ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at Field House
On 10th October 2006

Determination Promulgated:
On 7th November 2006

Before

Mr Justice Hodge OBE, President
Senior Immigration Judge Goldstein
Senior Immigration Judge McGeachy

Between

BA

Appellant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Lasalle, Solicitor
For the Respondent: Ms S L Ong, Home Office Presenting Officer

Paragraph 321A of the Immigration Rules defines occasions when the cancellation of leave to enter is mandatory. An overstaying of six months in breach of conditions of leave to enter is "such a change of circumstances" that leave should be cancelled.

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 24th November 1946. On 16th May 2006 an immigration officer on behalf of the

respondent cancelled her leave to enter the United Kingdom as a visitor. She appealed that decision and was successful at her appeal before Immigration Judge Ievins.

2. In a determination promulgated on 5th July 2006 he allowed the appellant's appeal on immigration grounds. The respondent contended there was an error of law and a failure to give reasons or adequate reasons for findings on a material matter. In particular it was said that the requirements at paragraph 321A of HC395, the Immigration Rules, are mandatory. The immigration judge was, it was contended, wrong to suggest there was a discretion within Rule 321A. A senior immigration judge ordered reconsideration on 17th July 2006.

The background

3. The appellant first came to the United Kingdom in 1972 as a Commonwealth citizen. At least one of her children was born here. A number of her children attended fee-paying schools in the United Kingdom. The appellant has been travelling to and from the UK as part of her business activities and to visit her daughters for many years since the early 1980s. The appellant has been a widow since 2001.

4. The appellant's business is as a trader. An important part of her business is dealing in costume jewellery. She has also invested in property in the United Kingdom and currently owns two properties in London NW2. One of her daughters lives in one of the properties. Another daughter is a doctor who lives outside London. She has a son who is still in education, and lives in the appellant's home in Lagos, Nigeria. It appears that for many years the appellant has been receiving treatment under the National Health Service in the United Kingdom. She has been registered with her current doctor since at least 1983. She has various health problems which have called for continuing treatment which is still ongoing.

5. On 15th September 2003 the appellant applied for a visitor visa. She asked that it be valid for five years. The application form makes it clear that an applicant for such a visa may only stay in the UK for a maximum of six months at any one time provided the visa remains valid. She said in 2003 that she intended to stay in the UK for four weeks. The purpose of the visit was described as "holiday and shopping". She said she had one close relative in the United Kingdom, her daughter. She had ample money available for her stay and the visa was granted.

6. During the currency of the five year visa the appellant entered the United Kingdom on 27th March 2005. She did not leave the UK until 22nd March 2006. She overstayed by nearly six months and so broke the terms of her visa.

The immigration decision

7. The appellant had left the UK in March 2006 but returned on 16th May 2006. She was interviewed on landing at Gatwick. An immigration officer cancelled her leave to enter. In the cancellation report it was said in a box entitled '*Refusal/cancellation*':

> *"You were given notice of leave to enter the United Kingdom as a visitor. But I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave, or there has been such a change of circumstances in your case since the leave was granted that it should be cancelled because:*
>
> - *You admitted to utilising the National Health Service since 1983;*
> - *You remained in the United Kingdom from March 2005 to March 2006 thereby overstaying your visa by six months;*
>
> *I therefore cancel your continuing leave. If your leave was conferred by an entry clearance this will also have the effect of cancelling your entry clearance."*

8. The appellant in interview had said her last visit to the United Kingdom was in September 2005. There was however no stamp on her passport indicating she arrived during that month. She has subsequently accepted that she was in the UK for the year from March 2005 to March 2006.

9. The immigration officer also established that the appellant had been registered with the National Health Service since 1983. The Immigration Officer confirmed from her GPs surgery that the appellant had used the NHS services since 1984 and had attended an appointment in September 2005. Visitor visas are not issued to enable visitors to the UK to access the NHS free of charge. She had been described to the immigration officer by the doctor's surgery as *"a regular at the surgery"*. She had also attended an appointment in September 2005. The immigration officer went on to say:-

"In view of the fact that the passenger had been using the National Health Service since 1984 when not entitled and had overstayed her last entry conditions by six months I consider that there had been such a change of circumstances since the grant of leave to enter conferred by the passenger's entry clearance that it should be cancelled."

