



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/06340/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9 January 2015

Decision & Reasons Promulgated  
On 30 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

SODIQ ADESOLA TAIWO  
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms C Physsas, Counsel, instructed by Graceland Solicitors  
(Lewisham)

For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal was originally heard at Field House, on 18 November 2014, when I was sitting on a panel with the Honourable Lord Burns. At that hearing we decided that there was an error on a point of law in a decision dismissing the appeal, and that there should be a remaking hearing, with no findings preserved. The error of law decision and directions, produced after that hearing, was as follows.

## ERROR OF LAW DECISION AND DIRECTIONS

- (i) The appellant is a citizen of Nigeria, now 22 years old, who has been in the UK since 2006. He first arrived as a child visitor, then had periods of leave as the dependent child of his father, and then had a period of leave to allow him to pursue an application to join the British Army. On 17 January 2014, after a delay of some two years, he was refused further leave to continue with his army application, and it was decided that he should be removed under section 47 of the Immigration, Asylum and Nationality Act 2006.
- (ii) His appeal was dismissed by First-tier Tribunal Judge V M D Fox, in a determination promulgated on 12 August 2014. The concession for those wanting to join the British Army operates outside the Immigration Rules, and it was not suggested that the appellant could comply with any other Rule. As a result the appeal was only concerned with Article 8 of the European Convention on Human Rights, and was dismissed on this basis.
- (iii) Permission to appeal was granted by First-tier Tribunal Judge Lambert, on 13 October 2014. Permission to appeal was granted on the basis that it was arguable that the judge had not considered, as part of the proportionality assessment, the appellant's private life, and the impact of the respondent's delay in processing his application on his efforts to join the British Army.
- (iv) The first part of the hearing before us was concerned with confusion about the respondent's bundle in the appeal. What emerged was that a respondent's bundle had been provided, but it did not contain the correct documents. Instead of containing documents relevant to the appellant's application, including a document from the British Army, it instead contained documents about an application made by the appellant's father, as well as a determination in an appeal concerned with the appellant's mother and one of his siblings. It appears that the appeal was adjourned twice, with directions aimed at obtaining a respondent's Rule 13 bundle with the correct documents, but on the day of the eventual hearing, 16 July 2014, the appeal went ahead despite the correctly compiled bundle still not being available.
- (v) Mr Whitwell, for the respondent, indicated that he did not have the documents listed on the front sheet of the, including the army document. Ms Physass, for the appellant, was not clear whether the representative at the First-tier hearing had had sight of the index on the front sheet of the respondent's bundle, which pointed to the existence of the army letter. During his submissions Mr Whitwell indicated that he would not object to any application to amend the appellant's grounds to include this procedural point, connected with the fact that the respondent had been in possession of important evidence but had not provided it. In the event,

however, we decided that an error of law had been established, justifying the decision being set aside, on the basis of the original ground on which permission to appeal had been granted. As a result it was not necessary to consider whether the grounds should be amended.

- (vi) It is well-established that, in a consideration of Article 8, it will be necessary to consider both family life and private life. It will often be necessary to consider a combination of both. It is generally accepted that an examination of Article 8 will start with family life. Where it has been decided that there are no relationships amounting to family life private life ties will require consideration. Relationships, including relationships with relatives that do not amount to family life, will often be a significant, and at times the most significant, element of an appellant's private life in the UK.
- (vii) It is striking that the judge's Article 8 assessment contains no reference to the appellant's private life. Mr Whitwell attempted to defend the determination on the basis that such a consideration could be inferred from general statements, particularly the last sentence of [61]. This is not a submission that we can accept. In our view the only fair reading of the determination as a whole must be to the effect that private life was not considered. Another point of concern, which arose on a close examination of the proportionality assessment, was that the judge, in conducting it, placed weight on a number of irrelevant or erroneous factors on the one hand, and failed to give any consideration to the most important factors in the appellant's favour, on the other hand. The judge indicated that the appellant had benefited from an education in the UK to which he had no entitlement (paragraph 55); and found that the appellant had "sought to establish himself without the respondent's consent"; and that his mother had "facilitated this unlawful residence" (paragraph 60).
- (viii) The difficulty with these points, which were clearly matters that the judge placed weight on in the proportionality assessment, is that the appellant has no history of unlawful residence in the UK, had not remained without the respondent's consent at any time, and has had immigration leave of a type that has entitled him to education in the UK. This appears to have been clear from the start, and his immigration history is in fact summarised by the judge at paragraph 3 of the determination.
- (ix) The key factors that were not considered in the proportionality assessment all come under the heading of the appellant's private life. The most important aspects were his relationships with his parents and his siblings (on the assumption that they were correctly rejected as family life), but there was also his length of residence to be considered, his age on arrival, and his hopes for an army career. The judge paid particular attention to the fact that one of the appellant's siblings had been refused leave, and

