



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

Appeal Number: IA/27349/2013

THE IMMIGRATION ACTS

Heard at : Field House

On : 23 March 2015

**Determination
Promulgated**

On 25 March 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHEE-KEONG NG

Respondent

Representation:

For the Appellant: Ms L Kenny, Senior Home Office Presenting Officer

For the Respondent: Mr J Collins, instructed by Kilic & Kilic Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Ng's appeal against the respondent's decision to refuse his application for indefinite leave to remain.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Ng as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Malaysia born on 1 August 1979. He entered the United Kingdom on 28 May 2000 as a visitor and was granted subsequent periods of leave to remain as a student until 31 March 2008, following which he was granted periods of leave to remain as a work permit holder until 10 March 2012. During that time he became, in January 2009, a member of the Territorial Army. He was subsequently accepted for permanent service in HM Forces and on 7 December 2011 became exempt from immigration control under section 8(4) of the Immigration Act 1971. He served in Afghanistan from 10 May 2012 to 25 November 2012 until he was demobilised as part of a routine administrative process.
4. In May 2012 the appellant applied for indefinite leave to remain on the basis of ten years' lawful residence. His application was refused initially on 23 January 2013, owing to gaps in his period of lawful residence in October 2002, January 2007 and May 2008. The respondent declined to exercise discretion in his favour in regard to those gaps and considered that the decision did not breach his Article 8 human rights.
5. The appellant appealed that decision to the First-tier Tribunal and in a determination promulgated on 10 June 2013 First-tier Tribunal Judge Maxwell allowed the appeal. He did so on the basis that the decision was not in accordance with the law since the respondent had failed, in exercising discretion against the appellant, to consider the circumstances under which the gaps in residence had occurred. Judge Maxwell found that there had in fact been no gap in October 2002 and that the other two gaps had occurred due to errors or oversights made by his college (with respect to the first gap) and his employer (with respect to the second), the circumstances of which had been made known to the respondent at the relevant times. Judge Maxwell also indicated that the respondent ought, in re-making the decision, to consider the appellant's service in HM Armed Forces.
6. The respondent then reconsidered the appellant's application and made a fresh decision on 8 July 2013, maintaining the refusal. No reference was made to the previous claimed gap in October 2002 but it was decided not to exercise discretion in the appellant's favour with respect to the latter two gaps. The application was refused under paragraph 276D of the immigration rules and again it was considered that the appellant's removal would not breach his human rights.
7. The appellant appealed again and his appeal came before First-tier Tribunal Judge Kainth on 29 October 2013. It was conceded before the judge that he could not meet the requirements of the immigration rules, including paragraph 276ADE, and the appeal proceeded on Article 8 grounds outside the rules. The judge noted that, whilst the appellant had a girlfriend in the United Kingdom, he was not relying on that relationship as part of his application. The judge heard from three character witnesses, including the Operations Partner of John Thompson & Partners, where the appellant had trained and worked as an architect for several years. Judge Kainth noted the positive credibility findings made by Judge Maxwell and maintained

those findings. He found that the appellant had established a private life in the United Kingdom, including his service in the Armed Forces, and concluded that interference with that private life was disproportionate and in breach of Article 8. He allowed the appeal on human rights grounds.

8. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had applied the wrong standard of proof in relation to Article 8 and that, in allowing the appeal, he had failed to explain how the appellant's circumstances were exceptional.
9. Permission to appeal was granted on 25 November 2013.
10. In a determination promulgated on 9 January 2014, Upper Tribunal Judge Freeman found an error of law in the First-tier Tribunal's decision on the basis that the judge had wrongly disclaimed any requirement for exceptionality. He went on to re-make the decision and dismissed the appeal, placing considerable weight upon the appellant's service in Afghanistan in HM Armed Forces, but concluding that his circumstances were nevertheless not exceptional and that a grant of leave outside the rules was accordingly not justified.
11. Permission to appeal to the Court of Appeal was sought, and granted, on the basis that UTJ Freeman had erroneously relied upon an exceptionality test. UTJ Freeman's decision was quashed and the matter remitted to the Upper Tribunal, where it came before me.

