Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/13533/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st April 2016	**On 10th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR TREVOR PHILIP RENE
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Muzira, Solicitor
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Dominica born on 26th January 1969. He appeals against the decision of First-tier Tribunal Judge Parkes sitting at Sheldon Court Birmingham on 21st August 2015 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 23rd March 2015. That decision was to refuse the Appellant's application for leave to remain in the United Kingdom under human rights considerations. The Appellant claimed that the refusal of his application breached this country's obligations under Appendix FM and paragraph 276ADE of

the Immigration Rules and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

2. The Appellant entered the United Kingdom on a visitor's visa on 11th May 2008 valid until 11th November 2008. The Appellant subsequently joined the Territorial Army and made two unsuccessful applications for leave to remain in 2008 and 2010. The Appellant further applied for leave to remain this time as a spouse in 2011 but this too was rejected by the Respondent. On 15th September 2014 the Appellant made an application the refusal of which has given rise to the present proceedings.

The Decision at First Instance

3. At paragraphs 7 and following the Judge succinctly summarised the nature of the Appellant's argument that he should be granted leave to remain against the background of his service in the Territorial Army. The Judge wrote:

> "7. The Appellant relies on his background as a member of the TA as justifying consideration of his application for leave to remain as a spouse when other preconditions cannot be met. It is not suggested that the Appellant could meet the requirements of Appendix AF in the Immigration Rules or of paragraphs 276O as that requires four years' service with HM Forces and that must mean the regulars it is not suggested that the Appellant was subject to service law for four years.
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> 8. In the Armed Forces Act 2006 which applied to his earlier applications and the Armed Forces Act 2011 a member of HM Forces is defined as a member of the regular forces in the case of the army is a member of the regular army. By Section 8(4) of the Immigration Act 1971 and in Home Office guidance on the point a member of the TA as a reservist is only exempt from immigration control when subject to service law.
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> 9. At page C10 of the Home Office bundle in a letter from the Appellant's representatives of 9th October 2014 there are extracts from the relevant IDIs. It is clear from the section dealing with a TA member that an individual serving on duty such as a weekend exercise would be exempt from immigration control but on completion of his service would resume his previous status. Although it was thought that there would not be many who had overstayed and who would return to being an overstayer that possibility was explicitly contemplated.
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> 10. It appears that simply being a member of the TA is insufficient to bring an individual within the definitions that apply once an individual had been discharged then they would not be subject to service law at any point and accordingly would not be exempt from immigration control. The Appellant has not had leave conferred on any basis under the Immigration Rules.
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> 11. Reference was made to an historic injustice however it is not clear what that would be. The Appellant was not sent on active service and while

reference was made to Rules that in certain circumstances might assist a TA soldier other than the Rules discussed above I was not directed to any other than the Rules that confer exemption only when subject to service law.

12. As the Appellant's applications that were made when he was in the TA were rejected and there was no successful application or challenge in the courts I cannot find that the Appellant benefited from the Rules that applies to members of the armed forces. It has not been shown that his exclusion from those Rules is unfair or amounts to an injustice, there is nothing to suggest that his position can be equated to that of the Gurkhas."

4. The Appellant left the Territorial Army on 19th November 2013 at his own request. His application for leave to remain made on 7th January 2014 was made out of time under paragraph 276 as it was made more than 28 days after his discharge. The application for leave which forms the subject of the present appeal was made nearly ten months after his discharge. The Appellant had only been in the United Kingdom since 2008 and could not meet the requirements of paragraph 276ADE. Even assuming his presence in the United Kingdom had been lawful throughout he was still three years or so short of the minimum time required under the paragraph. The Appellant had shown himself to be adaptable having moved from Dominica to the Dutch Antilles and from there to the United Kingdom and then establishing himself in the Territorial Army. The Appellant had grown up in Dominica and there could not be said to be very significant obstacles to the Appellant's return there.

5. At paragraphs 17 to 26 the Judge dealt with the Appellant's claim to have a family life. Dealing first with Appendix FM the Judge noted that paragraph EX.1 was not a standalone provision it was only engaged where other requirements had been complied with. The Appellant's fiancée told the Judge that she was in a new job and would be paid £15,100 a year which plus pension would be a total income of £16,900 per annum. The Judge was nevertheless apparently satisfied that the financial requirements were met and that the Appellant met the suitability requirements and would meet the English language test requirement.