had had an appeal dismissed, but the judge did not mention another appeal, the determination of which was in the respondent's bundle before him, in which the appellant's mother and another sibling had had their appeals allowed. This was followed by them being given leave to remain. We were told, at the hearing, that this was for a limited period until March 2015. Not only was the appellant's private life, including any relationships not found to amount to family life, a relevant factor in the proportionality assessment, but the fact that his mother and one of his siblings had been given leave to remain in the UK was an important aspect of this.

- (x) Other matters were potentially important, in relation to the connection between the appellant's application to the British Army and the lengthy delay in processing this application, but it appears to us that the above points are sufficient to establish legal errors requiring the decision to be set aside. It is therefore not necessary to go further.
- (xi) Another difficulty was not considered before us, but we raise it with the remaking in mind, so that both sides are prepared. The Upper Tribunal in **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** made it clear that a strict reading of **Kugathas v SSHD [2003] EWCA Civ 31** was incorrect. The approach to a consideration of whether there was family life between an adult child, such as this appellant, and his parents and younger siblings, would have to take into account whether an appellant had ever established an independent life outside the family. In **Ghising** there were references to a case in which a 23 year old daughter had been found to still have family life with her parents, having lived with them for all of her life. With these legal principles in mind the issue of family life will need consideration in the remaking process.
- (xii) Having considered the Practice Statement, and having considered submissions from both sides, we decided that this was a case in which it was appropriate to follow the normal course of remaking the decision in the Upper Tribunal. The fact-finding necessary did not appear to us to be so extensive as to require a remittal to the First-tier, and neither did it appear to us that the issues justified regarding this as a situation in which the appellant had been deprived entirely of a fair hearing at the First-tier. The matter was therefore adjourned for a remaking hearing in the Upper Tribunal, with the following directions.

### **Notice of Decision**

- (xiii) Having found that there has been an error on a point of law we set aside the judge's decision dismissing the appeal on Article 8 grounds. The decision needs to be remade as a result, and this will occur within the Upper Tribunal.

(xiv) No anonymity direction is made.

**Directions**

- (i) Both the appellant and the respondent are directed to make their best efforts to provide a copy of the relevant concession for those wishing to apply to the British Army.
- (ii) The respondent is directed to provide all documents referred to on the front sheet of the respondent's bundle, including the British Army response spreadsheet, and any other relevant documents.
- (iii) The appellant is directed to produce updated witness statements for the appellant and any other witnesses. These should include evidence as to the appellant's current intentions with regard to his British Army application; the current immigration status and whereabouts of all of his immediate family members, with details of any further applications made or contemplated; and an updated position on the current status of the appellant's relationship with Ms Bangura, who gave evidence at the First-tier hearing.
- (iv) The remaking hearing will proceed on the basis that no findings are preserved.  
The appeal will be listed for a remaking hearing with a 2 hour estimate and with no interpreter required.

