IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03600/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 May 2021	**On 16 June 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

RAHMAN MOHAMMAD YEAMINOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Biggs, Counsel instructed by Hubers Law Partners
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

2. The appellant is appealing against a decision of Judge of the First-tier Tribunal Judge Chohan ("the judge") dated 15 September 2020 dismissing his human rights appeal.

Background

3. On 23 January 2020 the respondent refused the appellant's application for leave to remain ("the respondent's decision"). The respondent's decision is in two parts. The first part considered whether the appellant was entitled to Indefinite Leave to Remain ("ILR") under paragraph 276B of the Immigration Rules (10 years continuous lawful residence). The respondent's decision states that the appellant had only been lawfully in the UK between 6 September 2009 and 11 April 2016 and therefore the conditions of 276B were not met. The second part of the respondent's decision, under the heading "repeat claim", stated that the appellant's human rights and protection submissions had previously been considered (in a decision made on 1 July 2019) and therefore did not amount to a fresh claim under paragraph 353 of the Immigration Rules. At the end of the respondent's decision it is stated that the appellant did not have a right of appeal.

4. On 29 February 2020 the appellant lodged an appeal with the First-tier Tribunal. No grounds were included.

5. On 16 March 2020 the First-tier Tribunal sent the appellant and his representatives a notification with the heading request for grounds of appeal ("the First-tier Tribunal's notice"). The First-tier Tribunal's notice states:

> "The Tribunal has received notice of the above appeal. Under rule 19 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, the appellant, or their appointed representative, must set out the grounds of appeal.
>
> The appeal has been received without any specific grounds for appeal and with a statement that grounds to appeal will follow.
>
> You are required to supply the Tribunal with complete and specific grounds of appeal, together with supporting reasons by 23 March, 2020.
>
> Failure to comply with this notice may result in the appeal being dismissed without a hearing under the provisions of rule 25(1)(e)."

6. On 18 March 2020 the appellant's representatives requested an extension to file the grounds of appeal. The request was made in an email where it was stated that "a short extension" was requested. There is no record on the Tribunal file that a decision in respect of the requested extension was made.

7. On 15 September 2020 the appeal came before the judge. After noting that the appellant had still not provided the grounds of appeal, the judge stated:

> "I am satisfied, pursuant to rule 25(1)(e) of the Procedure Rules 2014, that I may proceed to consider the appeal as a substantive matter without a hearing. The appellant has had ample time and opportunity

> to submit grounds of appeal. Having considered the respondent's decision and reasons for refusal, I am satisfied that the respondent has given cogent reasons for refusing the appellant's application and in the absence of any challenge to the respondent's decision (no grounds of appeal being set out), this appeal must be dismissed".

Grounds of Appeal

8. The appellant has advanced three grounds of appeal:
   a. First, it was procedurally unfair to dismiss the appeal under rule 25(1)(e) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") without giving the appellant notice and a chance to explain why he failed to comply with rule 19.
   b. Second, the judge did not correctly (or adequately) apply rule 25(1)(e).
   c. Third, the judge failed to adequately consider article 8 ECHR and/or give adequate reasons for his decision under article 8.

Relevant Procedure Rules

9. Rule 19 of the Procedure Rules provides:

> "(1) An appellant must start proceedings by providing a notice of appeal to the Tribunal.
>
> …
>
> (4) The notice of appeal must—
>
> (a) set out the grounds of appeal"

10. Rule 25(1)(e) of the Procedure Rules provides that:

> "25 – (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where –
>
> …..
>
> (e) a party has failed to comply with a provision of these Rules, a practice direction or a direction and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing.

Procedural unfairness in applying rule 25(1)(e)

11. In the grounds of appeal Mr Biggs argues that it was procedurally unfair to decide the appeal under rule 25(1)(e) without notice being given to the appellant and without him being given an opportunity to respond to the possibility that the appeal would be decided without a hearing.

12. It was immediately apparent from a review of the grounds of appeal that Mr Biggs had not seen the First-tier Tribunal's notice. I therefore drew it to his

attention at the start of the hearing. Mr Biggs acknowledged that this weakened, to some extent, his procedural unfairness argument, but maintained that there was nonetheless procedural unfairness because the appellant had not been given the chance to explain the relevant circumstances and the reasons for the failure to submit any grounds.

13. Ms Everett submitted that the appellant's procedural unfairness argument is undermined by the fact that the appellant was clearly on notice that if he failed to submit grounds his appeal might be determined without a hearing.

14. In this case, rule 25(1)(e) was applied following a breach of rule 19. There is nothing in rule 19 stating that a consequence of its breach is that a party will be deprived of a hearing pursuant to rule 25(1)(e). Therefore, having regard in particular to the importance of oral hearings in this jurisdiction (see *Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration And Asylum Chamber)* [2020] EWHC 3103 (Admin)), I would have had no hesitation in finding that there had been procedural unfairness if the appellant had been denied a hearing pursuant to rule 25(1)(e) without first being given an opportunity to remedy the breach of rule 19 and warned that rule 25(1)(e) might be applied if he did not do so.

15. However, the appellant (by way of the First-tier Tribunal's notice) was, in clear and unambiguous terms, given an opportunity to remedy the breach and put on notice that rule 25(1)(e) might be applied if he did not. Mr Biggs argued that the appellant was not given the chance to explain why he was unable to comply with rule 19 but that in fact is what the First-tier Tribunal's notice did. In these circumstances, no procedural unfairness arises. To impose on the First-tier Tribunal a requirement to give a second opportunity to the appellant to explain the reasons for his breach would, in my view, be undermining of procedural rigour, the importance of which in public law litigation has been emphasised by the Court of Appeal (see, for example, Singh LJ in paragraphs 67-69 of *Talpada, R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 841).

