



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

Appeal Number: IA/31898/2015

THE IMMIGRATION ACTS

**Heard at Bradford
On 2nd May 2017**

**Decision & Reasons Promulgated
On 24th May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**HAMILTON FLEX CHIWAYA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Preston, solicitor, ILAC

For the Respondent: Mr Diwncyz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Spencer made following a hearing at Bradford on 1st August 2016.

Background

2. The appellant is a citizen of Malawi born on 6th November 1994. He came to the UK on 2nd October 2010 with entry clearance to join his father who is a member of the British Army, with leave to remain as his father's dependant until 2015.

3. He and his sister, who came with him, made an in time application for further leave to remain. Whilst his sister was granted leave to November 2019, the appellant was refused on the grounds that he did not meet the requirements for leave with respect to family or private life in the UK, because his presence here was not conducive to the public good; his convictions made it undesirable to grant leave to remain. He therefore failed to meet the requirements of paragraph S-LTR.1.6.
4. He appealed to an immigration judge.
5. The judge set out the evidence. The appellant was diagnosed as HIV positive in 2010 and receives medical treatment for HIV. He also suffers from depression.
6. With respect to the appellant's convictions he wrote as follows:

"I accept that the criminal convictions relate to offences that are of a more minor nature. However I find that there are a lot of offences. They span over a four year period and it is apparent that the appellant has repeatedly committed exactly the same offences on occasions (e.g. shoplifting and driving whilst over the prescribed limit). This shows that unfortunately the non-custodial sentences or the custodial sentences have not worked in rehabilitating him. I find that the appellant has committed offences that could create a danger and/or risk to the public e.g. driving whilst over the prescribed limit and shoplifting."
7. The judge noted that two of the offences were committed a few months before the hearing which indicated to him that the appellant was still not abiding by the law. The judge considered the five step approach outlined by Lord Bingham in Razgar v SSHD [2004] UKHL 27 and concluded that the interference with the family's right to respect for their family life by the removal was proportionate to the legitimate public end sought to be achieved. On that basis he dismissed the appeal.
8. It was at this point that the appellant, who was not represented at the hearing before the judge, engaged his present representatives who drafted the application for permission to appeal.
9. The grounds cite paragraph 276AA which set out the requirements for indefinite leave to remain in the UK as the child of a parent, parents or a relative present and settled in the UK or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under Section 8(4)(a) of the Immigration Act 1971 and has at least five years' continuous service. The appellant had accrued five years' leave and was therefore entitled to indefinite leave to remain as the child of a member of HM Forces who is exempt from immigration control or who has five years' service. It was argued that the Immigration Judge had failed to adequately

assess the appeal on its facts and failed to conduct an adequate Article 8 assessment.

10. Permission to appeal was initially refused by First-tier Tribunal Judge Adio who said that since the appellant was over 18 at the time he made his application he could not have succeeded under the Rules quoted in the application for permission to appeal.
11. Upon renewal it was granted by Upper Tribunal Judge McGeachy.

The Hearing

12. Mrs Preston relied on her grounds and on paragraph 50(a) which requires that, upon an application for indefinite leave, limited leave must be granted to the child of a member of HM Forces who falls to be refused by virtue only of failing to meet the suitability requirements of the Rules.
13. The suitability grounds are set out at paragraphs 8 and 9 of the Immigration Rules. They set out the circumstances where applications will be refused on grounds of suitability and include cases such as the appellant who has a large number of convictions from 2012 to 2016 for theft and kindred offences and other miscellaneous offences for which he received a large number of non-custodial sentences. On one occasion he served a sentence of six weeks out of a fifteen week sentence for theft at a young offenders' institution in 2014. She did not seek to argue that the appellant could not properly be regarded as a persistent offender who has shown a particular disregard for the law.
14. Mr Diwncyz agreed with the First-tier Judge who had originally refused permission to appeal and submitted that the phrase:

“Limited leave to remain as a child of a member of HM Forces.”

Should be construed as to mean a minor, and therefore the judge's lack of reference to that Rule was immaterial since it could not assist the appellant.

Consideration of whether there is a material error of law.

15. Paragraph 49 of the Immigration Rules states as follows:

“49. Indefinite leave to remain as the child of a member of HM Forces will be granted to an applicant who has or has had leave to enter or remain under paragraph 43 or 47 of this Appendix or paragraph 276AH of these Rules and who:

(a) was either:

(i) under 18 years of age at the date of application; or

- (ii) aged 18 or over at the date of application and who was last granted leave under paragraphs 43 or 47 of the Appendix or paragraph 276AH of these Rules;
- (b) is not married or in a civil partnership;
- (c) has not formed an independent family unit;
- (d) is not leading an independent life;
- (e) is in the UK;
- (f) has made a valid application for indefinite leave to remain as the child of a member of HM Forces;
- (g) is not in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded;
- (h) is the child of:
 - (i) a foreign or Commonwealth citizen who is a serving member of HM Forces who has completed at least five years' reckonable service; or
 - (ii) a person who has been granted, or is being granted at the same time as the applicant, indefinite leave to enter or remain under paragraph 13 or 16 of this Appendix or paragraphs 276E to Q of these Rules; or
 - (iii) a member of HM Forces who is a British Citizen;
 - (i) meets one of the following criteria:
 - (i) the applicant's other parent must:
 - (aa) also come within paragraph 49(h); or
 - (bb) have been granted indefinite leave to enter or remain under paragraph 25 or 31 of this Appendix or paragraph 276S or 276V of these Rules; or
 - (cc) be being granted indefinite leave to enter or remain under paragraph 25 or 31 of this Appendix or paragraph 276S or 276V of these Rules at the same time as the applicant; or