6. The Appellant met his partner in 2009 and had been in a relationship living together since 2010. Both the Appellant and his partner were aware that the Appellant had been in the United Kingdom illegally becoming an overstayer after his visit visa expired. The relationship appeared to be genuine and subsisting and the Appellant's partner had never been to Dominica. However the Judge could not find that there were insurmountable obstacles that could not be surmounted or that would entail very serious hardship. The Judge rejected the claim under Appendix FM EX.1. The Appellant could return to Dominica and make an application for entry clearance as a partner or fiancée in the usual manner supported by the required evidence. The Judge acknowledged that this was not addressed as an issue in Appendix FM but it was for the Appellant to show that it would disproportionately interfere with his Article 8 rights to expect him to return to Dominica to make an application from there.

7. Such a separation would impose a financial burden but much of the Appellant's time in the United Kingdom was spent as an overstayer. By Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 little weight could be given to a relationship formed when the Appellant was in the United Kingdom illegally. That was the case here and both the Appellant and his fiancée were aware of the difficulties. It would not be disproportionate to expect the Appellant to leave the UK and make a proper application in the usual way. The Judge concluded at paragraph 26:

> "Article 8 is not a bypass to the Immigration Rules and the Rules form the starting point for the assessment of any application. This is not a case where the Appellant is in a situation not contemplated by the Rules, he is in a situation foreseen by the Rules but where he cannot meet the requirements including those of paragraph EX.1. There is nothing in the Appellant's circumstances that would justify granting leave to remain outside the Immigration Rules and accordingly the appeal cannot succeed".

The Onward Appeal

8. The Appellant appealed against this decision arguing that the Appellant's case should have succeeded outside the Immigration Rules due to the unusual and exceptional circumstances in the case. If proper regard was not had to the circumstances it would lead to the conclusion that the army had unlawfully taken into service an illegal immigrant. The Judge had made a number of mistakes. The financial limit was £18,600 and would not be met by an income of £16,900 as the Judge had concluded. Members of the reserved forces such as the Territorial Army could not normally apply for leave to enter or remain solely on the basis of their reserve service but the Judge had failed to appreciate this. From 11th July 2013 a person was required to have five years legal residency in the UK at the time they applied to join the army. However there was no such requirement when the Appellant applied to join the Territorial Army. The Judge had failed to appreciate the historical injustice in the case. There then followed at paragraph 4 of the grounds a lengthy recitation of the IDIs relating to the armed forces which the Judge had already summarised in his determination (see above paragraph 3).

9. The grounds complained that the Respondent had taken almost two years to reply to the 2011 application and that it was this delay which contributed to the Appellant's stay in the United Kingdom. The Appellant had not been given a confirmed exemption as should have occurred. The Respondent had rejected the Appellant's application for leave to remain on the basis that no fee was submitted when in fact no fee was payable.

10. The Judge erred in considering that the Appellant needed to be sent on active service before an historic injustice could arise. The grounds highlighted paragraph 5.2 of the Home Office guidance that whilst a person was serving on duty in the Territorial Army he should be regarded as exempt from control. There was substantial evidence of the Appellant's service in the Territorial Army submitted to the Judge at first instance. Paragraph 9 of the grounds listed these items including a letter from

the army, payslips, vaccination certificate, army ID card, annual appraisals and other documents. The historical unfairness affected the Appellant's circumstances in both his private and family life.

11. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cruthers on 2nd February 2016. He refused permission to appeal finding that whilst this might be an unusual case it was not exceptional. Part-time army service between 2008 and 2013 could not provide a proper basis for the grant of leave to remain. The Judge's apparent error regarding the amount required to satisfy the financial requirements of Appendix FM was an error in favour of the Appellant and could have made no difference to the result. In reality the grounds amounted to little more than an attempt to quarrel with the conclusion that the Article 8 case had not been made out.

