Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17819/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 28 August 2013	**On 24 October 2013**
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Before

UPPER TRIBUNAL JUDGE ROBERTS
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

CHUKWUENWENDU CHIGOZIE EKEZIE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Echendu, instructed by Minority Advice Bureau, Leeds
For the Respondent: Mr J Wardle, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Mr Chukwuenwendu Chigozie Ekezie, was born on 14 September 1980 and is a citizen of Nigeria. The appellant's appeal came before the First-tier

Tribunal (Judge Boyd) which, in a determination promulgated on 20 February 2013, dismissed the appeal. Judge Boyd set out the background to the appeal as follows:

> On 15 June 2012 a decision was made to remove the appellant from the United Kingdom. It is against this decision that this appeal has been brought.
>
> In order for the appellant's appeal to succeed he has to establish that his five year Business Visit Visa should not have been curtailed and that the respondents, upon whom the onus lies, have not established that they had grounds for curtailing his lease *(sic)*.

2. We have papers relating to the appellant's detention in June 2012 and a decision to remove him as an illegal entrant under Section 10 of the Immigration and Asylum Act 1999 which was dated 15 June 2012. The notification to the appellant of the decision to remove him had the effect of invalidating his leave to remain (see Section 10(8) of the 1999 Act). The appellant was removed and he now appeals from Sierra Leone, where he is currently living.

3. Judge Boyd set out the background of the case as follows:

> The appellant has been issued visit visas to enter the United Kingdom ongoing since 2007. His most recent visa was issued on 6 April 2011 valid until 6 April 2016. This was a business visit visa sponsored by Consomex Export UK Ltd. The appellant was arrested on 14 June 2012 by Strathclyde police during a traffic stop as a suspected immigration offender. He was interviewed. The appellant was issued with a notice to a person liable to removal and on 15 June 2012 a notice of immigration decision was made to remove him from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999 (administrative removal). The appellant was removed from the United Kingdom in terms of removal directions (sic) on 23 June 2012.

4. The judge went on to record that "it is not disputed the appellant's recent visa was for five years following its issue on 6 April 2011 and that this was a business visit visa sponsored by Consomex Export UK Ltd." Further, it is agreed that this company ceased to trade in or around June 2011, as is shown in the summary and reasons for the initial detention and that the appellant was aware of that fact before the decision was taken to remove him.

5. The appellant had entered the United Kingdom through Heathrow Airport on 22 April 2012 using his valid Nigerian passport and valid visa. At [9] Judge Boyd noted the contents of the appellant's statement prepared in relation to the appeal proceedings:

> I note the appellant's statement. Whilst he states that the company has ceased to trade is a sister company of the company he works for in Sierra Leone Consomex Export Holding SL, there is in fact no evidence which would establish that these are sister companies. I have no doubt, despite the appellant's protestations in his statement, that he did know that he had an obligation to advise that the United Kingdom company had ceased trading and therefore he was entering the United Kingdom without a sponsor. The balance of probabilities suggests this is very much the case.

6. The judge found that the appellant had entered the United Kingdom with full knowledge that the United Kingdom company which was sponsoring him had ceased to trade. He wrote at [11] that the appellant "simply took the chance of entering the United Kingdom in the full knowledge of the status or likely status of his business visit visa. I am not satisfied that this was simply a mistake, a misunderstanding or oversight by the appellant." The judge found at [13] that the appellant had used deception in seeking leave to remain and that he had also failed to observe the condition of his leave to enter "…namely the condition to advise of the change of circumstances".

7. We were referred to *Boahen* [2010] EWCA Civ 585 and also Fiaz (cancellation of leave to remain – fairness) [2012] 0057 (IAC). In *Boahen*, Pitchford LJ sought to navigate through the highly-convoluted law and regulations relating to the curtailment and cancellation of leave to enter and the refusal of leave under paragraph 321 of the Immigration Rules. In the same appeal, Thomas LJ described the law as "very complicated" and noted the "urgent need to simplify to write in plain English the relevant Regulations and other provisions. It cannot be right that officials of the UK Border Agency are required to try and understand and make sense of provisions that are so arcane and poorly drafted". At [14], Pitchford LJ makes reference to Schedule 2 of the Immigration Act 1971:

Schedule 2 to the Immigration Act 1971 contains provisions enabling immigration officers and others to examine persons arriving in the UK, and gives a power to cancel leave to enter either deemed or previously given. By paragraph 2A of Schedule 2:

2A(1) This paragraph applies to a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival.

