Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15809/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 April 2019	**On 02 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

KKOTMUNI KIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Bustani of Counsel
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of South Korea. She was born on 23 September 1975.

2. She appealed against the respondent's decision dated 15 June 2018 to refuse her leave to remain and to refuse her human rights claim.

3. The appeal was allowed by Judge Widdup (the judge) in a decision promulgated on 11 February 2019.

4. The grounds claim the judge made a material error. The judge relied on the case of **Mansur (Immigration adviser's failings) Bangladesh [2018] UKUT 00274** that the appeal should be allowed as it was a rare case. See decision at [39]–[40]. The grounds claim that the judge erred in making that finding as the appellant had failed to make a formal complaint to the OISC in respect of the allegation. Further, the judge speculated as to the reasons that had not happened and the possible outcomes should that occur. The grounds claimed that the appellant's circumstances could be distinguished from those in **Mansur** and fell short of meeting the rare case.

5. Judge Boyes granted permission on 4 March 2019. He said inter alia as follows:

> "3. The grounds are arguable. It is arguable that the judge has speculated as to the reasons why no application/complaint has been made. It was not for the judge to do this.
>
> 4. Secondly, the question remains whether this is one of those '*rare cases*'. The former solicitors have not ignored or gone beyond instructions nor have they '*blatantly failed to follow the appellant's specific instructions'*".

6. There was no Rule 24 response nor was there any skeleton from Ms Bustani.

Submissions on Error of Law

7. Mr Melvin relied upon the grounds.

8. Ms Bustani relied upon the correspondence from Kothala & Company dated 15 January 2018 and Gillman-Smith Lee dated 21 January 2019. Gillman-Smith Lee had acted for the appellant and wrote to Kothala & Company in their letter of 21 January 2019. The letter was signed by solicitor Siew S. Lee. The history as recounted by Kothala & Company is complex, however, in essence, Kothala & Company was putting to Gillman-Smith Lee that the appellant's application for indefinite leave was submitted "*out of time*" due to errors and omissions on the part of Gillman-Smith Lee, for which the appellant could not be held accountable. Gillman Smith-Lee's response was that they did not have a record of the appellant enquiring as to the possibility of applying for indefinite leave to remain under the long residence Rule around November 2014, however, they did recall the appellant enquiring about the possibility of her applying for indefinite leave to remain under the ten year Rule. Gillman Smith-Lee said they "*roughly*" went through the appellant's immigration history and that they "*may have advised*" that she had a gap in her leave to remain. Ms Lee said that an omission on her part led to the appellant's application for indefinite leave to remain being submitted more than fourteen days after the expiry of S.3C leave. Ms Bustani submits that there was a clear admission from Ms Lee that she gave wrong advice. That information was all before the judge.

Conclusion on Error of Law

9. Save for the late submission of the application, Gillman Smith-Lee did not concede any error on their part. Their letter is couched in ambiguity. Ms Siew Lee says "*to the best of my recollection*" she "*may have informed ...*".

10. The judge noted that the only complaint made against Gillman Smith-Lee was in correspondence, no proceedings had been issued against them and no complaint had been made to the Solicitors Regulatory Authority or to the OISC.

11. The judge took into account **Mansur (Immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 00274 (IAC)**, in particular, at [30]–[41]. The judge was of the view that the combination of circumstances brought it within the "*rare class*", a case identified by the President and that in some way made disproportionate the respondent's decision. In my view, that is a misreading of **Mansur** and the other case law in particular, **FP (Iran) [2007] EWCA Civ 13** and in particular, Sedley LJ's explanation of the court's approach at [42] quoting **Al Mehdawi [1990] 1 AC 876** per Lord Bridge at [898].

12. I do not accept that the judge was entitled to come to the conclusion that the appellant's particular circumstances brought it within the rare class of case identified by the President. I do not accept that an exchange of correspondence between two firms of solicitors brings the appellant's circumstances within the definition of a "*rare case*" notwithstanding the admission of error on the part of Ms Lee that the application was submitted late.

13. I find that the judge strayed into the area of speculation in terms of why no application or complaint had not been made. There is a world of difference between an exchange of correspondence and an acknowledgment of responsibility as opposed to those considered in **Mansur** particularly bearing in mind the appellant's failure to make a formal complaint to the OISC or the Solicitors Regulatory Authority. I find that Ms Lee's negligence should not have affected the weight the judge gave to the importance of maintaining the respondent's policy of immigration control such that he erred in finding the respondent's decision to dismiss the application was proportionate.

Notice of Decision

14. The judge's decision is set aside and will be re-made following a de novo hearing in the First-tier.

No anonymity direction is made.

Signed Date 29 April 2019

Deputy Upper Tribunal Judge Peart