Incorrect application of rule 25(1)(e)

16. Mr Biggs submitted that judge erred by failing to consider "all the circumstances" relating to the failure to comply with the rule 19, as is required by rule 25(1)(e), as he merely stated that the appellant had ample time and opportunity to submit grounds of appeal. Mr Biggs argued that this was legally insufficient. He maintained that it was necessary under rule 25(1)(e) for the judge to consider the appellant's reasons for the breach, which the judge did not do because the appellant had not submitted any reasons by the time the decision was made.

17. I do not consider there to be any merit to this ground. Rule 25(1)(e) requires consideration to be given to "any reasons" given by a party. If a party does not submit any reasons, despite being given an opportunity to do so, there are

no reasons to be considered and the judge cannot be said to have erred by not considering the appellant's reasons.

18. The judge was required to consider "all the circumstances". These were: (a) the appellant breached rule 19; (b) the appellant was given an opportunity to remedy the breach and warned that rule 25(1)(e) might be applied if he did not; and (c) the appellant did not remedy the breach (or give an explanation) despite the warning. Given these circumstances, it was open to the judge to reach the view that because the appellant had had "ample time and opportunity" to comply with rule 19 but had not done so it was appropriate to determine the appeal without a hearing.

Failure to adequately consider article 8 ECHR

19. The only reason the judge gave for dismissing the appeal was that the respondent gave "cogent reasons for refusing the appellant's application". Mr Biggs argued that this was insufficient and inadequate, as the judge was required to determine for himself whether the respondent's decision was unlawful under section 6 of the Human Rights Act 1998 (ie breached article 8 ECHR), not whether the respondent's reasoning was adequate: see section 84(2) of the Nationality Immigration and Asylum Act 2002,

20. I do not accept that the judge erred because although he did not state explicitly that he was satisfied the appellant's removal would not violate article 8 ECHR it is tolerably clear that this is what in substance he found, by effectively adopting the reasoning of the respondent.

21. It is not necessarily erroneous for a judge to adopt the reasoning of the respondent. See *Gheisari v Secretary of State for the Home Department* [2004] EWCA Civ 1854, where Sedley LJ stated:

> "I have no difficulty in accepting that where the Home Office refusal letter sets out coherent reasons for rejecting an account and the adjudicator having independently considered the question agrees with them, it is permissible for him or her, having set them out, simply to say so. The Home Secretary's reasons then become the adjudicator's by express adoption. But if they turn out to be inadequate, so will the adjudicator's decision be."

22. I am satisfied that in this case adopting the reasoning of the respondent was adequate because the appellant did not made any arguments challenging the respondent's reasons and there was no evidence or information before the judge that would support a finding that the appellant's removal would violate article 8 ECHR.

Materiality

23. If I am wrong in respect of any or all of the grounds considered above, the decision of the First-tier Tribunal should still stand because any error would not be material.

24. I pause to note that one reason it could be said that any error would not be material is that the judge did not have jurisdiction. However, I did not hear argument on this issue and I have not decided this point because it is not necessary for me to do so in the light of my findings above and the materiality points discussed below.

25. The reason any error would not be material is that the argument the appellant says he would have advanced at a hearing, had the appeal not been decided under rule 25(1)(e), had no prospect of succeeding.

26. The appellant's argument is the following: his leave to remain in the UK as a student ended on 11 April 2016. On 8 April 2016 he applied for a residence card under the Immigration (EEA) Regulations 2006. This application was refused and he was left with no lawful basis to be in the UK. If, instead of making an application under the EEA Regulations, the appellant had applied for leave to remain, his leave would have been extended under section 3C of the Immigration Act 1971 and his application might have succeeded, leading, ultimately, to a successful claim for ILR under paragraph 276B after he had accrued ten years' of lawful residence. Reliance is placed on *Mansur (immigration adviser's failings: Article 8) Bangladesh* [2018] UKUT 00274 (IAC).

27. *Mansur* was a case in which advisors had "blatantly failed to follow the appellant's specific instructions" and where there was a "clear and categorical" finding by the OISC criticising the conduct of the firm. At paragraph 32 of *Mansur*, the Upper Tribunal stated:

> "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".

28. The headnote to *Mansur* states:

> "(3) It will be only in a rare case that an adviser's failings will constitute such a reason. The weight that would otherwise need to be given to that interest is not to be reduced just because there happen to be immigration advisers who offer poor advice and other services. Consequently, a person who takes such advice will normally have to live with the consequences.
>
> (4) A blatant failure by an immigration adviser to follow P's instructions, as found by the relevant professional regulator, which led directly to P's application for leave being invalid when it would otherwise have been likely to have been granted, can, however, amount to such a rare case."

29. The facts of this case are far removed from *Mansur*. There is no finding by a regulator/ombudsman that is critical of the advice to apply for a residence card in 2016. The appellant has submitted a legal ombudsman decision, but this relates to a different firm and a different issue. The grounds of appeal make the bare assertion that it was wrong for the appellant to be advised to apply for a residence card in 2016 but do not explain why, based on the information available to the advisers at that time, it is believed it was incorrect advice. The grounds also make the bare assertion that the appellant might have succeeded in an application for leave to remain but there is no explanation of the basis it is believed he would have been granted leave (it is not even said what leave he would have applied for). Nor is it explained why it is believed he would have had the benefit of leave under section 3C for several years.

30. This case has nothing in common with *Mansur* and the appellant has not, on any legitimate view, put forward an arguable case that because of the incompetence of previous representatives he should be treated as if he had accrued 10 years of lawful leave. Accordingly, any error by the judge was not material.

Decision

31. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Dated: 4 May 2021