(2) He may be examined by an immigration officer for the purpose of establishing –

(a) Whether there has been such a change in the circumstances of his case since that leave was given, that it should be cancelled;

(b) Whether that leave was obtained as a result of false information given by him or his failure to disclose material facts;

(c) Whether there are medical grounds on which that leave should be cancelled.

(2A) Where the person's leave to enter derives by virtue of Section 3A(3) from an entry clearance he may also be examined by an immigration officer for the purpose of establishing whether the leave should be cancelled on the grounds that the person's purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.

(3) He may also be examined by an immigration officer for the purpose of determining whether it would be conducive to the public good for that leave to be cancelled.

(4) He may also be examined by a medical inspector or by any qualified person carrying out a test or examination required by a medical inspector.

...

(8) An immigration officer, may, on the completion of any examination of a person under this paragraph, cancel his leave to enter.

(9) Cancellation of a person's leave, under sub-paragraph (8), is to be treated for the purposes of this act and part 5 of the Nationality, Immigration of Asylum Act 2002 (Immigration and Asylum appeals) as if he had been refused leave to enter at a time when he had a current entry clearance".

It is common ground that paragraph 2A(2)(a) and 2A(2A) applied to Mr Boahen.

8. In the present case, the change of circumstances in question [closure of the United Kingdom company] occurred before leave was granted and, as a consequence, paragraph 2A(2) and (a) does not appear to apply. The issue is whether leave was obtained "as a result of false information given by [the applicant]" was a "failure to disclose material facts." At [33], the Court of Appeal refers to the Border Force Operations Manual:

Included in our authorities bundle is a section from the current Border Force Operations Manual entitled "**Cancellation of entry clearance that has effect as leave to enter (Paragraph 321A of HC 395)**". Under paragraph 1, "Introduction", the authors set out in summary the power of the immigration officer to cancel leave to enter on one of the grounds provided by paragraph 321A (paragraph 17 above) and continues:

"A person can also have their leave *cancelled* if they seek to entry *[sic]* for a purpose not specified by their entry clearance; although this refusal would fall under paragraph 320(5) and not paragraph 321A of HC 395." [emphasis added]

When dealing with "7. Change of Purpose" the Manual proceeds:

"Although refusing leave to enter to a passenger with a current entry clearance (which has the effect of leave to enter) based on a change of purpose is covered by paragraph 320(5) and not paragraph 321A, it is worth mentioning here. It is important to illustrate the difference between refusal on the grounds of **change of purpose** and refusal on the grounds of **change of circumstances**.

Where a person with a valid entry clearance seeks to enter the UK, leave can be cancelled on the basis where:

(i) The passenger admits that leave is being sought for a different purpose than specified on his entry clearance, e.g. a person with a visit visa seeking entry to follow a course of study;
(ii) There is clear evidence that the passenger's purpose of stay is different to that stated in his entry clearance, as with the above example, any documents found in the

> passenger's belongings about his course of study or an employer's letter with someone who was actually seeking entry to work."

In my judgement this advice is wrong, for the following reasons:

(1) The summary incorrectly treats refusal synonymously with cancellation. Cancellation is to be treated as refusal of entry only for the purposes of appeal under section 92 of the 2002 Act. They are not otherwise synonymous terms. Paragraph 320(5) does not deal with cancellation; it deals with refusal of leave to enter. Leave to enter can be cancelled for change of purpose, but the power is given under paragraph 2A(2A) and (8) of Schedule 2 to the 1971 Act and not paragraph 320(5). Paragraph 320(5) applies only to a visitor who is seeking entry clearance or leave to enter, not to a person who already has leave to enter but who has arrived for a purpose different from the purpose specified in his entry clearance.

(2) Paragraph 7 of the advice assumes a power to refuse leave to enter on the ground of change of circumstances. Paragraph 321A of the Rules and paragraph 2A(2) and (8) of Schedule 2 do not give a power to refuse leave to enter but a power to cancel an existing leave to enter.

(3) The advice is, however, correct to distinguish between the power to cancel under paragraph 321A on six grounds, including change of circumstances, and the power to cancel for change of purpose under paragraph 2A(2A).

