IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25494/2015
IA/25497/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st July 2017	**On 14th August 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

DR EVRAD KAMEUGNE KOUNCHOU
MRS MARIE CLEMENCE KUISSU KOUAM
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms U Miszkiez, Counsel, instructed by Jein Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Cameroon born on 15th November 1985 and 1st September 1988 and are married. The appeal of the second appellant is dependent on that of the first. The first appellant made an application for indefinite leave to remain on the basis of the Armed Forces Appendix of the Immigration Rules and that application was refused on 7th July 2015. Notice was given for liability to

administrative removal of the appellants under Section 10 of the Immigration Act 1999 as overstayers and a decision was made to remove the appellants from the United Kingdom.

2. The first appellant had arrived in the United Kingdom in 2011 under a Tier 4 Migrant visa valid until 24th September 2014. The second appellant arrived thereafter in May 2012 as his dependant with leave valid to the same date. On 31st March 2012 the appellant joined the Territorial Army as a reservist. On 12th May 2012 a decision was made to curtail the leave of the appellant as the appellant was in breach of his Tier 4 visa conditions as he had ceased to study. On 11th July 2012 his leave was therefore curtailed with no right of appeal and on 8th July 2013 a son was born to the appellant. The child does not appear to have been included as an appellant. On 7th July 2014 the appellant submitted the application as a member of the armed forces and on 24th September 2014 the appellant was discharged from the Territorial Army as it was thought that this was the date the visa expired, it being a condition of service that he have a valid visa.

3. The Secretary of State's refusal stated that his leave had been curtailed and therefore his employment was unlawful as he was not entitled to work. Exempt status by reason of engagement with the TA was applicable only on TA duties. The appellant *did not serve permanently with the armed forces and there was no provision for aggregating time to reach the four years of service required for his application*. The members of the HM Forces Reserves could not normally apply for leave to enter or remain on the basis of their reserve service. In relation to the second appellant she had provided an ETS TOEIC certificate which was no longer accepted from 1st July 2014 and she had not completed a continuous period of 60 months with leave under Appendix AF as the partner of someone serving in Her Majesty's Forces. She therefore failed to meet that requirement as well. No consideration was given to rights under Appendix FM or paragraph 276ADE as no human rights application or a fee paid application had been made. There were no Article 8 reasons given and the Section 55 Borders, Citizenship and Immigration Act 2009 duty was met as the appellants and their children would return to Cameroon as a family unit.

4. On appealing the first appellant submitted that his daughter born on 25th September 2014 needed medical care and there were no other means of supporting himself. The Secretary of State had failed to take into account the service with the TA of the appellant and the appellant had not known of the curtailment of his visa and he had never received it. He had not worked illegally. He had established a private and family life in the UK as a diligent citizen.

5. The grounds of appeal were field further to the 'old' provisions of Section 82(1)(d).

6. At the First-tier Tribunal hearing, as recorded by the judge at paragraph 18 of his determination, the appellants accepted they could not meet the provisions under either Appendix FM or paragraph 276ADE. They relied on Appendix AF of the Immigration Rules and Article 8 and I note that the grounds of appeal included a reference to appealing the Secretary of State's exercise of discretion. The judge

recorded that the appellant had given evidence he had never been discharged from the Army Reserves.

7. When the appellant was asked during the hearing whether he had ever studied or completed study in the UK the appellant stated that he obtained a PhD online through Berkeley University (paragraph 26). Before he came to the UK the appellant had worked as an accountant. He had one brother and two sisters who worked in Cameroon and his wife had family in Cameroon (paragraph 29). He also confirmed that he had received £2,500 to £3,500 per month from his father and friends, (paragraph 30). He produced however no evidence of the PhD, (paragraph 31).

8. The submissions on behalf of the appellant were recorded by the judge and reference made to the skeleton argument and emphasis was placed on the fact that the appellant had not had been served with a curtailment of his leave and so he could not be found to be an overstayer. The application leading to the appeal was lodged prior to the visa expiring so he had leave by reason of Section 3(c) of the Immigration Act 1971 because of the application and the appeal. The appellant had joined the Territorial Army, now the Army Reserves, on 31st March 2012 and had now completed over four years of reckonable service and fell for a grant of indefinite leave to remain and with him his dependant. As he remained lawfully in the UK by virtue of Section 3c and was not an overstayer and had four years' reckonable service then he would be eligible for a grant of leave to remain. The best interests of the children were a primary consideration.

