Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12045/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Working Remotely by Skype for Business	**Decision & Reasons Promulgated**
On 25 February 2021	**On 17 March 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SINAN GOK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Lewis, instructed by Kidd Rapinet Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Turkey who was born on 13 March 1984. He entered the United Kingdom on 28 November 2008 as a student with leave valid until 31 July 2009.

2. On 30 July 2009, he made a Tier 4 (General) Student application but this was rejected as he had not paid the fee.

3. On 26 August 2009, he made a further Tier 4 (General) Student application and was granted leave until 20 November 2010.

4. On 19 November 2010, he made an application for further leave as a Turkish citizen under the EC Association Agreement (the 'Ankara Agreement') and was granted leave until 16 February 2012. On further application, that leave was extended until 15 October 2013 and subsequently until 16 February 2015.

5. On 20 April 2015, the appellant made an application under the Ankara Agreement for Indefinite Leave to Remain. That application was refused on 6 October 2015.

6. On 25 November 2015, the appellant made a further application for leave to remain under the Ankara Agreement but that was again refused on 23 February 2016. A further application under the Ankara Agreement was made on 17 June 2016 but again refused on 23 November 2016. A subsequent Administrative Review maintained that decision on 4 January 2017.

7. The appellant made another application under the Ankara Agreement on 26 September 2017 for further leave but this was again refused on 22 January 2018 and that decision was maintained in an Administrative Review decision on 3 March 2018.

8. Most recently, an application under the Ankara Agreement for leave to remain was made on 26 March 2018 but again was refused on 8 August 2018 and that decision was maintained in an Administrative Review decision on 18 September 2018.

9. On 4 October 2018, the appellant made an application for leave to remain based upon his private and family life in the UK under Art. 8 of the ECHR.

10. On 1 July 2019, the Secretary of State refused that application.

The Appeal to the First-tier Tribunal

11. The appellant appealed to the First-tier Tribunal. In a decision sent on 13 March 2020, Judge Manyarara dismissed the appellant's appeal under Art. 8 of the ECHR. The judge found that the appellant could not succeed on the basis of his private life in the UK under para 276ADE(1) of the Immigration Rules (HC 395 as amended) or on the basis of "compelling circumstances" outside the Rules under Art. 8 of the ECHR. As regards the latter, the judge found that the public interest in the maintenance of effective immigration control outweighed the appellant's private life established in the UK whilst his immigration status was precarious.

The Appeal to the Upper Tribunal

12. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. In particular, the appellant contended that in assessing the weight to be

given to the public interest, the judge had failed to take into account that his solicitors had failed to notify him of the decision, following his application on 15 October 2013, to grant him further leave under the Ankara Agreement until 16 February 2015. As a consequence, the appellant had not thereafter made an in time application for further leave. Instead, he made an application on 20 April 2015 which was out of time. That error by his legal representatives adversely affected his application and, relying upon the UT decision in Mansur (Immigration advisor's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC), the judge had failed to take his solicitor's error or mistake into account as relevant to the weight to be given to the public interest in assessing proportionality under Art. 8.2.

13. Permission to appeal was initially refused by the First-tier Tribunal but, on 17 July 2020, on a renewed application UTJ Blum granted the appellant permission to appeal limited to that ground.

14. In response to directions from the UT, the appellant and respondent made further submissions dated 16 September 2020 and 1 September 2020 respectively.

15. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 25 February 2021, with the UT working remotely. Mr Lewis, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing by Skype for Business.

Discussion

16. The single issue between the parties is whether the judge erred in law by failing to take into account the circumstances (it is said) when the appellant's solicitors failed to notify him that his 2013 application for leave had been successful and that he had been granted leave until 16 February 2015. As a consequence, it is said, the appellant was unaware that his leave expired on that date and, due to an oversight, no application was made by him or his legal representatives until it was out of time on 20 April 2015. That, thereby, deprived him of an opportunity to succeed under the Rules and, the fact that he was an overstayer, was a principal reason why his application for ILR was refused on 27 September 2015 under the Ankara Agreement.

17. The appellant relies, squarely, upon the UT's decision in Mansur. In that case, Lane J (President, UTIAC) was concerned with a case where, in the context of a claim under Art. 8 of the ECHR, it was said to be relevant that the individual's solicitors had failed, on that individual's instructions, to withdraw an application for permission to appeal a decision of the First-tier Tribunal, the effect of which was that a subsequent application for leave was invalid as an appeal was "pending". This resulted in the individual not being able to establish the required ten years' continuous lawful residence under para 276B. The actions of that individual's immigration advisors (IWP) were said to be relevant in assessing that individual's Art. 8 claim. At [28] – [33], Lane J said this:

> "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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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."

