IN THE IMMIGRATION SERVICES TRIBUNAL IMS/2002/010/RTR

Before Mr David Bean QC (Chairman), Mr Paul Barnett and Dr Susan Rowlands

Between EBRAHIM & CO Appellant

and

IMMIGRATION SERVICES COMMISSIONER Respondent

DECISION

1. Ebrahim & Co (“the firm”) is a partnership formed by Mr Altaf Ebrahim and Ms Mitzba Atcha. It carries on business from offices in Wembley. The notepaper states that it provides “Legal Services”. (Until early in 2001 Mr Ebrahim was sole proprietor, and the description on the notepaper was “Asian Legal Services”.) Since neither partner is a solicitor, and the legal services provided plainly include immigration work, it was necessary for the firm to apply to the Immigration Services Commissioner for registration under section 84 of the Immigration and Asylum Act 1999 (“the Act”).
2. An application was lodged on 30 April 2001 for registration at all three levels of competency and all categories of advice and services. Nearly a year later, by a letter of 16 April 2002 signed by a caseworker, Annabelle Lim, on his behalf the Commissioner stated that he “cannot be satisfied that [the Appellant] and its advisers are competent and fit to provide immigration advice and/or immigration services and refuses this application.”
3. The firm, by Notice of Appeal dated 6 May with grounds in a letter of 12 May 2002, exercised its right of appeal to this Tribunal under section 87(2) of the Act. We heard the appeal on 2 December 2002. Ms Atcha represented the firm; she called Mr Ebrahim as a witness and gave evidence herself. The Commissioner was represented by Ms Jennifer Richards of counsel. In the absence of Ms Lim on maternity leave Mr Clive Copus, a caseworker who has recently taken over the file, gave evidence for the Commissioner.
4. At the outset a preliminary point arose. The bundle of documents compiled by the Treasury Solicitor for the Respondent, disclosed to the Appellant and lodged with the Tribunal, included a number of legally privileged memoranda. One of these, an e-mail containing advice from Mr Roland Phillips of the Treasury Solicitor’s office, was included in the Chairman’s bundle but not in the bundles copied to the two lay members. Ms Atcha submitted that she should be allowed to adduce it in evidence. In our view legally privileged documents disclosed in error should not be admitted in evidence. We therefore refused the application.
5. Mr Ebrahim gave evidence, which was not challenged, about the nature and extent of the firm’s work. He conducts interviews and gives advice, leaving advocacy work to others. He sees about 20 clients a day, including at weekends. The firm has two or three hearings each week before Immigration Adjudicators. They have not been criticised by any adjudicator nor by the Immigration Appeal Tribunal in 10 years of doing the work. They get involved in 5 or 6 judicial review applications per year.
6. Section 83(5) of the Act provides: “The Commissioner must exercise his functions so as to secure, so far as reasonably practicable, that those who provide immigration advice or immigration services –
7. are fit and competent to do so;
8. act in the best interests of their clients;
9. do not knowingly mislead any court, tribunal or adjudicator in the United Kingdom;
10. do not seek to abuse any procedure operating in the United Kingdom in connection with immigration or asylum (including any appellate or other judicial procedure;
11. do not advise any person to do something which would amount to such abuse.”
12. It was common ground that an appeal to this Tribunal is an appeal on the merits, and that we are not confined to the evidence which was before the Commissioner nor to examining the reasons for his decision. New material placed before us may either strengthen or weaken an appellant’s case. As to the burden of proof, it seems to us that under paragraphs (a) and (b) of section 83(5) the onus is on the applicant for registration (the appellant before us), whereas under paragraphs (c), (d) and (e) the onus is on the Commissioner.
13. We heard evidence about the case of a Mr Bachcha, which formed a substantial part of the Commissioner’s reasons for refusing registration. Apart from this case the only other complaint made against the firm was by a Mr Siddique; that claim had been withdrawn. The Commissioner did not conduct any exercise in the nature of a general audit of the firm’s work before reaching his decision, nor was any attempt made to do so before us.
14. In his Notice in Reply the Commissioner relied on three matters in particular: firstly, the Appellant firm’s role in the case of Mr Bachcha; second, the firm’s employment of a Mr Alex Nzeyi; third, a delay of several months in the firm providing the Commissioner with satisfactory evidence of its professional indemnity insurance. We deal with each of these in turn.