9. The passages of the Manual quoted above indicate to us why the facts in the present appeal should be distinguished from those in *Boahen* and also in the Upper Tribunal determination in *Fiaz.* The Court of Appeal noted the reasons for the immigration decision in *Boahen* at [4]:

> In a facsimile letter sent on 10 November 2008 the firm of solicitors acting for Mr Boahen, Carl Martin, challenged the immigration officer's decision. On the following day, 11 November 2008, a chief immigration officer, Mrs M E Boden, replied saying:
>
> "I have decided to issue an amended form IS 82A which more clearly outlines the reasons for the refusal of your client."
>
> The amended notice read as follows:
>
> "On the 26th January 2008 *[sic]* in Accra you were issued with a United Kingdom entry clearance endorsed "visit" but I am satisfied that there has been such a change of circumstances in your case since the leave was granted that it should be cancelled. The change of circumstances in your case is that you obtained leave to enter as a visitor for five weeks to visit your uncle, Kwadwo Duodo Owusu, but you have stated that you are now seeking entry for six weeks for the purpose of taking care of your uncle's children and that you will be given money and accommodation for doing so, which amounts to paid employment. Mr Owusu has stated that you will stay for two to three months.
>
> I note that you last entered the United Kingdom as a visitor on the 13th January 2008 but you did not leave until 4th October 2008, thereby overstaying by almost three months the

180 day limit endorsed on your visa. You claim that was because you did not feel well and had to consult an NHS doctor, but you have produced no evidence of this. You also claimed that your uncle could not afford to change your return ticket.

I therefore cancel your leave under paragraph 2(A)(8) of the Immigration Act 1971 and paragraph 321A(1) of the Immigration Rules (HC395).

Furthermore, you are now seeking entry for the purpose of employment but you are a visa national and have failed to produce a passport or other identity document endorsed with a valid and current UK entry clearance issued for the purpose for which the entry is sought. I therefore refuse you leave to enter under paragraph 320(5) of the Immigration Rules (HC395).

I therefore refuse you leave to enter the United Kingdom."

The notice proceeded to inform Mr Boahen that directions for removal would be set and that he had a limited out of country right of appeal against the decision. It was common ground before us that it was the amended notice of 11 November 2008 delivered in substitution for the notice of 4 November 2008 which would determine the issues arising in the appeal.

10. In Fiaz, the appellant was a student:

On 9 February 2011 he was granted leave to remain until December 2011 to complete the course. The appellant left the United Kingdom shortly after 26 February 2011 when he received news of the death of an uncle to whom he was close. He remained in Pakistan until his re-entry to the United Kingdom on or about 10 April 2011 when he was questioned about his intentions and he stated that he was still studying at St Johns College. Following further inquiries his leave to remain was cancelled on 11 April 2011 on the basis of a change of circumstances since it was granted.

The appellant appealed to the First-tier Tribunal. On 9 June 2011 Judge McIntosh dismissed his appeal. He found as follows:-

a. Following the refusal of 20 October 2010 the appellant was unable to start or continue his course with St John's College as he had no authority to do so.
b. The appellant informed the college that he intended to appeal but failed to inform them of the outcome of the appeal, the result of which he was aware of by the first week in January.
c. The appellant did not study at the college in January or February 2011 and his statement to the Immigration Officer that he had attended the college in the week before his departure to Pakistan was misleading.
d. The appellant had not communicated with the college on receipt of his identity document endorsed with leave to remain on 9 February 2011.
e. His failure to contact the college since January 2011 and his failure to resume his enrolment and continue his studies there was a material change of circumstances within the meaning of the Immigration Rules.
f. The decision to cancel his leave was in accordance with the Rules.

g. His removal from the United Kingdom would not breach his right to respect for private life.

11. The facts in the present appeal are very different. The appellant had been issued with a visa marked "C-VISIT-BUSINESS" valid from 6 April 2011 until 6 April 2016. The only condition endorsed on the face of the visa is "NO WORK OR RECOURSE TO PUBLIC FUNDS". The appellant was a business visitor and was covered by the provisions of paragraph 40 of the Immigration Rules:

40. For the purposes of paragraphs 41-46 a general visitor includes a person living and working outside the United Kingdom who comes to the United Kingdom as a tourist. A person seeking leave to enter the United Kingdom as a Business Visitor, which includes Academic Visitors, must meet the requirements of paragraph 46G. A person seeking entry as a Sports Visitor must meet the requirements of paragraph 46M. A person seeking entry as an Entertainer Visitor must meet the requirements of paragraph 46S. A visitor seeking leave to enter for the purposes of marriage or to enter into a civil partnership must meet the requirements of paragraph 56D. A person seeking entry to study as a student visitor must meet the requirements of paragraph 56K.