18. Lane J identified a number of features relevant to the issue of whether an advisor's failings could have the effect of reducing the weight to be given to the public interest in effective immigration control. First, Lane J considered that a "lack of culpability" by an appellant was a "necessary but not a sufficient factor" (see [29]). Secondly, he distinguished between cases of "poor immigration advice" and, given the outcome in Mansur itself, procedural errors which lead to an application failing (see [30] – [31].

Thirdly, an admission of guilt (perhaps attested by a culpability finding by the relevant professional regulator) is important (see [32]). Fourthly, it was relevant whether the application, had it not been for the error, would have been successful. Finally, however, the ultimate question was whether confidence in the system of immigration control would be diminished if the error of the individual's immigration advisors was taken into account.

19. Mr Lewis submitted that the appellant's circumstances are materially similar to those in Mansur. There had been a procedural error by his solicitors for which he was not to blame and which had an adverse effect on the appellant's immigration status. Mr Lewis submitted that the appellant's solicitors had accepted, and continued to accept, responsibility for the error for which the appellant was not to be blamed.

20. Mr Lewis relied upon the letter from the appellant's solicitors to the Home Office dated 20 April 2015 in which they set out what had occurred in 2014 when the appellant was last granted leave valid until 16 February 2015. The letter is in the following terms:

> "We firstly need to explain the reason for our client making this application for indefinite leave to remain and/or for an extension after the expiry of his leave to remain.
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> Please note that this is due to circumstances beyond the control of our client. Our client's documents were received by ourselves, then placed in his file without the usual letter being sent to him advising him that the documents had been received. The applicant was, it is believed, telephoned that his documents were in our office but it seems the applicant believed what was said was they were still at the Home Office. Unfortunately there is no note of that telephone conversation.
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> The file was then placed in safe storage with the offices in the awaiting collection hold and this oversight only came to light when a review was carried out of all the files and safe storage in the office. During this period the applicant genuinely believed that the matter was still outstanding with the Home Office and as such did not chase the matter further. He had previously had experience of matters taking some time to resolve with the Home Office and believed that nothing was amiss.
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> Please note this is of course extremely embarrassing as this firm handles thousands of applications and matters and this is the first time that such situation has arisen. We will request that the applicant not be penalised for this and would stress that as soon as the matters come to light, he has taken all steps necessary to submit this application to yourselves as soon as practicable.
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> He has in previous years always submitted his application in time and always attended to his matters diligently. He has no criminal convictions whatsoever and he has throughout his stay in the United Kingdom always maintained and accommodated himself from the proceeds of his self-employed activity and has not taken any employment other than to do with his business activity.
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> ….
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> Given the above our client was unable to register with the Police. We would therefore be grateful if you could advise whether he still needs to do this and if so whether you are able to return the documents to him to enable him to do this or alternatively we would be

> grateful if you could let us know what steps, if any, he has to take to rectify the oversight as well.
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> Once again we would stress that Mr Gok has always acted entirely properly and fully cooperated with this firm in respect to his applications. We do apologise for any inconvenience this error will have caused but do not believe it would be just and equitable in the circumstances for this to prejudice your consideration of the application. We have now reviewed our procedures and are putting into place a Protocol to ensure that such an oversight is not repeated."

21. Mr Lewis submitted that, following Mansur, the solicitors error or mistake was not merely a case of poor advice. It was a case where the solicitors had failed in their duty to inform the appellant of the grant of leave and to provide him with his immigration documents prior to him overstaying without knowing it.

22. Mr Lewis accepted that the appellant's application had not solely been refused on the basis that he was an overstayer. He contended that the police registration document had been retained by the solicitors and the appellant was unable to update registration. In addition, the reliance in the respondent's decision upon the appellant taking employment was a matter which the appellant had dealt with before the judge and was due to a misunderstanding of the circumstances. As I understood what was being said, the appellant claims that he was 'helping out' rather than being employed by another business in the same line of work as his own (see para 5(e) of the judge's determination).

23. In response, relying on the earlier written submissions, Mr Howells submitted that Mansur was not applicable to the appellant's circumstances. Mr Howells submitted that the judge had dealt with Mr Lewis' submissions and had specifically said at para 73 that he had taken into account "those matters urged upon me by Mr Lewis". Mr Howells submitted that this was not a case, like Mansur, where the appellant's application would have succeeded but for the error by his solicitors. There was an ambiguity in the evidence as to whether the appellant was, himself, at fault and the judge had not been assisted by the fact that the appellant was not called to give oral evidence. He submitted that this was not one of those "rare" cases where an advisor's failings constituted a valid reason to reduce the weight to be given to the public interest in assessing proportionality under Art. 8.2.