9. In summary it was submitted that although the appellants could not succeed under paragraph 276ADE their appeal should be allowed outside the Rules.

10. The judge in his decision stated as follows:

> *"41. The appellant knew that if he did not attend his course his visa would be terminated. The email from the college dated 31 October 2011 (A6) expressly said so. He attended no lectures after that. He cannot possibly have thought that his visa was still existent through to 24 September 2014. He stated that he did not receive notice of its curtailment. While noting that no documentary evidence of such notice has been produced, it would have been a matter of routine and on the balance of probabilities I find he was served with notice of curtailment. I do not find him a credible witness, and find that he did receive such a notice. Even if he did not, he will have known that his leave would have been curtailed. Accordingly he was without leave when the applications were submitted. Any service with the TA/Army Reserve would confer exemption only in respect of that service. In assessing the credibility of the appellant I noted that his application for fee exemption stated that he had no means of supporting himself, but in evidence to me stated that he had income of between £2500 and £3500 monthly from his father. I note also his fabricated PhD, and the untruthful use of the title 'Dr' on his notepaper.*
>
> *42. The appellant produced a payslip to show that he was last with the TA/Army Reserve on 16 August 2016, and so had more than 4 years service after enlistment*

in March 2012. If so his service was unlawful as no one without a visa can be in the TA/Army Reserves. The appellant has had no visa since 11 July 2012, and such service would not be 'reckonable service' for that reason. Even if the visa had not been curtailed it would have expired on 24 September 2014, and he has had none since, so that his reckonable service would have been 2.5 years only. I have been shown no evidence that S3(c) leave applies to service with the TA/Army Reserves. In any event I find that 'reckonable service' is actual service, not the length of time since joining, so that the cumulative reckonable service of the appellant is to be measured in a few weeks, not years."

11. The judge specifically stated at paragraph 48:

> *"48. A claim to rely on Appendix AF cannot succeed as the appellant was not with the TA/Army reserves for 4 years. There is no information before me as to how 'reckonable service' is calculated, and no submissions were made on the point. If it were relevant (that is if the appellant had been in the TA/Army Reserves for 4 calendar years) I find that he would not have 4 years 'reckonable service' as this is likely to mean 4 years full time service when aggregated. It seems to me very unlikely that serving 3 hours a week for 4 years (600 or so hours, or less than 3 months actual service) would confer the right to a grant of indefinite leave to remain. It is for the appellant to prove his case, and even if he had 4 calendar years in the TA/Army Reserve his appeal would not succeed for this reason."*

12. The First-tier Tribunal dismissed the appeal.

13. The appellant submitted an application for permission to appeal on the following grounds.

(1) Ground (i). The first appellant consistently denied receiving the curtailment notice dated 12th May 2012 and it was for the respondent to prove that it had been served, see paragraphs 34 to 46, **Syed (curtailment of leave – notice) India [2013] UKUT 144 (IAC)**. No documentary evidence of such notice had been produced by the respondent even at the hearing. Nevertheless the judge found that the appellant was served with a notice of curtailment and did receive such notice, paragraph 41. This was unsupported by the evidence and inadequately reasoned. To state that "it would have been a matter of routine" was speculative. The judge did not find him to be a credible witness and failed to give sufficient reasons for this finding.

The appellants had valid leave until 24th September 2014 and therefore that the applications made on 7th July 2014 were submitted in time. Accordingly the appellants had continuing leave under 3C. The judge erroneously found that the first appellant's service in August 2016 was unlawful and that he had no leave since 11th July 2012. The judge states "I have been shown no evidence that Section 3C leave applies to service with the TA/Army Reserves", paragraph 42, but this reasoning was inadequate since Section 3C had the effect of extending lawful leave on the same condition as before.

Ground (ii). The judge erred in his findings and in his Article 8 assessment was flawed. The judge found the PhD was fabricated and bought online but fails to give any adequate reason for this finding. That the appellant's account was unsupported did not mean the qualification was untrue.

In relation to the letter dated 26th June from Seven Day Healthcare as regards having similar problems in November 2011 and May 2012 the judge found: "This was reporting what the appellant had told the DR, who had not examined the appellant then, nor seen his medical records", paragraph 24. This was inadequately reasoned and speculative.

The judge found there was no medical condition of relevance. An inadequate account was taken of the daughter's hospital appointments dated February, March and June 2015 and reference to "further assessment". An inadequate account was taken of this material evidence.

