Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18141/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th April 2018	**On 17th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

TASLEEM SALEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim of Counsel
For the Respondent: Miss Z Ahmad of Counsel

DECISION AND REASONS

1. The Appellant a citizen of Pakistan (born 24th December 1985) appeals with permission against the decision of a First-tier Tribunal (Judge Woolf), dismissing his appeal against the Respondent's refusal to grant him indefinite leave to remain in the UK on the basis of ten years' lawful residency.

2. The Respondent's decision refusing the application was made on 13th July 2016. The appeal to the FtT was brought on the ground that the

Respondent's decision was unlawful in that it was incompatible with the Respondent's obligations under Article 8 ECHR.

3. Throughout this decision, I have referred to the Appellant's former solicitors as "P.J. & Co". I have refrained from using their full title as I was informed that the Appellant has complained about them to the legal ombudsman and the outcome of this complaint is currently outstanding.

Background

4. The Appellant has a lengthy immigration history and it is appropriate for the purposes of this decision to set it out here.

(i) The Appellant arrived into the UK on 4th February 2006 with leave to enter as a student which was valid from 24th January 2006 until 31st October 2009.
(ii) On 30th September 2009 he applied for leave to remain as a Tier 4 (General) student; this was granted to him on 19th November 2009 until 17th November 2010.
(iii) On 16th November 2010 he applied for leave to remain as a Tier 1 (Post Study Work) Migrant; this was granted to him on 30th December 2010 which was valid until 30th December 2012.
(iv) On 27th December 2012 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant; this was refused on 1st June 2013.
(v) On 17th June 2013 he lodged an appeal against the decision of 1st June 2013. This appeal was dismissed by a First-tier Tribunal and he subsequently became appeal rights exhausted on 14th February 2014.
(vi) On 25th February 2014 he made a further application for leave to remain as a Tier 1 (Entrepreneur) Migrant. This, it was claimed on his behalf, was lodged within 28 days of becoming appeal rights exhausted. This further application was refused by a decision on 24th April 2014 without a right of appeal.
(vii) On 27th May 2014 the Appellant's former solicitors (P.J. and Co) sent a pre-action protocol letter on the Appellant's behalf to the Respondent.
(viii) On 23rd July 2014 the Appellant made an application for Judicial Review against the 24th April 2014 decision. This application was refused on 17th December 2014. An application for permission to appeal to the Upper Tribunal was made and this application was listed on 9th March 2015 for an oral hearing.
(ix) On 9th June 2015 following an oral hearing permission to appeal was refused.
(x) Following that refusal an application for permission to appeal to the Court of Appeal was made on 6th July 2015. This was refused on 23rd December 2015 with no further appeal rights.
(xi) After exhausting all legal remedies in the UK the Appellant submitted an application to the European Courts of Human Rights on 16th January 2016. This application was returned invalid on 21st March 2016.

(xii) On 5th April 2016 the Appellant made a human rights application for indefinite leave to remain on the basis of 10 years long residency. This was considered and refused by the Respondent on 13th July 2016. The Appellant appealed that refusal to the FtT and it is this decision which forms that basis of the appeal before me.

The First-tier Tribunal Hearing

5. When the Appellant's appeal came before the FtT, the FtTJ noted that what was before her was an Article 8 ECHR claim based on the Appellant's ten year residency in the UK. After noting the Appellant's lengthy immigration history, and the relevant immigration rules contained under appendix FM 276ADE, she summarised the evidence upon which the Appellant relied.

6. She noted that the Appellant adopted the contents of his written witness statement dated 17th November 2017 [13]. In addition the FtTJ prompted the Appellant to respond to her question of why it would be difficult for him to return to Pakistan.

7. At [20] the FtTJ said the following:

> "The appellant must establish that he has at least 10 years continuous lawful residence in the UK resided in the UK lawfully for a continuous period 10 years subject to the caveat contained within subparagraph (v) of paragraph 276B of the Immigration rules as set out above."

She followed this up by saying at [21]:

> "He arrived in the United Kingdom on 4 February 2006. Taking the 10-year period from that date he has to show that his residence was lawful up until 4 February 2016. Even if I were to accept that his appeal against the decision to refuse his first application as a Tier 1 Entrepreneur made on 23 May 2013 was in time, his subsequent application was refused on 24 April 2014 and his application for Judicial Review of that decision was not successful nor was his application to the ECtHR. Neither of those applications extended his leave to remain in accordance with section 3C of the 1971 (sic). I conclude that the appellant has not had leave to remain since that second Tier 1 application was refused and he therefore cannot show that he has remained lawfully in the UK until 4 February 2016. The appellant has confused advice from his legal representative that he did not have to leave the UK whilst his Judicial Review was pending with lawful residence. He cannot meet the requirements of the immigration rules as set out in paragraph 276B."