2. Preparation for the remaking hearing on 9 January 2015 produced only limited results. The missing respondent's bundle, that had been discussed at the error of law hearing, had still not been located. Neither had either of the representatives been able to provide a copy of the concession that operated outside the Immigration Rules for British Army recruits, that was in operation when the appellant's application for further leave was made in January 2012. Neither had either side found the policy in force when the decision that is the subject of this appeal was taken in January 2014. A Home Office guidance document was produced, which was valid from 20 March 2014, entitled "Armed forces: exempt from immigration control". This guidance referred to a change in policy taking place on 11 July 2013, after which date anybody intending to join HM Forces needed to demonstrate that they had lived and held valid leave in the UK for a minimum of five years.
3. At the start of the hearing Mr Avery, for the respondent, referred to the appellant being on police bail. The appellant accepted that he was due to return to the police station later in January 2015 in connection with an enquiry about a suspected fraudulent internet transaction.
4. For the remaking hearing the appellant's solicitors had produced an additional bundle (116 pages) which included updated witness statements for the appellant; his mother; his partner; and his brother. There were also witness statements for two friends, but the oral evidence at the hearing was from the appellant and the three witnesses listed above.

5. Mr Avery, for the respondent, had obtained a single document from the respondent's bundle, namely a British Army spreadsheet. This consisted of a number of names, including that of the appellant, in the form of a table. Opposite the appellant's name was a comment that his application to join the British Army had been withdrawn in 2012.
6. The factual situation can be summarised, in outline, as follows. For the most part the facts were not disputed, with the exception of a factual dispute about the circumstances surrounding the ending of the appellant's application to join the British Army. The appellant's position on this was that he had wanted to continue with his application to join the parachute regiment throughout, and indeed he still wanted to pursue this. The only reason that he had not been able to was because the army had been unable to proceed when his visa expired. Mr Avery's position was that the spreadsheet established that the appellant himself had withdrawn his application.
7. The appellant continues to live with his mother, brother, and sister. His other sister has returned to Nigeria for national service there. The appellant's application to the parachute regiment started in 2011, and he passed a parachute regiment course in January 2012. The last contact he had with the army was in 2014, after a hearing, where they had told him that his name was still on their system, but they could not issue him with a letter. The appellant's mother leaves for work at 4am. As a result the appellant is largely responsible for the care of his younger sister, who is 10. His brother also leaves for work early. His brother suffers from sickle cell anaemia, and the appellant is the one who helps him when he has crises that necessitate him being admitted to hospital. His brother has a place to study architectural technology at Anglian Ruskin College in Cambridge. He is hoping to take this up, but there are some doubts over whether he can do so given his health.
8. The appellant's partner is a naturalised British citizen who comes from Sierra Leone. She is studying to be a midwife. She and the appellant have not lived together, but plan to marry. The appellant's mother approves of their plans. The appellant's girlfriend is currently living in a hostel, having had difficulties in her relationship with her mother, but she returns to the family home frequently, where she continues to have contact with, and look after, her younger brother who is 9. The appellant's girlfriend is now 19. The appellant's brother has applied for settled status, and is waiting for the result of this before he can proceed with his studies.
9. The appellant said that he remained committed to joining the parachute regiment, and that he had maintained his fitness for this purpose. His mother, brother, and partner, all supported him in this. The appellant indicated that his mother and brother would be able to work less, if he were in the army, and they could therefore take over with looking after his younger sister.