12. The Appellant renewed his application for permission to appeal to the Upper Tribunal. The Sponsor's income of £16,900 represented a near-miss as contemplated in the case of **SS (Congo) [2015] EWCA Civ 387**. That a case involves a near-miss cannot mean that that is wholly irrelevant to the balancing exercise required under Article 8. The renewed application for permission to appeal came on the papers before Upper Tribunal Judge Finch on 26th February 2016. In granting permission to appeal she wrote:

> "First-tier Tribunal Judge Parkes was in error in paragraph 26 of his decision when he found that it was not a case where the Appellant is in a situation not contemplated by the Rules. As explained in **Chen [2015] UKUT 189** whether the temporary separation caused by an individual within a couple returning to apply for entry clearance amounted to a breach of Article 8 was not addressed in Appendix FM. Therefore the First-tier Tribunal should have considered the appeal outside the Immigration Rules and when doing so should have taken into account the Appellant's service in the Territorial Army. As a consequence I find that the First-tier Tribunal Judge Parkes did make arguable errors of law when dismissing the Appellant's appeal and that permission to appeal should be granted."

The Hearing Before Me

13. The Appellant's solicitor indicated she relied substantially on the documents submitted to the Tribunal seeking permission to appeal. The Appellant's case was not one that could be considered by the Rules and therefore discretion should have been exercised in the Appellant's favour. The historical injustice was set out in the Appellant's statement and the skeleton arguments. The rejections of his previous applications were not justified. All the Appellant needed to do was to send his passport and a letter from the army but the Respondent rejected the application because no fee was provided when no fee was payable. It was conceded that the facts of the Gurkha cases which dealt with historic injustice were totally different but the point was the same.

14. In reply the Presenting Officer commented that Upper Tribunal Judge Finch appeared to be under a misapprehension that the Judge was unaware of the

historical background but in fact the Judge was perfectly aware of those issues. This was not a compelling case to go outside the Rules. The **Chen** point was that it was for the Appellant to show why separation from his partner while he returned to obtain leave to enter was disproportionate. Given the Judge's finding that the partner was earning £16,900 it was far from clear that entry clearance would automatically be granted and therefore it was reasonable to expect the Appellant to return to apply for entry clearance from Dominica.

15. In conclusion it was argued on the Appellant's behalf that no case law had been cited in the decision. The manner in which the Judge considered the proportionality exercise was flawed. The issue should be looked at in the round instead of being split into different parts of the determination. There were exceptional circumstances in the Appellant's favour and the appeal should have been allowed.

Findings

16. The Appellant's argument as to historical injustice is not entirely easy to follow (as the Judge pointed out at first instance) but it appears to be based on the premise that if the Appellant applied for leave to remain whilst serving in the Territorial Army such an application should have been granted because he was exempt from immigration control at that time. I agree with the submission made to me by the Presenting Officer that the Judge at first instance was aware of that argument and took some time and care in his determination to deal with it. I have set out verbatim above the relevant extract from the determination which shows that the Judge was aware of both the statutory background and the IDIs issued by the Respondent which governed this situation.

17. It did not follow that because the Appellant was serving in the Territorial Army that any application he might make to the Respondent must be determined in his favour. The Judge was careful to explain the difference between service in the Territorial Army and service in the regular army and what that meant in terms of exemption from immigration control. I do not take Upper Tribunal Judge Finch's decision to grant permission to appeal to be a criticism of that aspect of the determination. Rather I take Upper Tribunal Judge Finch's decision to mean that the Article 8 claim had to be looked at in the round given the fact that the Appellant had served this country in the capacity of a Territorial Army recruit. However it has to be said that the Judge was aware of that point as well and also dealt with that. Service in the Territorial Army could not be equated with service in the regular army for the reasons given by the Judge who illustrated the difference by pointed out that the Appellant had not for example been required to leave the United Kingdom on active service.

18. The Appellant also complained that the applications made whilst he was still in the Territorial Army were rejected on incorrect grounds namely non-payment of a fee which in fact was not payable. The Judge noted at paragraph 6 that it was not clear whether the Appellant had sought to challenge the Respondent's decisions to reject. In the case of a second application made by the Appellant in 2011 (for leave to remain as a spouse) which was rejected by the Respondent she appears to have

reconsidered that rejection but maintained her decision. In the circumstances it is difficult to see how the argument that the Respondent in the past had not dealt correctly with earlier applications made by the Appellant carried any weight in the present proceedings. The present appeal against a further application made in 2014 could hardly be the appropriate forum for an historical inquiry into previous leave applications made by the Appellant.