8. The FtTJ thereafter went on to consider the factors put forward by the Appellant in respect of his Article 8 claim and subsequently dismissed the appeal.

9. Permission to appeal was granted by the First-tier Tribunal in the following terms:

> "In reaching the decision set out the Judge has referred to the application for judicial review at paragraph 21 of the decision. The

> Judge states that the Appellant's application for judicial review was not successful. The Judge went on to state that neither of those applications, the Judge having referred to the Appellant's application to the ECtHR, had extended the Appellant's leave to remain in accordance with Section 3(C) of the 1971 (Act). The Judge concluded the Appellant had not had leave to remain. The Judge has also stated at paragraph 21 of the decision that the Appellant had confused advice from his legal representative that he did not have to leave the UK whilst his judicial review was pending with lawful residence. It is arguable that the Judge should have considered the issue of the advice provided by the Appellant's then solicitors and made findings on this matter since it is arguable that this constitutes a material aspect of the claim. It is arguable that the discretion conferred by the guidance referred to in the permission application fell to be considered and facts found on that basis. It is submitted in the permission application that the Respondent did not consider the clear discretion provided in the Long Residence guidance. It is arguable that the Judge should have dealt with this aspect of the case. It is arguable that the proportionality exercise has been affected."

10. Thus the matter comes before me to determine whether the FtT decision contains such error of law that it requires to be set aside and remade.

Error of Law Hearing

11. Mr Karim appeared for the Appellant; Miss Ahmad for the Respondent. Mr Karim's submissions advance three challenges to the FtT's decision:

    (i) the FtTJ failed to properly consider a material aspect of the Appellant's case; namely that he had been provided with wrong advice from his previous representatives;

    (ii) following on from that, the FtTJ failed to consider whether being wrongly advised by his representatives, should have led the Respondent to exercise discretion under the long residency guidance by reference to the heading of "exceptional circumstances"; and

    (iii) generally the FtTJ fails to embark on an adequate assessment of the Article 8 proportionality exercise.

12. In support of the first two challenges advanced, Mr Karim drew attention to the Appellant's application for indefinite leave to remain which is contained in Malik and Malik's letter of 4th April 2016. He also submitted further documentation which included follow-up correspondence with the legal ombudsman, and which was submitted to support the Appellant's contention that he had made a complaint against his former representatives, P.J. and Co. For the sake of clarity in this decision I confirm that the complaint letter does not relate to Malik and Malik.

13. Ms Ahmad responded by defending the decision. She submitted that the decision contains no error. An examination of the evidence which was before the judge would show that she had considered all the relevant evidence placed before her. The main part of that evidence consisted of

the Appellant's witness statement dated 17th November 2017. He had failed to make mention in that statement that he was alleging that he was disadvantaged by incorrect advice from his former representatives, P.J. and Co. Secondly it is correct to say there was a letter from those representatives dated 22nd August 2014 on file, but that letter was sent "To whom it may concern" as part of the preparation for the judicial review. The judicial review was unsuccessful.

14. So far as the recent documentation to the legal ombudsman was concerned, she submitted that this did not materially change the position. She said that whichever way it was looked at, the Appellant could not fulfil the Immigration Rule showing ten years' lawful residence. The judge had made a finding on that point. There was nothing exceptional put forward before the judge to alter that position.

15. She then referred to [5] of **BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311** in which the Upper Tribunal said the following:

> "We wish to make it clear that, in general, we will not make a finding of fact based on an allegation against former representatives unless, first, it is clear that the former representatives have been given an opportunity to respond to the allegation which is being made expressly or implicitly against them, and secondly, we are either shown the response or shown correspondence which indicates that there has been no response."

16. The decision was sustainable and disclosed no error of law.

Consideration

17. Whilst there are three separate grounds seeking permission, it appears that they are interconnected to the extent that the central issue before me hinges on the Appellant saying that the circumstances relating to his Article 8 claim are exceptional because of the poor advice he received in 2014 from his former representatives, P.J. and Co. Following on from that, his claim is that the Respondent failed to exercise discretion in his favour and the FtTJ failed to give appropriate credit for those factors when assessing the proportionality exercise in the Article 8 appeal.

18. I find firstly that I must observe that several assertions are made by and on behalf of the Appellant concerning the FtT hearing. In his witness statement of 18th January 2018 which accompanied his application for leave, he says the following:

> "I would like to clarify that though my witness statement dated 17th November 2017, does not clearly address the issue of poor advice I received from my previous solicitors (P.J. and Co. Solicitors), but I provided a letter dated 22nd August 2014 as well as I made oral submissions on this point at the time of my hearing. However, I believe the FTT judge had not considered my submissions properly despite the fact that the judge clearly indicated at the hearing that I

> was poorly advised by my previous solicitors and admitted that there were exceptional circumstance involved in my case."