## Submissions

10. The submissions by Mr Avery can be summarised as follows. The appellant was relying on family life to resist the Home Office decision, but from 2011 he had been set on a career in the army, which would itself disrupt his family life. This was a highly selective use of Article 8 which bordered on abuse. He was also relatively old to rely on family life, and his claim on this basis was weak. The army spreadsheet suggested that the appellant had withdrawn his army application himself, not that it was due to him having no valid visa. It was accepted that there had been a considerable delay in the Home Office reaching the decision. This was connected to a change in the rules for army recruits. There had been a change from a two year residence requirement to a five year residence requirement. The policy outside the Rules that he had benefited from had also been withdrawn. A change had taken place on 11 July 2013. Regardless of what the policy had been at the date of decision there was no live application to the army on which leave could have been granted anyway, because it had been withdrawn in 2012. The appellant's relationship with his partner was not a basis for him to succeed. They were not living together; they were not formally engaged; if the appellant did join the British Army this would disrupt their relationship; and they could live together in Nigeria, where the appellant had family connections.
11. Ms Physsas, for the appellant, after taking some time to read the armed forces guidance that had been produced at the hearing, made submissions as follows. The appellant had applied to enlist in the British Army, relying on the concession outside the Rules, as well as relying on Article 8. The army application process had been started in 2011, and he had passed the parachute regiment course in January 2012. From then on the process had been placed on hold because of his immigration status. The spreadsheet that had been provided had very limited information on it and should be given little weight. It was not on official paper, there was nothing to show it was from the army, and there was nothing from the army to confirm it. The information on it was also inconsistent with the idea that the appellant's application had been held with others for a policy review. The appellant, in any event, would have met the five year valid leave requirement. The refusal letter refers to the appellant's application to enlist being "withdrawn by the army" which itself conflicted with the spreadsheet. The letter from Teresa Pearce MP, in October 2013, and the chasing letter from Greenwich Community Law Centre in June 2012 suggested that he was, at those times, still pursuing the army application, and this had been confirmed by all of the witnesses.
12. Although it has not been provided it is clear that there was a policy operated by the Home Office, because he was granted leave under it to pursue his application. The new policy would not have adversely applied to him anyway. In fairness there was a need for reasons as to why the new policy did not apply, and a decision in relation to the old policy. Given the need for the Secretary of State to be consistent and fair the appellant should have been given leave to remain on a discretionary basis to continue and complete his application. The two year delay was excessive, and was

relevant in assessing proportionality. The appellant had a positive immigration history, a previous grant under the concession (and his intentions and circumstances had not changed), he had a plan to join the army which was relevant to his private life, there had been a policy in place and the decision was not in accordance with the law for not having considered it, or disproportionate in view of the delay. His ties to the UK had deepened in the period of the delay.

13. He had ties with family members, namely his mother, his siblings, and his partner. Joining the army would not sever these family ties. He had lived in the UK since the age of 14. He wanted to marry his partner, and he also wanted to help his mother financially, so that she could work fewer hours. He was currently closely involved in caring for and helping both his sister and his brother. All of the family would be devastated if he were to be removed. His future plans with his partner did not mean that he was currently leading an independent life. He had very limited ties to Nigeria, not having been there for nine years, and having no home to return to. Recruits to the army still have periods of leave, and may marry. The delay was significant, since the application should have been granted to allow the recruitment process to be completed.

### **Findings**

14. On the central contested factual issue my finding is that the account given by the appellant has been established, on balance of probabilities, as the true version of events. The letters at pages 55 to 57 of the appellant's bundle are consistent with the account that the appellant has given. The appellant's evidence on this point, to the effect that he never at any stage withdrew his application, has not been challenged specifically. The letter in October 2013 indicated that the appellant was still pressing, at that stage, for a decision that would enable him to continue with his application to join the armed forces. Following the end of the oral evidence no submissions were made suggesting reasons to disbelieve the appellant's evidence, backed up by these letters, or the account given by the other witnesses, to the effect that the appellant's desire to join the British Army remained undimmed despite the considerable delay.
15. The refusal letter referred to the appellant's application having been withdrawn by the army in April 2012. The army spreadsheet refers to it having been withdrawn by the appellant. This inconsistency suggests that the author of the refusal letter may have had access to some other information from the British Army, but this remains mysterious given the fact that the entire respondent's bundle has been misplaced and has not, to date, been found. Having considered the evidence as a whole on this issue my conclusion is that the brief army spreadsheet entry falls well short of the kind of reliable evidence that might outweigh the various items of evidence pointing in the other direction. My finding is that the situation is as described by the appellant, namely that he has remained keen to pursue the application throughout, that that was the purpose of his application for an extension of leave, and that the lengthy delay in deciding his application was the only reason for the recruitment process coming to an end. However the matter might be recorded for administrative purposes by the army, the central point is that the appellant needed leave to remain



to continue with the application, and he has never obtained it, with the result that the application could not proceed any further.

