



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

Appeal Number: IA/44665/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
(Employment Tribunal)
On 7th September and 9th November 2015**

**Decision & Reasons Promulgated
On 21st January 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PETER GACHATHI KINUTHIA

Respondent

Representation:

For the Appellant: Mr A McVeety on 7th September 2015; Mr D Mills on 9th November 2015, Senior Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. Following a hearing on 7th September 2015 I reached the following decision and made the following directions (typographical errors corrected):

"1. The appellant (hereafter the SSHD) sought and was granted permission to appeal a decision of the First-tier Tribunal which allowed the appeal of Mr Kinuthia against a decision of the respondent dated 27th October 2014 refusing to vary his leave to remain outside the Rules and deciding to remove him pursuant to s47 Immigration, Asylum and Nationality Act 2006.

Background

2. Mr Kinuthia, a Kenyan citizen, entered the UK on 12th January 2013 having been issued with entry clearance on 5th January 2013 valid until 5th January 2014 as a Tier 5 (Charity) Worker. Whilst in the UK he applied for and was interviewed by the British Army; successfully completed the selection process and on 25th November 2013 he was allocated an intake into the British Army of 24th February 2014. He immediately applied for a visa extension and on 25th February 2014 his leave to remain was varied and extended until 25th September 2015 endorsed "Forces not exempt leave to remain". On 7th April 2014 the Army issued him with a provisional start date of 7th July 2014.

3. On 19th August 2014 Mr Kinuthia applied for further leave to remain outside the Rules having been informed by the Army that he could not take up his place until he had completed 3 years lawful residence in the UK. That application was refused and a removal decision made on 27th October 2014 for reasons set out in an accompanying letter dated the same date. The SSHD considered the application for leave to remain outside the Rules and stated:

"The Secretary of State's policy is to consider granting leave outside the Immigration Rules where particularly compelling circumstances exist. Grants of such leave are rare and are given only for genuinely compassionate reasons. We have carefully considered your application for leave to remain to allow you to complete the necessary period of residence in the United Kingdom prior to joining the Armed Forces, for which there are no provisions under the Immigration Rules. The Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules.

Your application has been refused due to the fact that a variation of leave to remain is being sought for a purpose not covered by these Rules."

4. The First-Tier Tribunal Judge found the following material facts (which have not been challenged by the SSHD):

"9. The Home Office has previously exercised its discretion and granted the appellant Limited Leave to Remain in the United Kingdom from 25/02/14 until 25/09/14, as "Armed Forces not exempt from control" [in fact the endorsement read FORCES NOT EXEMPT LEAVE TO REMAIN]. Evidently the Home Office had decided that the appellant fulfilled the discretionary leave criteria presumably since the appellant's application to join the Army had been successful.

10. [Mr Kinuthia] made a further application to remain on the same basis, requesting the Home Office exercise its discretion outside of the Immigration Rules but his application was refused.

*11. In reaching the decision to refuse the application, the decision maker (applying **Ukus**, in the "purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it") noted that s/he should consider if "particularly compelling circumstances" existed. However it is not clear from the Reasons for Refusal Letter which such circumstances did not exist. The decision maker simply writes, "the Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules" without any further elaboration.*

12. The appellant fulfilled the discretionary criteria to be awarded Limited Leave to Remain in the United Kingdom from 25/02/14 until 25/09/14n much the same circumstances as existed when he made his further application in August 2014. Indeed [Mr Kinuthia] had progressed further and had been allocated a date to start Army training.

13. I am satisfied that the Home Office has given no reason as to why the application has been refused in circumstances where it is previously exercised its discretion in the appellant's favour. Accordingly I am satisfied that the decision 'is not in accordance with the law' (s86(3)(a))."

Error of law

5. The grounds of appeal assert that the description of the refusal letter as one without reason was

"... wrong and constitutes, at the very least, an error of fact. The refusal lays out the policy outside the IRs as well as the requirements for success under it and then explains that it is not considered that the A's desire to join the armed forces comes under that category.

6. There is nothing in law or policy that required the R to make reference to the pervious grant of leave to remain and the FtJ had not detailed any factors separate from the A's desire to be in the armed forces which might be said to be missing from the R's consideration."

6. I was not provided with a copy of the SSHD's policy in force either at the date when Mr Kinuthia was granted his "Forces not exempt Leave to remain" leave or at the date of that decision or the date of the decision the subject of this appeal. Nor was I provided with a copy of any policy that may have existed at those dates that covered recruitment to the Armed Forces. It was agreed that I could look for these documents on conclusion of the hearing and take them into account in reaching my decision.

7. The Armed Forces Guidance in force prior to and at the date of decision as "Forces not exempt leave to remain" was Chapter 15, Section 1 Armed forces:General. Section 3 reads:

"... A person admitted in another capacity (eg visitor, student) who wishes to join HM Forces should be advised to contact them directly – **enlistment is entirely a matter for the armed force concerned**. Normally, initial contact with a local recruitment office will be followed by a series of tests, interviews and later, an intensive selection lasting 1.5 days. After this, is a person is to be accepted into one of the armed forces, he will be invited to take an oath of allegiance ...

Once the applicant has been enlisted into HM Forces, he should submit his passport to the UK Border Agency ... When submitted, the passport of the person should be endorsed with suspension of any limited leave to enter/remain. The standard exemption endorsement should be used ..."while Section 8(4) of the Immigration Act 1971 applies to the holder" ...

...

Delayed enlistment. There may be circumstances where the receiving unit only runs one or two basic training courses per year and the enlistment date is therefore delayed. Where evidence of this is supplied, a period of six months' leave code 3 may be granted outside the Immigration Rules to cover the period up to the enlistment date provided.

...

8. *The Guidance Armed Forces on Appendix A Armed Forces of the Immigration Rules valid from 6th November 2014 does not permit switching and requires that for a person to be granted leave to remain as a person subject to immigration Control, the applicant must have inter alia*

“... made a valid application for leave to enter or remain as a member of another armed force subject to immigration control ...

...

have last been granted entry clearance, leave to enter or remain under Part 9 or under the previous concession relating to course F

...

Leave to remain will be issued for whichever is the shorter period of either:

The duration of the training, study or familiarisation, and

Four years including any leave granted under paragraph 57 or 59 or under the previous ‘Course F’ concession

...

9. *The LOTR policy valid at the date of the grant of leave and at the date of the decision the subject of this appeal states:*

“2. ... It is not possible to give instances or examples of case-types that might be defined as “particular compelling circumstances”. However, grants of such LOTR should be rare, and only for genuinely compassionate and circumstantial reasons ...”

10. *I was unable to find a copy of the ‘Course F’ concession. I was unable to establish whether and to what extent there were any transitional provisions in the Armed Forces guidance that related to individuals in the position of Mr Kinuthia namely granted a period of leave to remain in order to undergo army training but then falling within a Rule change at a time when an extension was requested. I was unable to establish whether at the time the army accepted Mr Kinuthia in their assessment programme a 3 year residence requirement was in place. It did not appear that the respondent has considered whether there were ‘circumstantial reasons’ in deciding whether Mr Kinuthia should be granted LOTR.*

11. *The FtT Judge did not have this information before him. Mr Kinuthia was unrepresented and it does not appear that these matters were brought to the attention of the judge by the presenting officer. Although it cannot normally be said that a FtT judge has erred in law in failing to have regard to matters that were not brought to his attention, in this instance it seems possible that these matters are such that should have been brought to his attention or at the very least considered by the respondent in reaching her decision.*

12. *In these circumstances I am not therefore in a position at this stage to reach a decision as to whether there was an error of law in the FtT decision, albeit he was not directed to policy, concessions and Rule changes that may have been relevant.*

13. *I accordingly direct that the following are filed and served on each party and on the tribunal within 28 days of the date this order is sent to the parties:*

(a) The SSHD to file and serve copies of the immigration directorate instructions relevant to the Armed Forces and Leave outside the Rules(LOTR) on

(i) The date the decision was taken to grant Mr Kinuthia his FORCES NOT EXEMPT LEAVE TO REMAIN (“FNELTR”) visa;

(ii) The date the decision was taken to refuse him leave to remain (the decision the subject of this appeal);

(b) The SSHD to file and serve a copy of the 'Course F' concession;

(c) The SSHD to file and serve a copy of the relevant Immigration Rule in force at the two dates together with any transitional provisions;

(d) The SSHD to file and serve, any information she has as to whether at the date the decision was taken to grant Mr Kinuthia his FNELTR visa, the army required 3 years residence.

(e) Mr Kinuthia to file and serve such information as he has as to whether at the date he was granted his FNELTR visa the Army required 3 years residence.

(f) Both parties at liberty to make such written submissions as they wish within 7 days after service of the above documents.

14. On receipt of these documents the Tribunal will proceed to determine this appeal, (save that consideration will be given to whether further oral submissions would be of assistance to the Tribunal in which case a Notice of Hearing will be sent)."

