ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 22 January 2008 & 22 April 2008

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Grubb

Between

AM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr S. Unigwe, instructed by Matthew Wokeson & Co Solicitors
For the Respondent: Mr J Gulvin, Home Office Presenting Officer (22 January 2008)
Mr G Saunders, Home Office Presenting Officer (22 April 2008)

Section 88(2)(d) of the Nationality, Immigration and Asylum Act 2002 restricts the grounds of appeal to those mentioned in s 88(4) if and only if the reason cited has some relationship to the application.

DETERMINATION AND REASONS

1. This appeal provides yet another example of uncertainty and maladministration resulting from the casual promotion and publication of "policies" by the Secretary of State. In R (Tozlukaya) v SSHD [2006] EWCA Civ 379 the Court of Appeal found that a change in a policy had not been properly implemented and was trenchantly critical of the resulting confusion. In OS [2006] UKAIT 00031 the Tribunal found that

© CROWN COPYRIGHT 2009

the Secretary of State's published policy denied the existence of the relevant Immigration Rules. More frequently, the Immigration Rules have been simply overridden by declarations of policy, most notably perhaps in the case of degree-level students. In HH [2008] UKAIT 00051 the Tribunal was shown a policy, apparently clear on its face, and not withdrawn (until the hearing in HH itself), which the Secretary of State and apparently all her officers had forgotten. In the present case the problem is different: the policy was published in different versions to different groups of interested people, with the result that the Secretary of State's officers were themselves not aware of its terms. It has become in general apparent that litigation is now often necessary to enable even the government to discover what its immigration policies are.

2. The appellant is a citizen of Ghana. He appealed to the Tribunal against the decision of the respondent on 17 July 2007 refusing to vary his leave. The Immigration Judge dismissed his appeal under the Immigration Rules but allowed it on human rights grounds. The respondent sought and obtained an order for reconsideration. Thus the matter comes before us.

3. Although the order for reconsideration was made solely on the basis that the Immigration Judge may have erred in failing to set out the basis upon which he found that a refusal of the appellant's application would breach his human rights, a number of issues were canvassed before us, including questions relating to whether the appellant had a right of appeal at all, and the respondent's decision -making process.

4. The appellant had always wanted to be a soldier. He obtained a visitor's visa in Ghana on 23 September 2003 and, using it, was admitted to the United Kingdom on 10 November 2003. His visa thereupon took effect as leave to enter until 23 March 2004. In order to obtain the visa the appellant must have persuaded the Entry Clearance Officer that he met the requirements of para 41 of the Statement of Changes in Immigration Rules, HC 395, including that he was genuinely seeking entry as a visitor for a limited period as stated by him, not exceeding six months, that he intended to leave the United Kingdom at the end of that period, and that he did not intend to take employment in the United Kingdom. The visa is endorsed "no work or recourse to public funds".

5. Within a few days the appellant had made enquiries about enlistment into the British Armed Forces. A person reading the Immigration Rules might think that such enquiries would put the appellant in danger of having his leave curtailed and of being removed from the United Kingdom. He had, after all, demonstrated that he no longer met the requirements of the Rules relating to visitors and indeed his conduct might be thought to raise a suspicion about his intentions when he obtained his visa. For some reason, however, nobody suggested anything of the sort. That may have perhaps been because the Secretary of State appears to abandon immigration control in the case of those who apply for enlistment in the armed forces after arrival. Chapter

15, s 1 para 3 of the Immigration Directorate Instructions contains the following passage:

> "A person admitted in another capacity (e.g. 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."

6. The last clause is obviously true: what is apparent is that an enquiry about enlistment is regarded as perfectly appropriate for a person who has been admitted to the United Kingdom for other reasons and with conditions inconsistent with an *intention* to work. We put the matter in that way because actual service in the armed forces creates exemption from immigration control under s 8(4)(a) of the Immigration Act 1971. Enlistment is not, however, an instantaneous process and it seems to us that a person seeking enlistment in the armed forces is indeed demonstrating that it is no longer the case that he does not intend to work in the United Kingdom.

7. The appellant's enlistment was quite protracted, and, his leave as a visitor having expired, he was granted a further period of leave (the IDIs describe this as "under code 3") outside the Rules from 10 May to 10 November 2004.

8. He became a member of HM Armed Forces, and so subject to military law and exempt from immigration control, on 18 October 2004. According to his witness statement, he had suffered an injury whilst in basic training. Certainly his injury became troublesome by the middle of 2005, and there are in evidence numerous army documents relating to medical examinations. An assessment dated 24 August 2006 indicates that he "almost certainly" passed out of training erroneously. He had not been able to take part in any organised physical activity other than mild remedial training "from the very first day he arrived". He was discharged as unfit on 2 February 2007. It is clear that the Army regarded his case as unusual and various officers did all they could to ensure that on discharge he had a pension, as indeed he does.