19. Much was made of the argument that the temporary separation of a couple whilst one went back to apply for entry clearance was not addressed in Appendix FM. However it is difficult to see how that point impacts with any significance on the issues raised in this case. It is important to consider the remainder of the headnote in the case of **Chen** which states:

> "There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba [2008] UKHL 40**."

20. In other words whilst Appendix FM did not include consideration whether it would be disproportionate to expect temporary separation the burden was still upon the Appellant to show that such temporary separation would be disproportionate. At paragraph 23 of the determination the Judge summarised the ratio in **Chen** and then dealt with the point at paragraph 24 which I have quoted above. It was for the Judge to decide whether the temporary separation which would be caused by the Appellant returning to Dominica to apply for entry clearance from there was or was not proportionate to the legitimate aim being pursued. It is quite clear at paragraph 24 that the Judge considered that very point and made his decision accordingly. It would not be correct to say that the Judge did not consider the appeal outside the Immigration Rules. He clearly did, see also paragraph 25.

21. The confusion appears to have arisen as a result of what the Judge went on to say at paragraph 26 when he said that this was not a case where the Appellant was in a situation not contemplated by the Rules. That remark has to be seen in the context of what the Judge went on to say that the Appellant was in a situation foreseen by the Rules "but where he cannot meet the requirements including those of paragraph EX.1". That was the situation contemplated by the Rules. I do not read paragraph 26 as being a reference back to the **Chen** point but rather the Judge was making a different point that the Appellant could not meet the Immigration Rules and there was nothing in the case that justified granting leave to remain outside the Immigration Rules.

22. The Judge appears to have erred in considering that the lower figure of £16,900 might be sufficient to meet the terms of Appendix FM. That as First-tier Tribunal Judge Cruthers pointed out was an error in the Appellant's favour. The Appellant's

argument whilst acknowledging that the Judge was wrong was that a near miss meant this could be looked at exceptionally under the terms of **SS (Congo)**.

23. I do not consider that that gives rise to any argument that the Judge erred in law. The essence of a near-miss argument is an acceptance by the court that the Appellant has failed to meet the Immigration Rules where relevant but nevertheless the appeal should still be allowed outside the Rules. What happened here was almost exactly the reverse. The Judge erroneously found that the Appellant met the financial requirements of the Rules and had to bear that in mind when deciding on the overall proportionality exercise (given that there were still matters that the Appellant could not satisfy within the Rules).

24. The Judge carefully considered that point and found against the Appellant. He was aware of the arguments that the partner had employment in the UK and had never been to the Appellant's home country but for the reasons which he gave at paragraph 21 and 22 any difficulties there might be in relocation could not amount to insurmountable obstacles. It was at that point that the Judge then turned his attention to the issue of temporary separation if the partner remained in this country whilst the Appellant returned to Dominica to apply from there. This was not a **Chikwamba** case for the reasons advanced by the Presenting Officer in argument before me. It could not be said that the Appellant would automatically succeed upon return therefore it was not a mere bureaucratic requirement that he should return to Dominica and apply for entry clearance from there. There were issues which would need to be dealt with in an application. The Judge was correct in apportioning little weight to the relationship between the Appellant and the partner. The criticism made of the Judge that he failed to cite sufficient case law falls down at this point not least because the 2002 Act applies in the proportionality exercise because it is a statute. The Judge was aware of the relevant part of the section and applied it. Given the little weight that could be ascribed to the relationship developed at a time when the Appellant had no leave, it was difficult to see how the Respondent's decision would be disproportionate under Article 8. The Judge gave clear and cogent reasons for his findings and I uphold his decision to dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5th day of May 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As no fee was payable and the appeal was dismissed there could be no fee award.

Signed this 5th day of May 2016

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Deputy Upper Tribunal Judge Woodcraft