining employment. It was however also the Appellant's case, based upon a letter from his father, that his cousins were threatening to assault him on return to Bangladesh due to a family land dispute, and that this threat posed a further obstacle to his integration. It is undoubtedly the case that the judge failed to consider this. However, it could not in my judgement have affected the outcome of the appeal. Taken at its highest, the evidence was of nothing more than a threatened assault on return to Bangladesh without there

being any suggestion that the local police would be unable or unwilling to provide him with sufficient protection against that threat. This could not in my judgement be considered as an obstacle to integration at all, let alone a "very significant" one. Moreover, the Appellant did not advance any lack of cultural, social or family ties to Bangladesh, which form the mainstay of what are generally considered to be obstacles to integration. I therefore conclude that the judge's omission in this regard was immaterial.

18. I have thus concluded that insofar as any of the matters raised in the grounds of appeal could be appropriately characterised as 'errors of law', they were immaterial to the outcome of the appeal and do not undermine the safety of the First-tier Tribunal's decision. If it is necessary to do so, I accordingly exercise my discretion by not setting aside that decision.

Notice of Decision

19. The appeal is dismissed.

No anonymity direction is made.

Signed Date: 20th July 2019

Deputy Upper Tribunal Judge Kelly

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed Date: 20th July 2019

Deputy Upper Tribunal Judge Kelly