9. On his discharge he became subject to immigration law again. His passport shows that on 10 April 2007 he was granted leave to remain until 8 May 2007, again on condition that he maintain and accommodate himself without recourse to public funds and that he would not engage in employment paid or unpaid, or in any profession. During the currency of that leave he made an application for leave to remain as a discharged soldier. Under s 3C of the 1971 Act the application, made as it was during the currency of existing leave, has the effect of extending that leave and its conditions. We have not been told whether the appellant is complying with the conditions. We do not know if he is in receipt of public funds. We do know that he claims to be employed in an unpaid capacity by an Oxfam shop. In the event, it was that application that was refused on 17 July 2007. The terms of notice of decision are as follows:

> "REFUSAL TO VARY LEAVE or VARIATION OF LEAVE
> Paragraph 322(1) of HC 395 (as amended)
> …
> You applied for indefinite leave to remain in the United Kingdom following medical discharge from HM Forces, but your application has been refused.
>
> There is no provision in the Immigration Rules for you to remain in the United Kingdom to receive medical treatment on the NHS and therefore the Secretary of State is not satisfied that the variation of leave that you have sought is for a purpose that is covered by the immigration rules.
>
> Your application is therefore being refused because you
> - Are seeking to remain in the United Kingdom for a purpose other than one which entry or remaining is permitted by immigration rules [section 88(2)(d)]
>
> Therefore, your right to appeal this decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 is limited by operation of section 88 of this Act."

10. It is surprising that the application was refused on the ground that the appellant was seeking to remain in the United Kingdom in order to receive NHS treatment. In his application he gives a number of reasons why he should be allowed to remain. He mentions the treatment he is receiving and, no doubt, if he is allowed to remain he will benefit from whatever medical treatment he can get. But there is no suggestion in his application that that is the purpose of it.

11. Under para 322(1) of the Statement of Changes in Immigration Rules, HC 395, refusal is obligatory if a person seeks leave to remain of a purpose not covered by the Immigration Rules; and s 88(2) provides that a person may not appeal against an immigration decision which is taken on the grounds he "(d) is seeking to enter or remain in the United Kingdom for a purpose other than one for which entry or remaining is permitted in accordance with Immigration Rules," but s 88(4) preserves a right of appeal on human rights, race relations or asylum grounds only. It was therefore argued by Mr Saunders before us that the appellant has no right of appeal save (for present purposes) on human rights grounds against the respondent's decision of 17 July 2007.

12. That submission is particularly troubling in view of the facts which we have set out. If it is correct, it has the effect that the Secretary of State can deprive an applicant of a right of appeal against an adverse decision by asserting that the decision is made on a ground which has, as in the present case, no bearing at all on the application. We would be unwilling to accede to that view in the absence of the clearest statutory provisions. We recognise of course that if s 88(2) on its true construction deprived the appellant of a right of appeal in these circumstances, we are without jurisdiction to consider any grounds other than those set out in s 88(4), however obvious the mistake and however unjust the respondent's decision appears to be.

13. Neither party was able to give us very much assistance on this point.

14. As we have indicated, the words of the statute exclude the appeal if the decision *is taken* on the grounds identified. The phrase is not "is *stated* to have been taken". One would normally expect the notice of decision to be, or to include, the authoritive indication of the grounds upon which a decision has been taken. Whilst not wishing to depart from that principle as a general rule, the wording of the statute does not in our view require us to treat the notice of decision as authoritive in every case. In the present case, although the reason is given in the notice of decision, that is a reason which appears to bear no relation to the application. Despite the wording of the notice of decision, the reason is not one upon which the decision could properly have been taken. The reason given must be a mistake. In the (we hope) unusual circumstances of this case, we have decided that we can safely ignore the assertion in the notice of decision that the ground for it was that the application was being made for a purpose not covered by the Immigration Rules. Instead, we can look at the realities of the case.

15. This is an unusual case, because the ground stated is one which does not appear to have been open to the decision maker as arising from the application that was made. Where the ground cited is one which could arise from the application, we think it very unlikely indeed that it will be right for the ground given in the notice of decision to be ignored. That is not the position here. In so far as the refusal was an appropriate – and hence lawful – response to the application, it is a refusal which must have been on grounds other than those alleged.

16. To put that another way, in our judgment s 88(4)(d) restricts the grounds of appeal if the reason cited is a lawful (albeit perhaps wrong) response to the application. If the reason cited has nothing to do with the applications, s 88(2) (d) is of no effect. In the result we have concluded that the appellant's right of appeal is not restricted by s 88(2), and accordingly that we have jurisdiction to deal with all grounds. If we are wrong about that (and we may be) it should make no difference to the appellant or the respondent, for the reason we set out at para 25 below. We now turn to the merits of the appellant's appeal.