Appeal Hearing

12. At the hearing, and after hearing submissions from both parties, I indicated that there was an error of law in the decision of the First-tier Tribunal such that it had to be set aside and re-made, given the absence of any consideration of the weight to be attached to the immigration rules and to the public interest.
13. I heard submissions from both parties with a view to re-making the decision.

Consideration and Findings

14. In deciding to allow his appeal, two First-tier Tribunal judges made very favourable comments about the appellant, in particular in regard to his exemplary record of service with HM Armed Forces, as confirmed in the letters of support provided. Page 24 of the appeal bundle is a letter from Major C L Ellidson of the Royal Engineers and page 25 is a letter from Captain Glen Franklin also of the Royal Engineers, both attesting to the indispensable role played by the appellant as an architect in the Royal Engineers, particularly during his service in Afghanistan. Upper Tribunal Judge Freeman also referred to the fact that the appellant's valuable public work was recognised by the award of a NATO medal and indeed a certificate for that award is included in the appeal bundle. He found that such activities could not be written off as easily replicated elsewhere for

the purposes of consideration of private life in accordance with the principles in MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 00037.

15. UTJ Freeman's only reason for dismissing the appellant's appeal was that his circumstances did not meet the "exceptionality" test for succeeding under Article 8 outside the rules. However the Court of Appeal found that he erred in that respect and I accordingly re-visit the question of whether circumstances exist that justify a grant of leave on Article 8 grounds outside the rules, which as recent case law has established is in effect the proportionality exercise within the five stage test in R (Razgar) v SSHD (2004) UKHL 27.
16. Section 19 of the Immigration Act 2014 inserted into the Nationality, Immigration Act 2002 the relevant public interest considerations in Article 8 cases, at sections 117A and 117B of Part 5A. I turn to those considerations in section 117B, from which it is apparent that there are no considerations militating against the appellant.
17. With regard to section 117B(2), the appellant speaks English and has produced evidence of his integration into society, not least by his studies, work and service in HM Armed Forces. With regard to section 117B(3) he has produced evidence of his qualifications, training and admirable employment record as an architect and would thus be independent and far from a burden on taxpayers. As regards section 117B(4) and (5), his private life has been established when in the United Kingdom lawfully. Although it is established case law (Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261, Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72) that a near miss cannot provide substance to a human rights case which is otherwise lacking in merit, the circumstances of the appellant's inability to qualify under the ten year residence rules is nevertheless a matter of some weight in his favour when taking account of all the relevant considerations.
18. Other than his inability to meet the requirements of the immigration rules there are, accordingly, no public considerations specifically weighing against the appellant. On the contrary there are many factors in his favour, namely his employment record and the level of support afforded in the various letters from friends and colleagues. There are also compelling circumstances in the appellant's case, which, it seems to me, taken cumulatively with the other favourable considerations, bring him into the category of those rare cases where a grant of leave outside the rules is justified. I refer in particular to his past services in HM Armed Forces which, albeit not lengthy and whilst not giving rise to any expectation that a right to remain in the United Kingdom would follow, nevertheless earned him a NATO medal and led Major Ellisdon to describe him as having "selflessly volunteered to put himself in harm's way to further the United Kingdom's stabilisation goals in Afghanistan."

19. In all of these circumstances, it seems to me, therefore, that the appellant's removal from the United Kingdom would be disproportionate and in breach of Article 8. Accordingly I conclude that his appeal should be allowed.

DECISION

20. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed to that extent and the decision of the First-tier Tribunal is set aside.

21. However, I re-make the decision by allowing Mr Ng's appeal again.

Signed Date: **23 March 2015**
Upper Tribunal Judge Kebede