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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05833/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 16 January 2015	**On 20 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

VERA BANFOGHA NKAMANYANG AWA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Westmaas, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon born on 10 June 1985. She has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Scobbie, promulgated on 1 October 2014, dismissing her appeal against a decision of the respondent, served on 13 January 2014, to refuse her application for leave to remain outside the rules by reference to paragraph 322(1) of the Immigration Rules, HC395.

2. The background is that the appellant was granted leave to remain in the UK as a Tier 1 (Post-Study Work) Migrant from 6 September 2011 until 6 September 2013. Towards the end of that period she began making enquiries about joining the British Army. On 5 September 2014 the appellant applied for further leave under a concession outside the rules for leave to remain to enlist in the British Army. In the solicitors' covering letter reliance was placed on the IDIs Ch 2, s1, annex A, para 2 or Ch 2.1.7. The letter stated the appellant was booked to have an assessment for her suitability to enlist on 12 September 2013.

3. The appellant's application was refused by the respondent because the British Army could not find her application to enlist. The decision was made by reference to paragraph 322(1) of the rules, which states that leave must be refused if leave is being sought for a purpose not covered by the rules.

4. The appellant's husband, Mr Fitzgerald Fonane Mbekwa, whom she had met and married in the UK on 28 May 2013, was also refused further leave as the appellant's dependant. He does not appear to have lodged an appeal.

5. The grounds of appeal argued the application had not been fully considered and discretion should have been exercised differently in the appellant's favour. Correspondence was attached showing the appellant had applied to join the Army. Alternatively, the decision was a breach of the appellant's human rights.

6. The appellant was represented by counsel at her appeal. Judge Scobbie heard the appeal on 15 September 2014. He heard detailed evidence from the appellant about the progress of her application to enlist. He noted the appellant was seeking leave for a purpose not covered by the rules and therefore the mandatory refusal was correctly made. He accepted the respondent had discretion to exercise whether to grant leave outside the rules. However, he had no power to exercise discretion himself. He upheld the decision. In paragraph 21 he gave brief reasons why there had been no breach of the appellant's right to enjoy her private life under article 8.

7. The appellant was granted permission to appeal by Judge of the First-tier Tribunal Levin because he found it was arguable that the judge's apparent acceptance that the Army had no record of the appellant's application to enlist was perverse.

8. The respondent filed a response opposing the appeal, arguing the refusal letter did not state that there was no record of the appellant's application but it appeared the date of assessment had passed. Furthermore, according to the presenting officer's notes, the

appellant did not rely on article 8.

9. I heard submissions from the representatives as to whether the judge made a material error of law. I have recorded them in full and merely attempt to summarise them here.

10. Mr Westmaas accepted the appeal was outside the rules and that the Tribunal had no jurisdiction to exercise discretion to depart from the rules. He could not show me the source of the concession relied on by the appellant but Mr Avery accepted that there was a policy to grant a period of leave to enable certain Commonwealth citizens to enlist in the Army.

11. Mr Westmaas based his arguments on breach of the common law duty to act fairly in line with the decision in *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC). He produced a letter from the Ministry of Defence, addressed to the appellant, as "Vera Awa", dated 28 October 2014, which confirms she did apply to join the Army on 9 January 2013 and her application was active during the time of her appeal to the First-tier Tribunal. The respondent had asked for sight of her application in January 2014 but had used the name "Banfogha Nkamanwang (sic) Awa Vera" which was not the name the appellant had used to apply to join the Army, which was "Vera Awa". As a result her application had not been located. Mr Westmaas argued the respondent's decision was unfair in light of the known facts.