2. Pursuant to my directions, I received written submissions from the SSHD, which included a copy of the casework instruction dated 3rd April 2012. The SSHD confirmed that it appeared that I had found the correct guidance relating to the periods when the decisions were made relating to Mr Kinuthia and confirmed that the SSHD was unable to find anything regarding the length of time the army required a candidate to have had lawful leave in the UK. The Course F instruction, the SSHD stated, was a category used by the UK military when foreign countries send military personnel (normally officer rank) for training at one of the UK's training establishments. The SSHD did not file and serve a copy of the relevant Immigration Rules in force at the two dates relevant to Mr Kinuthia (25th February 2014 (grant of FNELTR)) and 27th October 2014 (refusal of further leave to remain and removal decision).
3. Mr Kinuthia, submitted a copy of the emails from the army confirming that he required 3 years lawful residence for his application to be continued.
4. In the light of these submissions, I considered I would be assisted by further oral submissions and this appeal was set down for further hearing on 9th November 2015.
5. Mr Kinuthia had informed me on 7th September 2015, and the respondent did not dispute this, that he had applied for his first variation of leave on 24th November 2013.
6. The casework instruction provided to me by the respondent dated 3rd April 2013 states:

'2.2 It remains an option for staff to extend leave to remain if an applicant meets all applicable rules of the category they are applying under, even if there is a stated intention to join HM Forces or if there are exceptional and compelling reasons to allow an individual to remain in the UK.

2.3 once an individual has taken their Oath of Allegiance and starts basic training they will become exempt from immigration control.'

7. There appears to be a discord at the various stages that Mr Kinuthia has been through in his applications to remain in the UK to join the British Army. He applied for, passed the basic test for admission to the army, and was granted an extension of time by the UKBA to remain to take up the training. The Army then informed him of the requirement for 3 years lawful residence which he did not at that time have (**although he now, at the time of writing this decision, does have**). He applied for further formal leave to remain specifically in order to obtain those three years (having previously been granted leave to remain in order to complete the assessment process) and that application was refused. During this period, there have been Rule and policy changes, some of which appear to relate to him and others of which do not.
8. The reasons for the decision the subject of appeal state

“... We have carefully considered your application for leave to remain to allow you to complete the necessary period of residence in the United Kingdom prior to joining the Armed Forces, for which there are no provisions under the Immigration Rules. The Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules.

Your application has been refused due to the fact that a variation of leave to remain is being sought for a purpose not covered by these Rules.”
9. The decision the subject of appeal was a combined decision dated 27th October 2014 both to refuse to vary leave to remain and to remove Mr Kinuthia by way of directions under s47 Immigration, Asylum and Nationality Act 2006. I have set out above at considerable length the various policies and statements by the SSHD in so far as I have been able to find them. In a commendably short and succinct decision by the First-tier Tribunal the First-tier Tribunal judge concluded that the respondent had not given reasons for reaching a decision that the Mr Kinuthia did not benefit from consideration outside the Rules and ‘remitted’ the decision for a lawful decision to be taken.
10. It is plain that Mr Kinuthia cannot succeed under the Immigration Rules per se. There is no provision under the Rules for him to be granted leave to remain for the required period to enable him to acquire the three years necessary period of residence in the UK to fulfil the Army’s requirements. Mr Kinuthia did not seek to argue that the decision to refuse him leave to remain under the Rules was unlawful – his application had been made for leave to remain outside the Rules and thus his appeal was founded upon that decision. – Mr Kinuthia did not, at the time of his application, or the decision meet the requirements of the Immigration Rules, taking account of the transitional provisions.
11. In reaching her decision on the application before her, the respondent appears to have solely considered whether Mr Kinuthia meets the requirements of the Immigration Rules. She does not appear to have taken any account whatsoever of her previous decision to grant leave to remain to enable Mr Kinuthia to undertake the relevant admission procedures to the British Army. It is inconceivable that she would not have known of the three-year lawful residence requirement of the Army

when granting leave to remain outside the Rules to enable him to undergo the recruitment process. One must ask what was the point in granting Mr Kinuthia leave to remain outside the Rules to undergo that process and yet not have in mind that there would be a further period of leave required to enable him to take up the training if he passed that recruitment process. If she were not going to permit him leave to remain to access the training, then why put Mr Kinuthia and the Army to the expense of going through the recruitment process.

12. It is simply unsatisfactory for the respondent to refuse to grant leave to remain outside the Rules without at the very least considering the full circumstances and the casework instructions when considering the exercise of her discretion and then to decide to remove Mr Kinuthia. The reasons for such a decision are inadequate in the extreme and show a complete disregard to her policy (see paragraphs 6 and 8 above).
13. The First-tier Tribunal therefore, albeit not specifically allowed in such terms, was correct to find the decision to remove Mr Kinuthia to be unlawful. There is no material error of law in the decision of the First-tier Tribunal. I do not set aside the decision of the First-tier Tribunal to allow the appeal.

Conclusion

There is no error of law in the First-tier Tribunal decision.

Note: The consequence of this decision is that Mr Kinuthia has, since his arrival in the UK been lawfully in the UK. He has thus been lawfully present since 12th January 2013 and remains lawfully present until a lawful decision is taken and his appeal rights exhausted, if it is an adverse decision. I have no doubt that the respondent will now consider afresh Mr Kinuthia's application in the light of his circumstances and the previous leave granted and will seek information from Mr Kinuthia as to his current circumstances with regard to his Army application.

Date 20th January 2016

Upper Tribunal Judge Coker