The judge found that the first appellant was not presently with the Army Reserves and had not been so since 24th September 2014 because there was one payslip. However, this finding was unsupported by the evidence contained in the appellants' bundle and the judge failed to take adequate account of the British Army identity card valid until 10th June 2019 and seven payslips from October 2015 to April 2016.

Further, the judge found that the reckonable service was actual service or full-time service when aggregated, not length of time since joining but failed to give sufficient or any reasons for so finding. The judge erred in finding the first appellant had not had four years' reckonable service ([42], [45] and [48]).

(2) Overall, the errors vitiated the judge's assessment under the Immigration Rules. He had not given adequate reasons further to **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)**.

(3) The above errors vitiated the assessment under Article 8. In particular,

a. the judge found the family and private life was not engaged,

b. the judge failed to direct himself to the threshold of engagement,

c. the judge failed to consider the modified proportionality test and erroneously applied the test of exceptionality,

d. there was no proper assessment of the balancing exercise,

e. the judge failed to reach a finding on the best interests of the children,

f. the judge failed to consider whether it was reasonable to expect the family to relocate to Cameroon and instead considered a no obstacles test,

g. the judge failed to take adequate account of his valuable contribution to British society, and

h. the judge erroneously treated the considerations under Section 117B as determinative.

14. At the hearing before me it was submitted by Ms Miszkiez that arguments had been raised by Mr Wilding which she was not confident that she would be able to respond to fully in submission. It was agreed by Mr Wilding that he could not defend the reference by the judge to curtailment but that the curtailment letter had indeed been served on the college, which was the address the appellant had given the Home Office.

15. Ms Miszkiez submitted that the consideration of the 3(c) leave affected the judge's assessment of credibility, which contaminated the assessment under Article 8. It could not be said that it was a matter of routine for curtailment letters to be served and that was an error of law. The credibility assessment overall under Article 8 was fatally flawed and not defensible. I was referred to the letter from the Rifles dated 3rd June 2014. Ms Miszkiez stated that the letter showed that the appellant had been able to serve with the Reserves as he had Section 3(c) leave and was not in breach of a condition. He was not discharged, had leave and was not working in breach of condition. The Secretary of State's refusal letter was flawed and not in accordance with the law. The skeleton argument before the First-tier Tribunal made the point that the decision was not in accordance with the law because the leave had not been effectively curtailed. The matter should be remitted back to the Secretary of State. The appellant would now raise the matter of his application for naturalisation.

16. The judge had approached the matter on the basis of the lack of credibility of the appellant, which affected his assessment of Article 8. Even if the application was not successful, part of the assessment under Article 8 was that the appellant was in breach of the Immigration Rules. The application must be properly considered and the appellant was entitled to a lawful decision.

17. Mr Wilding submitted that there was an error in the approach to **Syed**. It was agreed that Judge Housego had asked the wrong question. In his investigations Mr Wilding could not establish what postal address had been given by the appellant and there was no concession that the curtailment had not been notified to the appellant although he did concede that the formulation of the question by Judge Housego was incorrect and he could not have said that there was service when the letter of service had not been put before him.

18. However, even if that were the case the appellant bears the burden of proof and Mr Wilding made specific reference to Section 86(3), which states:

"The Tribunal must allow the appeal insofar as it thinks that -

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently",

but Section 86(4) states:

"For the purposes of subSection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision."

That, Mr Wilding submitted, was fatal because the appellant could have been given removal directions under Section 47 rather than under the 1999 Act. Even if it was right that there was no proper curtailment the error relied on did not amount to an unlawful decision as there was an alternative route. The language in Section 86 referred to "could" and not "would". It was not enough to say that the Secretary of State issued an unlawful immigration decision as he could have been removed under Section 47 on the basis of the refusal of the application.

19. The appellant applied under the Immigration Rules but the type of case 'not in accordance with the law' was in relation to a policy not being considered. The Tribunal cannot allow an appeal as being not in accordance with the law if another provision could have been used and this showed the teeth of Section 84. The appellant was not studying a few months after his arrival at the college and for which the CAS was issued, therefore he had indeed failed to study and therefore he still would have been in breach. That was accepted.