19. I have read the FtTJ's decision. It is a careful decision. So far as I can see there is nothing in the decision which would indicate that the FtTJ informed the Appellant that he was "poorly advised" by his previous solicitors and there is certainly no indication that the FtTJ "admitted that there were exceptional circumstances involved" in his case.

20. On the contrary the evidence before the FtTJ was that contained in the Appellant's witness statement of 17th November 2017. It is a very full statement outlining his immigration history together with reasons why his Article 8 claim should be allowed. It makes no mention at all in the statement of a claim that he received poor or wrong advice from his previous representatives. It is correct that the Appellant submitted a letter from those representatives dated 22nd August 2014. The letter is addressed "to whom it may concern" and makes the following statement:

> "Our client is entitled to remain in the UK until a decision is made in his judicial review application."

21. The judge refers to it. The judge clearly had that evidence in mind because she refers to the Appellant confusing advice from his legal representative [21]. The difficulty for the Appellant is that this piece of correspondence is the only documentary evidence concerning this issue put before the judge. The judge has turned her mind to it. Taking that evidence together with her assessment of the Appellant's oral evidence, the judge concluded that, "the appellant has confused advice from his legal representative that he did not have to leave the UK whilst his judicial review was pending with lawful residence." That was a finding open to her on the available evidence.

22. Whilst it is correct that the Appellant has now made a complaint to the legal ombudsman against his former representatives, so far as both the FtT and this Tribunal is concerned, there is no evidence of resolution of this issue. It is not a matter for the FtTJ to make a finding on whether the Appellant was "poorly advised" by his former representatives. The FtTJ simply needs to keep the matter in mind when assessing the Appellant's claim under Article 8. I find that this she has done because she refers to the issue [21].

23. So far as the second ground of challenge is concerned, it is hard to see how this challenge can succeed. What is said by Mr Karim is that the Respondent failed to give proper consideration to the Appellant's application for indefinite leave to remain. This is on the basis that the application dated 4th April 2016 under cover of Malik and Malik's letter, contains the following passages which were set out in the context of the Appellant's immigration history.

> "Thereafter the applicant submitted his subsequent applications for Judicial Review and European Court of Human Rights within their

relevant deadlines. We therefore submit that this is similar, if not tantamount, to having his leave extended by Section 3C of the Immigration Act 1971.

Our client was not informed by his previous legal representatives that submitting an application for permission to apply for Judicial Review did not extend his lawful residence in the UK, and to this extend (sic) seek to rely on the case of BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311, which held that the negligence on the part of her former solicitors should not be held against the applicant.

Furthermore we request the SSHD to exercise her discretion in relation to this requirement in favour of the applicant. …"

24. So far as I can see what was put before the Secretary of State on this point, again amounts to no more than an allegation of misconduct. Any response made by P.J. & Co. to the legal ombudsman is not before the Tribunal and the outcome of the investigation is not decided. Reliance on **BT** does not assist in this regard because it comes back to what I said earlier in this decision that there is no factual evidence sufficient to show that the Appellant's former representatives have been negligent. Furthermore I find no basis for the Appellant's claim that the FtTJ "admitted that there were exceptional circumstances involved" in his case.

25. In his witness statement of 18th January 2018, the Appellant has stated that, "Had I known this (that the period during which his judicial review was being considered would not constitute continuing 3C leave) I would have used other options to stay legal in the UK as I never intended to overstay." To date the Appellant has not signified what "other options" would have been available to him, nor is there any indication that he would have been successful had he pursued any such options.

26. Finally the last ground raised claims that the FtTJ failed to make a proper assessment of the Article 8 ECHR claim. I disagree, I find she did so. She has carefully noted the Appellant's family circumstances in Pakistan. She has noted that she was satisfied that he would have family support there. She also noted that he would be able to access treatment for his anxiety and depression and more particularly she noted he is educated to degree level and therefore should be able to access employment.

27. She self-directed herself in applying Section 117A and 117B of the 2002 Act and set out in her decision that the Appellant has no partner or children. She concluded that even though the Appellant suffers anxiety and depression, he could not meet the relevant Immigration Rules. Accordingly she found no good reason to depart from the Rules and found that any Article 8 claim must fail in the face of the public interest element requiring his removal.

28. For the foregoing reasons therefore I find that the decision of the FtT discloses no error of law and the decision therefore stands.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 8th January 2018 discloses no error of law requiring it to be set aside. The decision therefore stands. This appeal is dismissed.

No anonymity direction is made.

Signed C E Roberts Date 16 April 2018

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed C E Roberts Date 16 April 2018

Deputy Upper Tribunal Judge Roberts