12. Mr Avery argued there was no error in the decision. The judge's decision had been inevitable.

13. The circumstances of this appellant's appeal are very unfortunate. It is clear the appellant's application was considered under the concession and that checks were made with the Army. The results are shown at Appendix E of the respondent's bundle. There was no record of any application in the name of Banfogha Nkamanyang Awa Vera, which was the name used on the application form FLR(O) and the covering letter from the appellant's solicitors. Her passport records her surname as "Awa Vera" and her given names as Banfogha Nkamanyang. The appellant accepted this was incorrect and her first name was Vera. As a consequence of the difference in names, the wrong information had been provided to the respondent by the Army, which resulted in the application being refused.

14. However, none of this means there was a material error of law in the Tribunal's assessment. The letter of 28 October 2014 was not before the judge. He had been shown the response from the MoD which led to the decision. He had also been shown emails produced by the appellant suggesting her she had made an application. He was not bound to prefer the appellant's evidence and he was certainly not

"perverse" in failing to do so.

15. In any event, the point now being pursued was never made to the First-tier Tribunal, which cannot therefore be faulted for not considering it. I can find no reference at all to any *Patel* unfairness argument being put forward and there is no reference either to arguments that the respondent had failed to apply her policy.

16. It was open to the appellant to have argued the decision was not in accordance with the law because the respondent had applied her policy wrongly owing to a misapprehension of fact, in line with *DS Abdi* [1996] Imm AR 148. However, the appellant did not pursue that argument before the First-tier Tribunal and, in any event, she did not establish the error of fact.

17. As far as any argument based on *Patel* was concerned, in my view it would have been doomed to failure. There was no procedural unfairness in the way the respondent approached her task. She considered the application under the policy and checked the appellant's claim with the MoD. It was not due to any failure on the part of the respondent that the result came back negative. It was caused by the appellant using a different name in her Army application to the one she used for her immigration application.

18. In *Marghia (procedural fairness)* [2014] UKUT 00366 (IAC) the Upper Tribunal provided the following guidance:

> "9. … The "common law duty to act with fairness", which the judge refers to in paragraph 15 of the Determination and Reasons, is the common law duty of a decision-maker or a public body to make decisions in a *manner* which is fair, i.e. the common law duty of fairness is about *procedural* fairness in this context. There is, however, no absolute duty at common law to make decisions which are *substantively* "fair". The Court will only interfere with administrative decisions which are unfair in this second, i.e., substantive, sense where they can be shown to be Wednesbury unreasonable, i.e. that no reasonable decision-maker or public body could have arrived at such a decision.
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> 10. Ms Malhotra and the Judge erroneously use the term "fairness" in the second, substantive sense. It is not suggested, however (nor could it be) that the decision in question was Wednesbury unreasonable. It was a matter for the Secretary of State as to whether or not she exercised any residual discretion to permit the Claimant to have a further Tier 4 visa notwithstanding her clear inability to meet the criteria set out in the Rules. That exercise of such residual discretion, which does not appear in the Rules, is absolutely a matter for the Secretary of State and nobody else, including the court (see Abdi [1996] Imm AR 148). The Court should not have sought to impose its own view. This trespassed upon the proper functions of the executive. Nor could there be any suggestion of any procedural unfairness in this case. The mere fact that the judge in question may have had sympathy

for the claimant or regarded the substantive decision of the Secretary of State as "unfair" is not to point.

19. It will be remembered that, in *Patel*, the issue was the respondent had refused an application by a would-be Tier 4 (General) Student Migrant for further leave because the sponsor licence of the proposed college had been revoked without the applicant being aware of or responsible for it. It was *procedurally* unfair to refuse the application without giving the appellant the chance to vary his application. In contrast, in the present case, the respondent did not act unfairly in refusing the application which was based on the result of the verification check she conducted. In effect Mr Westmaas was arguing there had been *substantive* unfairness.

20. Mr Westmaas did not pursue any arguments regarding the judge's dismissal of the article 8 claim which, I note, was included in the grounds of appeal to the First-tier Tribunal.

21. For these reasons, I find there is no error of law in the First-tier Tribunal's assessment and its decision dismissing the appeal shall stand.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

Anonymity direction made.

Signed **Date 19 January 2015**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal