Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05737/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 22nd December 2014	**On 23rd December 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

APENISA NABAINIVALI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Khan of SMK Solicitors.
For the Respondent: Miss Johnstone – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Freer, promulgated on 17 June 2014 following a hearing at Birmingham, in which he dismissed the Appellant's appeal on both the immigration rules and human rights grounds against the refusal of the Secretary of State to vary the Appellant's leave so as to permit him to remain in the United Kingdom for a purpose not covered by the Immigration Rules.

2. The Appellant is a citizen of Fiji born on 25th April 1989. He entered the United Kingdom lawfully with a visit visa granted on 17th May 2012. Whilst in the United Kingdom, on 4th September 2012, he applied to join the British Army. The variation application was refused on 13 January 2014 under a general ground of refusal paragraph 322 (1).

3. The Judge noted that the Appellant applied for further leave to remain only and made no application under Article 8 ECHR. The core of the Appellants case is that his application to join the British Army is still 'in process', his having completed the preliminary stages of the process including a pre-selection physical test with the next stage being the final selection exercises. The Judge noted evidence provided by the Secretary of State in the form of a schedule containing a number of names of individuals, in addition to the Appellant, which stated that his application had been withdrawn on the 17 September 2013 as there was no valid visa.

4. The Judge sets out his findings from paragraph 22 onwards of the determination. In this paragraph he states:

> 22. The appellant has not produced any letter or e-mail from the Army to back up his account that there is still a pending enlistment application. This seems an easy enough proof to obtain, if what he says about his most recent Army contacts is true. I bear in mind that he is represented and that he knew there was an appeal and that he knew all depended on the outcome of that appeal. At best he can point to a letter nearly 2 years old (dated 3 September 2012) stating that he was (at that date) in the process of applying.

5. In relation to the schedule provided by the Respondent, the Judge noted that the Appellant's visit visa expired in September 2012. The Judge noted acceptance into the army was not automatic and that the enlistment application was not shown on the evidence still to be pending and that the weight of evidence showed it to have been withdrawn with effect from 17 September 2013.

Discussion

6. The grounds of appeal raise the issue of delay and challenge the Judge's findings with regard to the reason the application was found not to be proceeding further. Mr Khan confirmed in his submissions that the two core challenges to the determination are (1) that there was no evidence that the application was " dead" and (2) that the delay in processing the application by the Respondent has created the problem for which the Appellant himself is not responsible; in that

his visa expired leading to the decision to withdraw the application by the Army.

7. In relation to the first matter the word 'withdrawn' when giving its ordinary meaning is to remove or take away (something) from a particular place or position or discontinue or no longer provide (something previously supplied or offered). In this case to no longer permit the Appellant to be involved in a particular process or activity such as his application to join the British Army. The Appellant was aware of the reason why the Secretary of State refused his leave application and in his witness statement comments upon efforts he claims to have made to obtain information to support his claim that the application was still pending. In paragraph 13 of the determination the Judge notes that the Army Careers Office had moved from Stoke to Newcastle and that the Appellant contacted the office on 22nd May 2014 and was told by a sergeant on duty that a letter would be provided confirming the application is under the process of a final decision, but no such letter had been provided. This evidence was clearly taken into account by Judge Freer and his factual findings that no material had been provided from the Army to back up the account that there was still a pending enlistment application appears to be the only finding the Judge could make on the available evidence.

8. The reason for the withdrawal decision dated 17 September 2013, that the Appellant had no extant visa, is conceded before the tribunal today. The Army has its policies in relation to those seeking to join who are not British nationals and one of those is the requirement for a valid visa. The decision of the Army is not the subject of separate judicial review or other such challenge. In light of the lack of evidence of a pending application the Judge made no legal error in concluding as he did.

9. In relation to the assertion that delay rendered the decision unlawful, for had the decision being made shortly after the application or prior to 17 September 2013, the application would not have been withdrawn, this is not a matter that was advanced before the First-tier Judge and it cannot be an error of law for Judge Freer not to consider a ground not advanced or relied upon before him on these facts.

10. In any event, the ground has no arguable merit. Although the application was made on 4 September 2012 but not refused until 31 January 2014 it is not been established that the period of delay is such as to make the decision unlawful. The schedule referred to by the Judge is one prepared by the Secretary of State containing a number of names, twenty in total on this document which is described as spreadsheet 5, sent to the Army together with details of dates of birth and nationalities. The Army completed columns four and five setting out applications that are withdrawn or which have been

deferred. The fact there are a number of names relating to similar enquiries indicates that at some part in the process such applications have been grouped together or passed to a central case work unit. It is said the schedule was sent to the Army in October 2013 and the decision made upon receipt of the schedule shortly there after. Taking into account the total number of applications the Respondent receives, the issue of resources, the fact that it does appear that the application was being processed, and the lack of evidence of a specified time in which a decision must be made in such cases, I do not find it established that any delay that has occurred is such as to render the decision unlawful.

11. On the basis of the case as pleaded before the First-tier Judge and on the evidence provided in support of the Appellant's claim, I do not find the Appellant has substantiate his claim that the Judge made any legal error material to the decision.

Decision

12. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

13. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 22nd December 2014