17. At the hearing on 22 January 2008, the appellant's representative produced what was said to be a copy of a memorandum from Colonel KT Haugh at the Directorate of Personnel Services (Army), dated 7 November 2007. It is headed "Support to Foreign and Commonwealth Citizens serving in the British Army and their Families — Change to Home Office Policy in Cases of Medical Discharge Directly Attributable to Operational Injuries". Following its statement of the change in that policy, the memorandum sets out further information. The relevant paragraphs are as follows:

> 2. c. **Medical Discharge as a Result of Injuries Sustained on Operations.** Where a non-British member of the Army is

medically discharged as a direct result of injury sustained in an operational theatre, the Home Office requirement for them to have completed four years service towards a grant of Indefinite Leave to Remain (ILR) will in future, normally be waived. It means that individuals that qualify under these circumstances may now apply for ILR even if they have not completed 4 years Army Service. The accompanying dependent spouse/civil partner and children will also normally qualify for ILR at the same time. This is a new and most welcome change of policy confirmed at Reference B and follows on from recent discussions between the Army and the Home Office seeking to resolve this situation.

d. **Home Office Re-Consideration of Cases Previously Refused.** The Home Office have also confirmed that cases which meet the criteria at Para 2c but which were previously refused and which are brought to their attention will be re-considered sympathetically and discretion exercised where appropriate.

e. **Other Forms of Discharge with Less than Four Years Army Service.** The Home Office have confirmed that an individual discharged with less than four years service for reasons other than injuries directly sustained on operations leading to medical discharge may continue to seek discretionary leave to remain in the UK. This is no change to the existing policy. Each case will be examined sensitively on its merits and in the light of the evidence and supporting documentation produced by the applicant. There may be cases, where the circumstances are complicated – for instance, those discharged for inappropriate behaviour, and misconduct or criminal activity and such applications will be investigated thoroughly by the Home Office and then decided on a case-by-case basis.

18. Mr Gulvin, who represented the Home Office, having taken instructions and having consulted his colleagues, confirmed that he could not confirm either the new policy set out in para 2.c or the existing policy set out in para 2.e. A letter from the Tribunal to Colonel Haugh produced a response from Giles Ahern, the Deputy Director Personnel. He confirmed that the information contained in paras 2.c and 2.e "was provided by and cleared with the Operational Policy Unit of the Borders and Immigration Agency (BIA) whose policy has been cited". The letter goes on to set out the history of the policy change, concluding as follows:

> "On 23 October the HO announced that the requirement for Commonwealth and ROI personnel who are medically discharged as a direct result of injuries sustained in Operational theatres to have served for four or more years before they sought ILR would normally be waived. At the same time, the HO re-affirmed that their policy of allowing those who are medically discharged with less than four years service for reasons other than injuries sustained in Operational theatres to apply for discretionary leave to remain would continue and would be assessed on a case by case basis. Furthermore, the HO confirmed that they would be prepared to re-assess any cases

brought to their attention where individuals medically discharged with less than four years service who have previously had their applications denied. I attach a copy of the HO statement – Reference B of Colonel Haugh's letter.

The BIA has confirmed that when the revised policy was announced they requested that applications and Judicial Review cases involving medical discharge were put on hold until their new guidance was ready. It may therefore be that this request did not cascade to the Presenting Officer Units. In terms of this information being accessible to the public, the HO has advised that they hope to publish the revised guidance on their website shortly."

19. The Tribunal had not previously seen the Home Office statement that was Reference B of Colonel Haugh's letter. When the matter came before the Tribunal again on 22 April 2008, Mr Saunders, then appearing for the respondent, produced what he said was the Home Office's statement of its policy. It reads, in full, as follows:

> "We are extremely proud of armed forces, including those men and women from the Commonwealth.
>
> In recognition of this, where a member of our Armed Forces is medically discharged as a direct result of injury sustained during operations, the requirement for them to have completed four years' service in order to qualify for settlement will normally be waived.
>
> If any cases of service men or women being refused settlement in these circumstances are brought to our attention, we will look again at their applications sympathetically.
>
> There may be cases, of course, where the circumstances are more complicated and such applications would need to be investigated thoroughly and then decided on a case-by-case basis."

20. We have to say that we were somewhat surprised by the production of the policy in that form, given the rather different form in which it had been provided to the Army and in which Giles Ahern had sent it to us. Mr Saunders' document is only about one-third the length of the full version, which continues, after the quotation by the "BIA spokesperson" acknowledged by Mr Saunders, as follows:

> "Q & A lines
> **What about their dependants?**
> The dependant spouse/civil partner and children of a former member of the Armed Forces granted settlement would also qualify for settlement in line.
>
> **Would this also apply to someone who was injured in training?**

Again, where an injury leading to medical discharge was sustained outside the operational theatre, such applications would need to be investigated thoroughly and then decided on a case-by-base basis.