# The case of Mr Bachcha

1. Mr Bachcha entered the UK on a false passport on 1 March 1998. He was detained as an illegal entrant from 25 August 2000 onwards and during the period October 2000 to May 2001 was a prisoner at HMP Leicester, convicted of certain immigration offences.. He claimed asylum on 22 September 2000 but the claim was certified by the Secretary of State under paragraph 9(6)(a) of Schedule 4 to the Act. Ebrahim & Co were contacted by relatives of Mr Bachcha and asked to act for him.
2. Except on the occasion of his hearing before an adjudicator, Ebrahim & Co took instructions from Mr Bachcha by telephone. Ms Richards criticised this as inadequate and tending to show that the firm was not fit and competent. We disagree. Clearly the telephone is far from ideal as a sole means of communication between immigration adviser and client; but Mr Bachcha was in Leicester Prison and the funds which his relatives could make available may have been limited.
3. On 13 March 2001 Mr Bachcha’s case came before an adjudicator, Mr O’Malley, sitting at Birmingham. Mr Bachcha was present and was represented by Mr Alex Nzeyi, a law student who did a substantial amount of work for Ebrahim & Co including some advocacy. We return to the subject of Mr Nzeyi’s employment later in this judgment.
4. The adjudicator’s written decision, in the usual way, begins by listing the advocates and describes Mr Nzeyi as a “Solicitor”. Ms Richards relied on this as evidence of knowingly misleading the adjudicator, though it is right to say that this was not in the forefront of her submissions. We do not have the attendance slip nor any evidence from the adjudicator. It is, however, within the experience of all three members of the Tribunal that advocates are frequently given the wrong professional description in the decisions of tribunals, especially where a wide range of people have a right to appear. On the evidence available to us we consider that this allegation of misleading behaviour is not made out.
5. Mr Nzeyi’s task was not an enviable one. The client, in his asylum interview, had alleged that “thugs” had tried to kill him by shooting him in the leg. But in the same interview he had admitted that his main reason for leaving India, of which he was a citizen, had been the problem of unemployment. He had not said anything at that stage about relatives in the UK (which would have laid the foundation for an argument, such as it was, under Article 8 of the European Convention on Human Rights); but such relatives existed and had instructed first another firm, then Ebrahim & Co. The previous firm was exercising a lien over the papers until £300 was paid towards their fees, although it is not clear what, if any, additional material the papers would have provided.
6. Mr Nzeyi no longer works for Ebrahim & Co and was not available to give evidence. In any event what passed between him and Mr Bachcha is covered by privilege which can only be waived by the client. We have to do the best we can from the documents, in particular the adjudicator’s decision.
7. Mr Nzeyi decided not to call the client, nor to ask for an adjournment, but to ask for time to put in written submissions. The Tribunal takes the view that this was a legitimate judgment call. Calling the client would almost certainly have resulted in his swift demolition in cross examination. Adjournments are not readily granted by adjudicators, to whom many such applications are made simply in order to postpone the day of reckoning. On the other hand, where an adjournment has not been sought time may well be given to put in written submissions, as happened here. Thus far we do not criticise the firm’s performance in this case.
8. Efforts were made to obtain the papers from Mohammed & Co, the firm previously acting, but these were only received one day inside the 14 days the adjudicator had granted for written submissions. Mr Ebrahim looked at them. In the event no written submissions were made.
9. We think this was unsatisfactory. The Article 8 claim was no doubt a weak one, but it could and should have been made, especially since the adjudicator had granted the opportunity for written submissions. As Ms Richards pointed out, it was not necessary to obtain the files from Mohammed & Co in order to be able to state what the interference with Mr Bachcha’s family life would be; and even if it had been, we doubt whether the adjudicator would have felt able simply to ignore written submissions which arrived, say, on the 15th day after the hearing with a suitable explanatory letter. We are far from saying that such submissions would have made any difference: indeed Mr Bachcha’s case may well have been hopeless.
10. The adjudicator, in a short and robust judgment, roundly rejected Mr Bachcha’s asylum application.
11. What then happened is that the Home Office gave directions for Mr Bachcha’s removal from the country on 16 May 2001. The previous day Ebrahim & Co faxed a letter to the Home Office taking the Article 8 point. Not surprisingly the response was unfavourable, but the date of removal was delayed until 22 May. On 21 May Ebrahim & Co lodged an application for judicial review in the name of Mr Bachcha at the Administrative Court. It had to be in his name, as they are not solicitors, but his address was given as “c/o 66A Ealing Road, Wembley, Middlesex” [the Appellant firm’s address]. In the space for a signature to attest to the Statement of Truth Mr Bachcha’s name and initials are given in block capitals.
12. This was unsatisfactory for a number of reasons. Firstly, in a High Court application immigration advisers who are not solicitors cannot act. The Statement of Truth in a claim for judicial review made by a litigant in person must be signed by that person, not by an agent on his behalf. Secondly, a professional person, whether a solicitor or an immigration adviser, is under a duty not to initiate court proceedings which are plainly hopeless. We think that the judicial review application was in that category. The Article 8 point would, as we have already observed, been late in the day and weak had it first been made before the adjudicator or in written submissions to him after the hearing. Made for the first time in a judicial review application the day before the proposed removal of the client from the UK, it was doomed to failure. We consider that the handling of the case in this way demonstrates incompetence, in that the point should either have been raised earlier or not at all. It is not necessary to decide whether it also constitutes evidence of advising a client to abuse asylum procedures, and without knowing whether the initiative for the judicial review came from the client or the firm that would not be an easy matter to determine.