12. Paragraph 46G provides:

Requirements for leave to enter as a Business Visitor

46G The requirements to be met by a person seeking leave to enter the United Kingdom as a business visitor are that he:

(i) is genuinely seeking entry as a Business Visitor for a limited period as stated by him:

(a) not exceeding 6 months; or

(b) not exceeding 12 months if seeking entry as an Academic Visitor

(ii) meets the requirements of paragraphs 41 (ii)-(iv), subject to paragraph 46HA, (v), (vi)-(viii) and (x)-(xii);

(iii) intends to do one or more of the following during his visit:

(a) to carry out one of the following activities;

(i) to attend meetings, conferences and interviews, provided they were arranged before arrival in the UK and, if the applicant is a board-level director attending board meetings in the UK, provided they are not employed by a UK company (although they may be paid a fee for attending the meeting);

(ii) to attend trade fairs for promotional work only, provided they are not directly selling;

(iii) to arrange deals, or negotiating or signing trade agreements or contracts; ***[my emphasis]***

(iv) to carry out fact-finding missions;

(v) to conduct site visits;

…..

13. As the Tribunal in *Fiaz* noted, "a change of circumstances justifying cancellation exists when the basis for the grant of the leave has disappeared…" Unlike the appellants in *Boahen* or in *Fiaz,* the appellant in the present case was not seeking to change his status as a foreign national in the United Kingdom: in *Boahen,* the appellant had sought, in effect, to convert from the status of visitor into that of a paid carer whilst in *Fiaz* the appellant had failed to study at the college in respect of which he had obtained entry clearance. In order to comply with paragraph 46G, the appellant had to intend to follow one or more of the activities specified at 46G (iii)(a). We find that the appellant fell firmly into the category at sub-paragraph (iii) *("to arrange deals or negotiating or signing trade agreements or contracts"*). The grounds of appeal at [17] state:

> "The appellant's business visit visa was given for business visits to buy goods from the United Kingdom. The appellant had since six years of visiting the United Kingdom not deviated from this purposes. Even on his bail, the Immigration Officer gave him two weeks to load his containers of goods he bought from the United Kingdom. This indicates there was no fundamental change of circumstances that justified the cancellation of the appellant's five years' business visa."

14. The appellant has claimed throughout that the sister company of Consomex Export UK Ltd continues to trade and that it was in order to undertake business for that company that the appellant came to the United Kingdom. We consider it significant that, notwithstanding closure of the United Kingdom company, the appellant had still transacted business which required him, whilst on bail from immigration detention, to load containers with goods purchased under contracts which he had negotiated in this country. All the evidence, in our opinion, indicates that the appellant had done in the United Kingdom precisely what he had intended and had been required by the Immigration Rules to do, that is, in the words of paragraph 46G, to arrange deals, negotiate and sign trade agreements and contracts. That purpose was not altered or interrupted by reason of the closure of Consomex UK Ltd. The appellant is, therefore, very different from the appellant in *Boahen* and also does not fall foul of the difficulties encountered by the appellant in *Fiaz* where the requirement not to change course or college without the prior approval of the Home Office had been ignored by the appellant.

15. Judge Boyd appears to have assumed that the appellant had an obligation to trade only with his "business visa sponsor". We are not sure what the term "business visa sponsor" actually means in the context of paragraph 46G. We consider that Judge Boyd was wrong to impose upon the appellant a restriction and obligation which appears nowhere on the face of the visa issued to him or in the Immigration Rule subject to which that visa had been issued. Accordingly, we find that there were no grounds for the Immigration Officer finding that there had been a change in the appellant's circumstances such as to justify the cancellation of his business visa. Judge Boyd erred in law such that his determination falls to be set aside. We have remade the decision. This appeal is allowed.

DECISION

16. The determination of the First-tier Tribunal promulgated on 20 February 2013 is set aside. We have remade the decision. This appeal is allowed.

Signed Date 18 October 2013

Upper Tribunal Judge Clive Lane