24. In the result, I am persuaded by Mr Lewis' submissions. There is no doubt that Judge Manyarara was referred to, in Mr Lewis' submissions, the decision in Mansur. That case was central to the argument relied upon, then and now, by the appellant. Mr Lewis also referred me to the UT's decision in Patel (historic injustice; NIAA Part 5A[2020] UKUT 35 (IAC). However, that case does not assist the appellant as it is concerned with failings by *the respondent* rather than the appellant's own legal representatives.

25. In this appeal, the judge dealt with the solicitors' claimed error or mistake in para 17 of his determination as follows:

> "In relation to the reason for the gap in the appellant's leave, I have considered the information provided by the appellant's solicitors. Contrary to the submission made by Mr Lewis that the applicant's solicitors had accepted that they were to blame for the predicament that the appellant found himself in, the appellant's solicitors referred to a possible misunderstanding between them and the appellant, which resulted in the appellant overstaying. Whilst submissions have been made in relation to the error by the appellant's solicitors, there is indeed an undisputed gap in the appellant's leave to remain and he became an overstayer after 2015. I therefore make this finding of fact".

26. Apart from the reference to having taken into account "matters urged upon me by Mr Lewis" (at para 73), the judge did not engage with the issues identified in Mansur at [28] – [33]. If there was an issue as to whether or not the appellant was, in part, to blame for the 'misunderstanding' that led to him overstaying, the letter from the appellant's solicitors goes a considerable way to accepting that it was their fault (not his), that led to the out of time application in 2015. It is unclear from para 17 of the judge's determination whether, in the light of that evidence, he accepted the "necessary but not a sufficient factor" that there was a "lack of culpability" by the appellant (see Mansur at [29]). This was not a case of "poor advice" of the kind identified in Mansur at [30]. There was a procedural error, not balanced legal advice as to a course of action to be taken, which, on the face of it, disadvantaged the appellant. That is, by its very nature, the kind of "error" or "mistake" by a legal representative which Mansur identifies as potentially relevant to a subsequent Art 8 claim.

27. One distinction between Mansur and this case is that relied upon by Mr Howells, namely that the error by the appellant's solicitors was not the sole reason why the appellant's application for leave under the Ankara Agreement was unsuccessful. The appellant, however, had explanations as to why the two reasons relied upon by the Secretary of State should not hold good. First, in relation to not reporting to the police station that was, in itself, affected by the solicitor's error and the retention of documents. Secondly, there was a misunderstanding as to his role in the other business such that he was not, in fact, employed in breach of the conditions of his leave under the Ankara Agreement. Had the appellant's legal representatives put the appellant in a position to make his application in time, he would have had a right of appeal in which these matters could have been aired.

28. Whilst that is a distinction between the facts of this case and Mansur, I do not consider that it is determinative of the issue as to whether effective immigration control can be affected by the error or mistake of the appellant's solicitors. The error or mistake adversely affected his ability to establish his application under the Ankara Agreement. Of course, approaching the appellant's appeal under Art. 8 on that basis, Judge Manyarara should have made findings on these issues. If made in the appellant's favour, then I do not see how the appellant would necessarily be in a different position to an individual, such as in in the Mansur case, who can show that the error or mistake of his legal representatives affected him adversely such that what was an invalid or unsuccessful application, should be viewed as having been one that would have been successful. Turning to Lane J's question in [33] of Mansur, in such a situation confidence in the respondent's system of immigration control

would be no less, and no more, diminished if the appellant would have succeeded on appeal than if his application would have succeeded at the outset but for the error by his legal representatives.

29. In this case, Judge Manyarara made no findings on these issues and so, whether (and, if so, to what extent) the public interest in effective control should be given less weight because of the error of the appellant's legal representatives, was not properly grappled with.

30. For these reasons, I am satisfied that the judge materially erred in law in dismissing the appellant's appeal under Art. 8 of the ECHR.

Decision

31. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art. 8 involved the making of an error of law. The decision cannot stand and is set aside.

32. Both representatives indicated that if the error of law was established, the proper disposal of the appeal was to remit it to the First-tier Tribunal for a *de novo* rehearing.

33. I agree. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal in order to remake the decision under Art. 8 of the ECHR *de novo*. The appeal to be heard by a judge other than Judge Manyarara.

Signed

Andrew Grubb

Judge of the Upper Tribunal
9 March 2021