



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/10185/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31 July 2017**

**Decision & Reasons Promulgated  
On 22 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MARSSAILLE MBOH ARREY  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr A Bandegani, Counsel instructed by Fadiga & Co

**DECISION AND REASONS**

1. The appellant (to whom I shall refer hereafter as “the respondent”, as she was before the First-tier Judge) appeals to the Upper Tribunal against the decision of a First-tier Judge allowing the appeal of Mr Arrey (to whom I shall refer hereafter as “the appellant”), as he was before the First-tier

Judge, against the Secretary of State's decision of 9 March 2016 refusing to vary leave to remain.

2. The appellant sought leave to remain on the basis of Article 8, having originally been granted entry clearance as a Tier 4 (General) Student valid from 25 December 2009 to 30 September 2012. He was then granted leave to remain as a member of the Armed Forces valid from 3 September 2012 to 12 January 2014. He was refused indefinite leave to remain as an HM Forces discharged personnel on 6 October 2015. The appellant was refused under paragraph 322(1) of the Immigration Rules on the basis that the variation of leave to enter or remain was being sought for a purpose not covered by the Rules. The appellant had requested leave to remain in the United Kingdom to enable him to pursue employment as an IT consultant.
3. There was a previous hearing on 9 May 2017 before Mr Justice Lewis and me and this was adjourned on the basis that Mr Jarvis wished to amend the grounds.
4. The judge noted that the claim had to be considered only in respect of Article 8 as the appellant conceded that the application fell outside the Immigration Rules. She set out the Razgar guidelines, and noted the evidence of the appellant and also of Major Buchanan who is Battalion Second-in-Command of a London Regiment. Major Buchanan had explained the appellant's value as a reservist and support to the regular army and the economic cost in terms of the loss to the public purse of the training that he had and the cost of recruiting and training a replacement. He also spoke about the appellant's capacity and character. The judge noted what had been said in UE (Nigeria) [2010] EWCA Civ 975 about the relevance of the loss of public benefit as a consideration when assessing the public interest side of proportionality under Article 8. The judge found that the public value had been and potentially would continue to be very significant and that the loss of that benefit to the public purse was also very significant. She said that there was no public benefit in requiring the appellant to return to Cameroon and reapply to return to the United Kingdom and rejoin the reserves with the consequent loss of experience and seniority. She considered that the need to maintain a firm and fair policy of immigration control did not outweigh respect for the appellant's private life which provided so much public benefit. She also took into account Section 117B of the 2002 Act, noting that for example the appellant speaks English, is not a burden on the taxpayer, as a reservist he provided a financial as well as a security benefit, his leave had been lawful and he had explained the difficulties he had encountered in ensuring that he had correct leave.
5. The appeal having been allowed, the Secretary of State sought and was granted permission to appeal on the basis that the judge had failed to quantify the public interest when assessing proportionality and had in effect concluded that army reservists were exempt from immigration

control due to the cost of their training and the service they provide to the community. It was also argued that the judge's application of the decision in UE was defective in that the kind of case where this was appropriate had been set out in Singh [1986] UKHL 11 as applicable in the case of a person of outstanding value to a particular section of the community of which they would be deprived if the person were deported. It was also said to be unclear on what basis the appellant could obtain entry clearance in the future. The amended grounds set out the relevant guidance of the Secretary of State concerning reservists and the fact that the appellant did not qualify for indefinite leave to remain by virtue of at least his overstaying in the United Kingdom and the fact that he had not met the relevant eligibility requirements. The test remained one of compelling circumstances and the judge had failed to identify the precise nature and weight of the public interest in the Rules. This was not a Chikwamba type case. The appellant had not had leave to remain in the United Kingdom since 12 January 2014.

6. In his submissions Mr Jarvis relied on and amplified the points set out in the grounds. It was clear that the appellant could not claim to be a former member of HM Forces in light of the guidance. There had been periods when he had been exempt from immigration control. The judge was required to engage with his history and approach it with regard to benefit to the community as set out in UE (Nigeria). The effect of not taking account of the unlawful nature of the appellant's stay in recent years in the United Kingdom was that the judge had placed a gloss over his history in the United Kingdom.
7. In his submissions Mr Bandegani argued that there was no error of law. If there were it was immaterial. The judge had clearly set out the relevant applicable law at paragraph 18 onwards. It was conceded that the claim could not come within the Immigration Rules and there was no family life. The judge had properly applied Section 117B. Everything had to be read together. The facts and evidence before the judge were those on which she had based her decision and there was no error of law in deciding the appeal in that way. In his Rule 24 response he had addressed the case as originally put in the grounds and what seemed to survive that was the UE (Nigeria) point. All that said was that a contribution to the community and to society at large could be a relevant, sometimes highly relevant factor in the proportionality balance. The judge had addressed this in paragraph 23 of her determination. She had found that the loss of that benefit and the loss to the public purse were very significant and the witness had given evidence on the latter point. There was no argument that on any finding this was an irrational conclusion so it was hard to see how, based on proper authority, the decision could be wrong in law. There was no inconsistency between what was said in UE (Nigeria) and what Parliament had said. Even if what Mr Jarvis said was correct about periods when the appellant had overstayed, and the times when the appellant was exempt from immigration control, any misunderstanding of that nature was not material to the overall findings based on the evidence. It was clear that