20. However, and moreover, the appellant applied under Appendix AF and applied as somebody who had been discharged but he had not in fact been discharged and therefore paragraph 16 did not apply to him. The Secretary of State applied the correct Rules and the Rules in force at the date of the application were the same as those in force at the date of the decision. I was referred to paragraph 16 and paragraph 11 set out as follows:

*"16. Indefinite leave to remain as a foreign or Commonwealth citizen **discharged** from HM Forces will be granted to an applicant who:*

(a) is in the United Kingdom;

(b) is not in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded

(c) has made a valid application for indefinite leave to remain as a foreign or Commonwealth citizen discharged from HM Forces;

(d) does not fall to be refused on the grounds of suitability under paragraph 8 or 9; and

(e) meets the general eligibility requirements in paragraph 11.

*11. The general eligibility requirements to be met as a **discharged** member of HM Forces are that:*

(a) the applicant:

(i) has completed at least 4 years' reckonable service in HM Forces; or

(ii) meets the medical discharge criteria in paragraph 12; and

(b) on the date on which the application is made:

(i) the applicant has been discharged from HM Forces for a period of less than 2 years; or

(ii) in the case of an applicant who was medically discharged more than 2 years before, new information regarding his or her prognosis is being considered by the Secretary of State; or

(iii) the applicant has been granted his or her most recent period of limited leave:

(aa) under paragraph 15 or 19 of this Appendix as a foreign or Commonwealth citizen who has been discharged from HM Forces; or (bb) under paragraph 276KA or 276QA of these Rules; or

(cc) under the concession which existed outside these Rules, whereby the Secretary of State exercised her discretion to grant leave to enter or remain to members of HM Forces who have been medically discharged; and

(c) in relation to an application made by a Gurkha, the Gurkha is a citizen or national of Nepal."

21. Paragraph 16 refers to indefinite leave to remain by someone who was discharged from the HM Forces and indeed it was the appellant's case that he had not been discharged. The earliest time he could have been discharged to meet the requirements is 7th July 2012 but here he was not discharged on 7th July 2014 and therefore could not meet the requirements on any reading.

22. Thirdly, in relation to reckonable service he must be *discharged*. When he applied he had only been in the UK just over three years. On any reading the applicant was going to fail. It was clear from the skeleton argument at the First-tier Tribunal that he was saying that he satisfied paragraph 16 and all parties approached the matter on the basis of a misunderstanding. The appellant failed under 11(a)(i) and failed under (b)(i). The appellant was arguing that he was working and therefore not discharged and indeed the part of the grounds to this Tribunal referred to the military card as continuing to be valid. This was unanswerable.

23. The second point was whether for the purposes of 11(a)(i) a reservist could qualify as a member of HM Forces. I was referred to the Armed Forces Act of 2006 and provision 368, which specifically refers to the regular forces. The appellant was claiming to be a member of the TA. This did not apply to reservists.

24. Fourthly, the four years' reckonable service was grappled with by the judge such that the appellant was only exempt from immigration control when he was deployed or due to be deployed. The appellant may have had leave to remain as a student as he was not effectively curtailed but his reckonable service only stemmed from when he was deployed or due to be deployed and that was three hours per week.

25. At this point Ms Miszkiez submitted that these were new submissions but, as I pointed out, the appellant had indeed applied under Appendix AF and also the point on reckonable service was raised in the grounds for permission to appeal.

26. Mr Wilding submitted that when he was not serving he needed leave in another capacity and the judge approached this correctly. Service of three hours per week could not amount to four years' reckonable service. The payslips showed £500 to £600 payment a month and that was not evidence that he was due to be deployed for the entire period.

27. Not least one must be discharged by the date of the application and by the date of application the appellant needed to be discharged for two years and he could not show that. His application was doomed to fail.

28. The case of **Syed** could be distinguished on the basis that the appellant had lawful leave which continued to run and it was not open to the Secretary of State to curtail that leave. In this case, even if there had been a failure to serve the notice of curtailment the substantive leave had expired and where there was a refusal by the Secretary of State there could always be a removal decision served with it, whereas in **Syed** there was no removal provision for a person whose leave was still running.

29. In relation to Article 8 the credibility point did not infect the analysis made under the Immigration Rules and the judge based the finding in relation to Article 8 on the circumstances of the family. In essence there was no obstacle to the family returning to Cameroon and I was referred to the findings at paragraphs 44, 46 and 47. In relation to the failure to consider Section 55 this family would be removed together and further there was no specific challenge to the assessment of the children's best interests. There was no suggestion that the children were going anywhere else other than with the two appellants.

30. There was no failure to deal with the medical evidence and the children, see paragraph 32, and the evidence was not up-to-date.

31. Ultimately the appellants had failed to properly evidence their claim to remain in the UK and despite an unhelpful lack of signposting in relation to Section 55 any explicit consideration would not show a material difference.

32. The key point in relation to **Syed** was that he still had leave when the decision was made. That was not the case here.

33. Ms Miszkiez submitted that the Secretary of State relied on a breach of condition and anything that followed rendered the decision unlawful. The appellant was entitled to a lawful decision regardless of the outcome and this was a material error. If Section 86(3) applied it should be submitted back to the Secretary of State and Section 86(4) was a red herring. Even if the application was submitted on the wrong basis the applicant was nevertheless entitled to a lawful decision. The appellant was notified that he would be discharged by the army after the expiry of the visa and he would then be discharged. He had exempt status even on three hours per week.

34. In relation to his reckonable service the judge's calculation of reckonable service was fatally flawed. There was no information on how it was calculated.

35. The assessment of credibility had not given the appellant any benefit in relation to his service in the Reserves and his belief that the appellant was a forger also affected the judge's view of Article 8.

36. There was no Section 55 analysis and the assessment on proportionality was flawed. Ms Miszkiez submitted that the matter should be referred back to the Secretary of State and/or secondly that the matter be remitted back to the First-tier Tribunal. Further, there should be an anonymity direction. In addition, Mr Wilding submitted that if it was considered that the point in regard to **Syed** was a material error of law the Upper Tribunal was capable of determining the Article 8 decision as there were no extensive findings of fact required.

Conclusions

37. Essentially First-tier Tribunal Judge Housego found that the appellant had had no visa since 11th July 2012 but he stated: "Even if the visa had not been curtailed it would have expired on 24th September 2014, and he has had no leave since, so that his reckonable service would only have been 2.5 years." Notwithstanding that conclusion, the judge made a finding that "reckonable service" is actual service, not the length of time since joining so that the cumulative reckonable service of the appellant was to be measured in a few weeks, not years.

38. The appellant argues that he continued to have leave because of his 3(c) leave and his service should have been taken into account.

39. The appellant made an application under Appendix AF and the relevant Immigration Rules have been set out above. The appellant simply cannot satisfy this part of the Rules. Specifically, which both parties agreed this is the only application that the appellant could make and both parties agreed that the grounds advanced by the appellant were that he had not been discharged. As can be seen from paragraph 16 it is specific to indefinite leave to remain applications that he is discharged. The point is that the appellant under the Immigration Rules would need to have shown

that he was discharged and he could not possibly do that and he did not contend that.

40. Further, it is clear that the appellant could not as a reservist qualify as a member of HM Forces without having been a full-time member. As set out in the relevant definition in Appendix AF at Part 1, paragraph 2:

> *"(d) 'A member of HM Forces' is a person who, subject to subparagraphs (e) and (f), is a member of the **regular forces** within the meaning of the Armed Forces Act 2006."*

41. This is also made evident by Section 374 of the Armed Forces Act 2006 which defines as follows

> *'the 'regular forces' means the Royal Navy, the Royal Marines, the regular army or the Royal Air Force, and references to 'a regular force' are to be read accordingly;*
>
> *'the reserve forces' means the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Regular Reserve, the Army Reserve, the Royal Air Auxiliary Air Force, and the references to 'a reserve force' are to be read accordingly'.*

In effect, the appellant was a member of the Territorial Army subject to the Reserve Forces Act 1996 which states at Section 1(2)(b) that the reserve forces include the Army Reserve and the Territorial Army. He had never been a member of HM Armed Forces for the purposes of the Armed Forces Act 2006 or the Immigration Rules even whilst deployed as a reservist and subject to service law (Section 376(2) of the Armed Forces Act).

42. Despite the close analysis of the above, which was not discussed by either representative or the First-tier Tribunal Judge at the First-tier Tribunal the appellant had not undertaken four years' reckonable service because he had not been in the 'regular forces'. He could not amass reckonable service. The judge was correct, in finding that his reckonable service could not be taken into account. I also find that reckonable service can only mean when the appellant is deployed or due to be deployed. These points are regardless of the question about his 3(c) leave. I do not accept that the appellant was deployed at all stages during his four and a half years, particularly when he was supposed to be on a student visa, albeit that he was not studying. It is clear that those in the TA need alternative leave such as student leave.

43. As the decision letter from the Secretary of State established, his exemption from immigration control under Section 8(4) only applied when he was on active service with HM Forces or in his case the Army Reserves.