16. The refusal letter in January 2014 gives no hint of any reason for the lengthy delay, of two years, in deciding the application. The MP's letter in October 2013 referred to enquiries made of the Home Office, but contains nothing further than that the Home Office could not say how long the application would take. A letter from the Home Office to Greenwich Community Law Centre in August 2012 referred to a Croydon casework team being disbanded, and work being transferred to an office in Sheffield, who were working through a backlog of cases in date order. The submissions by Mr Avery at the hearing, therefore, were entirely new, and it was not clear on what these submissions were based. He suggested that the appellant's application had been delayed because of a policy review, and he referred to a number of other applicants being caught up in delays for the same reason. The suggestion that this was the real reason for the delay, rather than the explanation offered about the transfer to Sheffield, raises a number of further questions, particularly given that the change in policy between the two year residence and the five year residence requirement was not one that would have impacted on the appellant. I can make no clear finding on the reasons for the administrative delay of two years in deciding the appellant's application for further leave in order to continue with his application to join the parachute regiment. On the evidence available to me the true position remains obscure.
17. The evidence about the appellant's relationship with his immediate family members was not challenged in any way. I could see no reason to reject the appellant's account that he was still living together with his mother and siblings, that he was closely involved in caring for his younger siblings, and that he remains in a committed relationship with his partner.

### **Decision and Reasons**

18. In remaking the decision I have decided to allow the appeal on the basis that the decision was not in accordance with the law.
19. The application, when made, was concerned with a matter not covered by the Immigration Rules, namely an application to join the British Army. The appellant had been successful in such an application in 2011, and the further application was made for the purpose of continuing with the army recruitment process, which was reasonably well advanced by the time the appellant's leave to remain expired in January 2012. By the time the appellant was granted further leave to remain to join the armed forces, in 2011, he had been in the UK lawfully for five years.
20. If I had been provided with the policy that operated outside the Immigration Rules that was in force when the current application was made, in January 2012, I could have considered the question of whether the appellant would have succeeded under that policy, if his application had not been delayed. Similarly, if I had been provided

with the policy in force when the decision was taken, in January 2014, I could have considered whether the application fell within the policy on that date. Despite the directions made, however, I was not provided with the policies in force either at the date of application or at the date of decision.

21. Given my finding above, that the application was only treated as withdrawn because of the visa delay, the refusal contains a mistake on a factual matter, in that it treats the British Army application as no longer of any relevance. The refusal, in this respect, fails to engage with the key point at issue. There is an obvious circularity here. The delay by the Home Office in processing the application caused the army application to be treated as withdrawn; and the Home Office then proceeded on the basis that there was nothing left to decide, because of the fact that the application had been withdrawn. The decision maker failed to appreciate that the progress of the army application was closely linked to the leave application, and that there was no separate reason for it being treated as withdrawn.
22. At the centre of this case is, in my view, a striking instance of unfairness caused by unexplained delay. The appellant was a young man who was well advanced in pursuing his application to join the parachute regiment, which demands recruits of a particularly high calibre. He might have thought that passing the fitness test was the difficult part, but in reality it was the Secretary of State's delays that turned out to be impossible to surmount. Despite going to the MP, who made enquiries, and despite the appellant's representatives making enquiries, there was no explanation of any sort offered for the delay, (and no mention of any policy review), and neither was there any prioritisation of the application. As a result the appellant's central goal, his desire to join the army, was cast into a state of limbo. When the decision did arrive it failed to address the key issue, and instead took a reductionistic route to refusing the application, without engaging fully with the facts of the case.
23. If the appellant's application had been dealt with in a timely and efficient manner it appears likely that it would have been successful, and by now the appellant would have been a member of the British Armed Forces. Nothing has emerged to indicate that the appellant would not have been successful if the application had been considered within a few months of it being made, and nothing was put forward to suggest that the appellant would not be still be successful today, despite the lengthy delay that has resulted, both from the delay in the application, and the delay to date in the appeal process. I have not been shown any policy change that would have justified refusing to allow him to continue. The fact that the appellant appears to be as keen today as he was in 2012 to join the parachute regiment, despite the frustrating nature of the delay, is a testament to the strength of his commitment to this career path.
24. I have considered the submission made by Mr Avery that the appellant was making a selective use of Article 8 bordering on abuse. This submission appeared to me to miss the heart of the case. This case is concerned primarily with an application to join the British Army, as it has been from the start. It was only through ignoring all

evidence other than the spreadsheet, and regarding the army issue as no longer of any relevance, that this submission could be made. In my view, however, it cannot be correct to characterise this as a case where the appellant is relying solely on his family relationships in order to remain in the UK. It is undoubtedly true that those relationships are important, but there has never been any reason to doubt the central thrust of the case, from the time that the application was made, until the present.