the appellant spoke English, was not a burden on the taxpayer, was a reservist and his leave had been lawful and for some periods exempt from immigration control. It was hard to see what the error of law was. If the Tribunal disagreed then it would depend upon the nature of the error found whether the matter would need to be reheard in the First-tier or remain in the Upper Tribunal.

8. By way of reply Mr Jarvis emphasised that it was not a rationality challenge but that the judge, he said, had erred in setting out and applying the law. It had been argued on behalf of the Secretary of State why Section 117B had not been applied properly. It was clear from what had been said by the Court of Appeal in Rhuppiah [2016] EWCA Civ 803 that the relevance of the precariousness of immigration status was the effect it had on the extent of protection which should be afforded to private life for the purpose of the Article 8 proportionality balancing exercise. The appellant had been an overstayer so his residence for a period had been unlawful, and that contrasted with what the judge had said about his leave being lawful. This was clearly a material mistake of fact. The judge had to say why the appellant did not benefit from the Rules as a starting point and had failed to understand the appellant's immigration history and why the application fell only to be considered outside the Rules.
9. I reserved my decision.
10. There are essentially two matters of concern with respect to the judge's decision. The first relates to her conclusion at paragraph 25 that the appellant's leave had been lawful. It seems clear, as pointed out at paragraph 3 of the amended grounds, that the relevant starting point was the fact that the appellant did not qualify for indefinite leave to remain by virtue of overstaying in the United Kingdom and the fact that he had not met the "reckonable service" eligibility requirements in paragraph 11(a)(i) of the Armed Forces Appendix in that he had not completed at least four years reckonable service in HM Forces. Also it was conceded he could not benefit from the private life Rules at paragraph 276ADE(1). It is clear that the exemption from which the appellant benefited lasted only for the period of the deployment which concluded on 10 February 2015. The appellant did not make an application for leave to remain in the 28 day period after he returned to the United Kingdom and became an overstayer. Thereafter he began work for Wonga as an IT consultant on 25 June 2015 but did not have leave to remain in the United Kingdom and nor did he have permission to work. An application on 27 May 2015 for indefinite leave to remain under the Armed Forces Appendix as a discharged member of HM Forces was refused on 6 October 2015 and he did not appeal this decision. A further application on 15 October 2015 was refused on 9 March 2016.
11. I accept also with reference to the 27 May 2015 ILR application that that could not succeed because the appellant was unable to show that he was "a member of the regular forces" and the law applicable to him was contained in the Reserved Forces Act 1996.

12. A consequence of this is that the judge erred in concluding that the appellant's leave had been lawful. There were clearly periods when his leave was not lawful and that required to be factored into the Article 8 proportionality evaluation. He had never been a member of HM Forces and was not discharged from HM Forces. The guidance in particular in Agyarko [2017] UKSC 11 is of relevance.
13. The other matter of concern is the judge's evaluation of public benefit based on UE (Nigeria). I consider that that was legally flawed on the basis that the case was clearly distinctly separate from the requirement of exceptional circumstances (in effect) as set out in Bakhtaur Singh. It is right also to argue as Mr Jarvis does that the identity and nature of the public interest in Article 8 cases has been significantly clarified since 2010, including what was said in Rhuppiah about the relevance of the precariousness of immigration status and the effect that that has on the extent of protection which should be afforded to private life. The judge emphasised the issue of public value without taking proper consideration of other relevant factors such as, in particular, Section 117B(5).

### **Notice of Decision**

14. As a consequence I consider that the judge erred in her evaluation of Article 8 in this case. I consider, bearing in mind the submissions on the point that the appropriate forum for remaking the decision is the First-tier Tribunal and therefore the Secretary of State's appeal is allowed to the extent that the matter is to be reconsidered in the First-tier Tribunal.
15. No anonymity direction is made.



Signed

Date

Upper Tribunal Judge Allen