# The employment of Mr Nzeyi

1. The substantive complaint about the employment of Mr Nzeyi is as follows. Mr Nzeyi was a law student at Thames Valley University who successfully graduated, we were told, this year. He is not a British citizen. The Immigration Rules allow a person who obtains leave to enter the UK as a student to undertake work provided that it is “part time or vacation work undertaken with the consent of the Secretary of State for Employment”. Mr Nzeyi obtained permission to work for Ebrahim & Co on 30 March 1999. The rules laid down by the relevant Department, then the Department for Education and Employment, state that during term time students to whom the Rules apply may not work more than 20 hours per week: this information is available in the publications “Leaflet for Students” and “Questions and Answers for Employers”. But Mr Nzeyi, as he has readily admitted in correspondence, worked an average of 35 hours per week for the Appellant firm, and longer in vacations.
2. A telephone conversation about this took place between Mr Ebrahim and Annabelle Evans (the future Annabelle Lim) of the Commissioner’s office on 31st May 2001. Later the same day Mr Ebrahim wrote to her “to confirm the following: (a) Mr A. Nzeyi works less than 20 hours per week during term time.”
3. This was clearly untrue. At first Mr Ebrahim tried to explain it away by drawing a distinction between work as such and a student’s work experience, arguing that the latter does not count. But eventually he accepted that Mr Nzeyi did indeed work more than the limit of 20 hours per week.
4. A firm doing substantial amounts of immigration work should have known better than to condone a breach of the rules; and Mr Ebrahim ought to have known better than to tell a lie about it in his letter of 31st May 2001. But this is the only instance of dishonesty on the part of the Appellant firm which has been uncovered by the Commissioner or in the hearing before us. We therefore treat the misstatement in the letter as an isolated incident.
5. Allegations of breaches of the Immigration Rules or rulings made under them relating to employment are primarily for the Immigration Service, rather than the Commissioner, to investigate. We do not know what the result would have been had there been such an investigation by the Immigration Service into Mr Nzeyi’s circumstances.

The delay in providing insurance details

1. The complaint here is not that the firm practised uninsured, but that it took several attempts over several months to obtain the proof of insurance which was quite rightly called for. Ms Richards accepted that on its own this point would not amount to much, but argued that it was specific evidence of incompetence to be added to the other material before us. We agree. But in the end it is a minor matter.

# Conclusion

1. We have found that the firm acted incompetently in lodging the judicial review permission application in the Bachcha case; that Mr Nzeyi was allowed to work excessive hours; that Mr Ebrahim wrote a letter which was an isolated incident of dishonesty; and that there was minor incompetence over the insurance certificate. As against that, the lay members of the Tribunal, each of whom has extensive experience in the field, regard it as highly significant that despite their considerable turnover of immigration work there is no evidence of other complaints (other than one or possibly two withdrawn ones), let alone adverse findings, against the Appellant firm.
2. We conclude that, viewing the matter as a whole, the firm has satisfied us that it is fit and competent to provide immigration advice and services and that it acts in the best interests of its clients. We are not satisfied of any of the matters set out in subsections (c) to (e) of section 83(5).
3. We allow the appeal and direct the Commissioner to register the Appellant firm at all three levels. This is, however, subject to two provisos. Firstly, we make it clear that the firm should not engage in the practice of lodging High Court applications, for judicial review or otherwise, on behalf of litigants in person. Secondly, we note that under paragraph 3 of Schedule 6 to the Act the Commissioner may require registered persons to apply for continuation of their registration, and that different intervals may be fixed in relation to different registered persons.
4. We consider that the Commissioner would be acting entirely properly if he were to require the Appellant firm to submit an application for continued registration at some date to be determined by him between 1 July and 31 December 2003. Before determining that application the Commissioner may decide – it is entirely a matter for him – to conduct a more extensive audit of the firm than was done in 2001. We hope and expect that Ebrahim & Co will observe the standards properly to be expected of registered persons. Nothing in this judgment should be regarded as giving them grounds for complacency.