25. If the army issue was no longer relevant then the case would take on a different complexion, but given that the army issue remains central it appears to me to be clear that the appellant is now entitled to pursue the application that has been suspended because the army recruitment process was not completed when his leave expired in January 2012.
26. It appears to me that the most appropriate outcome in remaking the decision in this appeal is to find that the decision under appeal was not in accordance with the law. That decision, as I have said, proceeded on an incorrect factual basis. If the decision maker had been aware of, or engaged with, the fact that it was only because of the Home Office delay itself that the army application had been treated as withdrawn, then there would have been a need for the decision maker to turn to consider two issues. The first of these would have been whether the application should be granted on the basis of a policy outside the Rules covering army recruitment. The failure to undertake this consideration renders the decision not in accordance with the law, on Abdi principles. The second, if the application did not fall within such a policy, or if there was no policy currently in force, would have been whether the application should have been granted on a discretionary basis outside the Immigration Rules.
27. I appreciate that this latter point would not have been one that could have been considered, in jurisdictional terms, at any appeal. However, it would only be if these aspects, given the centrality of the army application, had been properly decided, not in the appellant's favour, that the residual issue of leave to remain on Article 8 grounds would have arisen.
28. Despite deciding that the appropriate disposal of this appeal is that the decision was not in accordance with the law, and that it is not necessary to consider Article 8 in full, I would make the following observations. The appellant is clearly closely involved with the care of his two younger siblings, and is in a serious and committed relationship with his partner. If the British Army application issue were to fall away, therefore, there would be an arguable case to be considered on the basis of his family life connections. His connections with his siblings involve an element of dependency, suggesting that family life continues despite the fact that he is now over 18. I would not accept the argument put forward by Mr Avery that joining the army would have the same impact on family life as removal to Nigeria. This misses two crucial points. The first is that the appellant intends to send some of his salary to his mother, and this will enable her to remain at home to care for his younger sister, through not working such long hours. The second is that members of the British

Army are allowed periods of leave, and it is not a life that demands of soldiers that they cannot marry, or have any family life.

29. Without it being necessary to proceed to a full analysis of Article 8, however, my decision is that the appeal falls to be allowed on the basis that the decision was not in accordance with the law, through proceeding on a mistake of fact, or alternatively through failing to consider or apply a relevant policy. In my view the fairest outcome now would be for the matter to be reconsidered, with a view to the appellant being given an appropriate period of leave to enable him to pick up his British Army application where he left it, back in January 2012, when this ill-fated application was made.
30. I have considered the issue that was raised at the start of the hearing about the appellant being on police bail. At present the position is that he is not facing any charges. If this changes then that may, of course, have an impact on any future decision. The nature of my disposal of the appeal, however, and the fact that I am making no direction, leaves it open for this matter to be considered by the decision maker. I would note, however, that there has been such serious delay in this case so far, which has impacted so significantly on the appellant's plans, that it appears to me that it would be wrong to deal with this now in anything other than a timely manner.
31. Neither side raised any issue of anonymity, and I make no such direction. Having allowed the appeal on the basis that the decision was not in accordance with the law, I have decided to make a fee award, in the sum of £140. This reflects the significant unexplained delay in the decision making process, and the fact that it appears that the application would have been successful if it had been dealt with properly, and on a proper timescale.

### **Notice of Decision**

The decision dismissing the appeal having been set aside, for the reasons given above, the decision is remade as follows.

The appeal is allowed on the basis that the decision was not in accordance with the law.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Gibb

**TO THE RESPONDENT**  
**FEE AWARD**

Having allowed the appeal in remaking it, I have decided to make a fee award in the sum of £140 for the reasons given above.

Signed

Date

Deputy Upper Tribunal Judge Gibb