- (dd) have died; or
 - (ii) the parent under paragraph 49(h) has sole responsibility for the applicant's upbringing or the applicant normally lives with this parent and not their other parent; or
 - (iii) there are serious and compelling family or other considerations which make the applicant's exclusion from the UK undesirable and suitable arrangements have been made for their care;
- (j) does not fall to be refused on the grounds of suitability under paragraphs 8 or 9;
 - (k) meets the general eligibility requirements in paragraph 42;
 - (l) where the applicant is 18 or over, can demonstrate sufficient knowledge of the English language and about life in the UK, in accordance with the requirements of Appendix KoLL to these Rules;
 - (m) will be accommodated adequately by the parent or parents the applicant is seeking to remain with without recourse to public funds in accommodation which the parent or parents the applicant is seeking to join, own or occupy exclusively; and
 - (n) will be maintained adequately by the parent or parents the applicant is seeking to join, without recourse to public funds.
50. Limited leave to remain as a child of a member of HM Forces for a period of 30 months and subject to a condition of no recourse to public funds will be granted:
- (a) where an applicant fails to meet the requirements for indefinite leave to remain in paragraph 49 by reason only of failing to satisfy the suitability requirements in paragraph 8 or 9 in respect of a grant of indefinite leave to remain (but not a grant of limited leave to remain); or
 - (b) where an applicant fails to meet the requirements for indefinite leave to remain by reason only of failing to meet the requirements in paragraph 49(l); or c) by reason only of failing to meet the requirements of paragraph 49(h)(i) or (ii), provided that the applicant's sponsor has been granted

leave to enter or remain under paragraph 15 or 19 of this Appendix.”

16. I conclude that the reference to child in paragraph 50 means the son or daughter of a member of HM Forces and not a minor as suggested by Mr Diwncyz.
17. First, if the Rules had intended that the provision should only refer to minors they would have said so. Second, the paragraph to which it refers plainly is concerned with both children of serving members of HM Forces who are under 18 and those who are over 18. Paragraph 50 refers to the inability of an applicant to meet the requirements for indefinite leave to remain in Paragraph 49. Paragraph 49 refers to applicants who are both under the age of 18 years at the date of application and those who are 18 or over who had last been granted leave under paragraph 43 or 47, as in this case.
18. The appellant did not make an application under paragraph 49, for indefinite leave to remain. Had he done so, it would appear that he would have met all of the requirements of that paragraph save for the suitability requirements.
19. On the findings of the Immigration Judge, none of which are challenged by the respondent, he is still living with his father, stepmother, sister and stepbrother and is not leading an independent life. His mother died in 2004. The judge said in terms that the appellant’s father had financially and emotionally supported him during his lifetime. He was initially granted leave to remain under paragraph 43 as the child of a member of HM Forces. According to his witness statement his father has been a serving member of the British Army for seven years. The judge accepted that the appellant could speak English.
20. The sole reason why the appellant would have been refused, had he applied for indefinite leave, would have been on suitability grounds. According to Rule 50, in these circumstances, limited leave to remain will be granted for a period of 30 months subject to a condition of no recourse to public funds.
21. I have great sympathy with the Immigration Judge. These Rules were not brought to his attention by the appellant who was not advised of their existence by his previous representatives. Neither, it has to be said, did the respondent realise that they were potentially applicable when the appellant made his application for further leave to remain.
22. Nevertheless the fact that the appellant should have been given leave for a period of 30 months had both he and the respondent realised that paragraphs 49 and 50 applied, is plainly relevant to the issue of proportionality.
23. Accordingly, the judge erred in law, and his decision is set aside.

Findings and Conclusions

24. The judge concluded that the appellant could not meet the requirements of the Immigration Rules which he was considering but accepted that there were compelling circumstances in this case so as to require a consideration of Article 8 outside the Rules. His assessment has not been challenged.
25. It is quite plain from the determination that the judge accepted that there was family life in this case. The unchallenged evidence is that the appellant has always lived with his father except for a period of time when his father obtained accommodation for him for six months at a friend's house in Birmingham. The appellant is unwell, suffering from HIV and from depression. There is therefore clearly a degree of dependency here which amounts to more than the normal emotional ties.
26. The appellant has distant relatives in Malawi, his father has associates there and will be able to assist him financially. He will be able to receive the correct medical treatment there. Those factors favour his removal. However, the fact that the appellant satisfies the requirements of paragraph 50, is also highly relevant to the question of whether it would be proportionate for him to be removed. Indeed paragraph 50 envisages these precise circumstances, namely where an appellant would normally be refused on suitability grounds but who would otherwise have been granted indefinite leave to remain. It states in mandatory terms that leave will be granted for a period of 30 months.
27. That firmly tilts the scales in his favour.
28. In conclusion, the appellant has successfully navigated through to the issue of proportionality, having both established that there were compelling circumstances in his case such as to require an assessment of Article 8 outside the Rules. Having established that he enjoys family life in the UK deserving of respect, the fact that he meets the requirements of paragraph 50 renders it disproportionate for him to be removed.

Notice of Decision

29. The original judge erred in law. His decision is set aside. It is remade as follows. The appellant's appeal is dismissed with respect to the Immigration Rules. It is allowed with respect to Article 8.

No anonymity direction is made.

Signed

Date 23 May 2017

A handwritten signature in black ink that reads "Deborah Taylor". The signature is written in a cursive style with a large initial 'D' and a distinct 'T'.

Deputy Upper Tribunal Judge Taylor