44. The decision letter of the Secretary of State was in accordance with the law as it clearly stated that the appellant had not met the requirements of paragraph 16(e) of Appendix AF of the Immigration Rules, which requires that the appellant :

> *"(e) meets the general eligibility requirements in paragraph 11"*,

The appellant had not been a discharged member of HM Forces or accrued reckonable service and did not meet the eligibility requirements. This was the case whether or not his leave had been curtailed and, as Mr Wilding pointed out, on the basis of the refusal the Secretary of State under Section 86(4) could have implemented the removal via an alternative route although I do not analyse that point further. The judge found at paragraph 42:

> *"42. Even if the visa had not been curtailed it would have expired on 24th September 2014, and he has had none since, so that his reckonable service would have been 2.5 years only. I have been shown no evidence that Section 3(c) leave applies to service with the TA/Army Reserves.* ***In any event I find that 'reckonable service' is actual service, not the length of time since joining, so that the cumulative reckonable service of the appellant is to be measured in a few weeks, not years****."*

45. Regardless of the remaining analysis by the judge that was correct and on any analysis the appellant could not succeed under Appendix AF.

46. The judge did consider the appellants in relation to Article 8 and accepted that even if Article 8 was engaged an interference with the rights was entirely proportionate. The judge cited **Razgar v SSHD [2004] UKHL 27** and **Huang v SSHD [2007] UKHL 11**, directing himself appropriately and indicating that such decisions would not normally infringe Article 8 and noted that the appellants' representative himself had conceded that the appellants could not succeed under paragraph 276ADE. It is not arguable that the judge failed to consider whether the appellants could reasonably return to Cameroon.

47. At paragraph 47 the judge found that there were no obstacles to the family returning to Cameroon and the family life of the appellants was not engaged as all four would be returning as a family unit. The judge also found that there was no evidence of any private life beyond their family life. Notwithstanding that, the judge stated that if Article 8 was engaged then interference with those rights was proportionate for the reasons set out in Section 117A, B and D of the Nationality, Immigration and Asylum Act. The judge simply found that there were no compelling circumstances in this case.

48. There is no indication that his views on the PhD infected his analysis because there are no compelling factors. The judge was fully aware of the TA service (which did not afford the family ILR). It is not apparent that he failed to take it into account as he proceeded thereafter to consider Article 8. The family's leave had always been precarious and any such TA service would not become a compelling fact and failure to specifically identify it could not render this decision in material legal error. The judge made reference to precarious leave not unlawful leave in his Article 8 assessment and made no reference to any finding of the PhD in his Article 8 assessment.

49. With regard to the health of the appellant, the judge clearly did not accept that the appellant was too ill to study but could undertake physical activities in the TA

(paragraph 30) and I am not persuaded that his approach to the medical evdience was unreasoned or in error. The judge found the medical evdience to be scant. The judge also recorded the medical evidence in relation to the children such that there was no evidence of the serious skin condition which affected his elder child and no up-to-date medical evidence, the last being 22nd July 2015, as to the positional talipes of the younger child. In his conclusion the judge noted that there was no evidence of treatment for the child with talipes since 15 January 2015. It was open to the judge to conclude that the first appellant's medical problems were limited to treatment from over the counter analgesics for muscular pain and indeed that was the evdience that was given to him by the appellant. The judge rehearsed at length the provisions under Section 117 which he is obliged to take into account, noting that the appellant's "family is rich – his father owns hotels and other companies and sends £2,500 to £3,500 to the appellant each month in cash", and further: "There is no conceivable difficulty to the appellants or their children in a return to Cameroon."

50. Although I find there may be some error in the judge not specifically signposting Section 55 this is not a material error as this provision was identified at the outset of the decision and the judge had it in mind. The children were not part of the appeal but the judge applied, in essence, **Beoku-Betts v SSHD** [2008] UKHL 39 and at paragraph 9 the judge noted that the best interests of the children are an integral part of the proportionality assessment and Article 8 and cited Section 55.

51. The judge was aware of the ages of the children and found the family would return as a unit. Neither of these children is a qualifying child. The judge applied the right test, noting that "if Article 8 was engaged then interference with those rights is entirely proportionate for the reasons set out in Section 117A, B and D of the Nationality, Immigration and Asylum Act 2002 and in **Razgar**".

52. The judge addressed the issue of the Secretary of State's discretion and found no evidence of improper procedure. His conclusions were open to him.

Notice of Decision

The First-tier Tribunal made no material error of law and his decision shall stand. No anonymity direction is made.

Signed Date 10th Augsut 2017

Upper Tribunal Judge Rimington