What happened before?
To qualify for settlement under the immigration rules, a former member of the Armed Forces needs to have completed 4 years service prior to their date of discharge. Applications for leave from those discharged before completion of 4 years have been considered outside the rules on their individual merits on a case-by-case basis.

What change to policy are you actually making?
Where a member of the Armed Forces is medically discharged as a direct result of injury sustained in an operational theatre, the requirement in the settlement rules for them to have completed four years service will *normally* be waived. New detailed guidance on the circumstances in which it is appropriate for discretion to be exercised is being prepared.

Why are you changing this now?
The changes have taken place as a result of ongoing dialogue between MoD and BIA caseworkers to ensure that specific guidance exists for exercising discretion in these types of cases.

What change is there for those already refused?
Where cases are brought to our attention, they will be re-considered sympathetically and discretion will be exercised where appropriate.

What is happening with cases that might currently be under consideration?
Any current applications involving a medical element where the applicant has not completed 4 years are currently being held, pending the completion of revised guidance.

What about non-Commonwealth nationals serving in the Armed Forces?
The main statement only refers to Commonwealth nationals in the Armed Forces but the same consideration will apply to non-Commonwealth members of HMAF, including members of the Brigade of Ghurkas."

21. We do not suggest for a moment that Mr Saunders gave us anything other than the fullest information that he had. It is, however, clear that that information, obtained after inquiry within the Home Office, on notice, was incomplete. So it appears that although the Home Office is prepared to give information to the Army that is designed for cascading to all those concerned, in order to assure them about the decision making-process in various classes of case, the information is not subsequently made available to those who might have to make any

evaluation of that decision-making process after it has occurred. Indeed, as we have noted, those who advised Mr Gulvin on the first occasion completely denied the existence of the policy, whereas those advising Mr Saunders on the second occasion were apparently not in a position to produce it in full. We regard this state of affairs with the gravest concern. It is difficult to know the basis upon which the Tribunal or any other part of the judicial system can be expected to operate if important material, which has previously been disclosed, is first denied and then abbreviated by the government.

22. Be that as it may, and despite the respondent's best efforts, we do have the full policy. It is not said that the claimant was medically discharged as a direct result of injury sustained during operations. The claimant's injury appears to have occurred during training. He is not directly affected by the change in policy. The importance of the policy documents is their recording of an existing policy and their assertion of its continuance. That is the policy set out in para 2.e of the Colonel Haugh's memorandum. Individuals such as the appellant "may continue to seek discretionary leave to remain in the UK. This is no change to the existing policy. Each case will be examined sensitively on its merits and in the light of the evidence and supporting documentation produced by the applicant". In the full statement of the new policy, under the question "What happened before?," it is asserted that "Applications for leave from those discharged before completion of 4 years have been considered outside the rules on their individual merits on a case-by-case basis". The only change heralded in the next paragraph is related to those medically discharged as a direct result of injury sustained in an operational theatre who have less than four years service. As that is the only change recorded, it follows that the policy recorded under the heading "What happened before?" continues in relation to others. That is entirely consistent with the understanding of Colonel Haugh's memorandum. And, in any event, as Giles Ahern's letter indicates, para 2.e of that memorandum was cleared with the BIA.

23. On the basis of the information before us we have no hesitation in finding that the respondent's declared policy is that where a Commonwealth soldier is medically discharged with less than four years service for reasons other than injuries directly sustained on operations, there will be individual consideration of whether leave to remain should be granted outside the Rules. The consideration will be on a case-by-case basis, on the merits of the case and sensitive.

24. We further have no doubt in saying that no such consideration has taken place in the appellant's case. Indeed, it is difficult to see how the respondent's treatment of the appellant is anything other than the opposite of what was suggested in the policy. Instead of receiving a sensitive consideration of his case on the merits, his application was summarily refused for a reason entirely unrelated to it. In the circumstances the Secretary of State's decision in his case was not in accordance with the law and on that basis we allow the appellant's appeal.

25. Earlier in this determination we have recorded our view that the notice of decision issued to the appellant did, contrary to what is asserted in it, carry a right of appeal. We indicated that that conclusion was not beyond doubt. If it is wrong, the appellant has no right of appeal, although that does not of course make the Secretary of State's decision in his case any more lawful. There ought to be no difference in the way the appellant is treated now, however, because Mr Saunders did indicate that the respondent was content to re-determine the appellant's application in any event. So, whether or not the appellant has a right of appeal, he now has an expectation that his application will be properly dealt with.

26. For the reasons we have given, however, we conclude that the appellant has a right of appeal. The Immigration Judge erred in failing to consider whether the appeal ought to be allowed on the ground which we have identified. We substitute a determination allowing the appeal on that ground.

C M G OCKELTON
DEPUTY PRESIDENT