The Immigration Rules

10. So far as relevant the Rules provide as follows:-

> *"**Refusal of leave to enter in relation to a person in possession of an entry clearance**:*
>
> *321. A person seeking leave to enter the United Kingdom who holds an entry clearance which was duly issued to him and is still current may be refused leave to enter only where the immigration officer is satisfied that:*
>
> *(i) whether or not to the holders knowledge, false representations were employed or material facts were not disclosed, either in writing or orally for the purpose of obtaining the entry clearance;*
>
> *(ii) a change of circumstances since it was issued has removed the basis of the holder's claim to admission....*
>
> ***Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom**:*
>
> *321 A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply:*
>
> *(1) there has been such a change of circumstances of that person's case, since the leave was given, that it should be cancelled; or*
>
> *(2) the leave was obtained as a result of false information given by that person or by that person's failure to disclose material of facts;*

11. The immigration judge said in his determination "*it is not entirely clear to me whether the decision to refuse the appellant leave to enter is under paragraph 321 (i) and (ii) or under 321 A".*

12. The "*Refusal/Cancellation*" notice appears, as indicated, in a box in the relevant report. In the second sentence the immigration officer says that he is "*satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave".* This is almost a direct quote from paragraph 321(i) of the Immigration Rules. It uses similar wording to paragraph 321A(2).

13. The immigration officer goes on to say in the remainder of the second sentence in the refusal/cancellation box, "*or there has been such a change of circumstances in your case since the leave was granted that it should be cancelled"*. This is almost a direct quote from 321 A (1) of those Rules. It also in part mirrors the wording of paragraph 321(ii).

The Immigration Judge's Decision

14. The immigration judge concluded that the appellant had over the last 30 years travelled to United Kingdom and elsewhere in the world partly for family reasons and partly because of her business. He said:-

> "*21. It appears that the appellant has been receiving National Health Treatment with her GP Doctor Kelleman since 1983 and with another doctor before that. Of course a person who is not a citizen of this country or of the European Union and who is in this country simply as a visitor is not entitled to receive National Health Service treatment free of charge but I accept and find that the appellant did not know that. In all innocence she has received National Health treatment from her current doctor since 1983. Because the appellant did not know that she should not do so I draw no conclusions adverse to her or to her credibility from the fact that she has, until now received National Health Service treatment to which she is not entitled.*
>
> *22. The appellant is a much travelled woman and I believe that the appellant knew full well when her leave to remain expired in September 2005, that she should have left this country. Whether or not it was as a result of bad advice, the appellant made, for her, a serious mistake when she overstayed. I find that what happened was that in or about September 2005 the appellant planned to go from the United Kingdom to the United States. Because her Nigerian passport was not valid for long enough she found that she would not be allowed leave to enter the United States. Why she did not apply from the Nigerian authorities in the United*

Kingdom to extend her Nigerian passport or to obtain a new one, I do not know. At the same time the appellant was seeking and receiving medical treatment for various conditions from her GP in the United Kingdom. Rather than going back to Nigeria, obtaining a fresh passport, and then coming back to this country on her valid Nigerian multiple entry visitor's visa, the appellant simply decided to overstay. She continued to receive medical treatment and finally went back to Nigeria in March 2006. When the appellant was interviewed by an immigration officer on her return in May 2006 she told an untruth when she said that she last arrived in the United Kingdom in September 2005, whereas it was of course March 2005. But the appellant has apologised for that mistake."

15. At paragraph 24 of his determination the judge correctly accepted that the appellant had a right to appeal against the immigration decision. He went on to say:

> "*The immigration officer has a discretion under both Rules 321 and 321A of HC 395. I consider that the immigration officer should have exercised his discretion differently. There are effectively two reasons why the decision of 16th May 2006 was made: that the appellant had received National Health Service treatment when she was not entitled to it and she had overstayed between September 2005 and March 2006*"

Paragraph 321A Immigration Rules

16. Under paragraph 321 an immigration officer is entitled to refuse leave to enter. Under paragraph 321A an immigration officer has to cancel such leave as has been granted. These are two separate and distinct decisions. It is unhelpful as occurred here in the box on the decision form containing that decision to describe what is occurring as a "*Refusal/Cancellation*". A separate decision is required for either a refusal of leave to enter or a cancellation of leave to enter.

17. We are satisfied that the decision in this case was made by the immigration officer in reliance on the rules contained in paragraph 321A. He "cancels" the appellants continuing leave. He does not refuse leave to enter under paragraph 321. The preamble to the rule states " *Grounds on which leave to enter…is to be cancelled at port…*". Macdonald's Immigration Law & Practice (6th Edition) points out at 3.76 "*The wording of the rule relating to the cancellation of advance leave (whether or not*

*granted by entry clearance) is mandatory: leave to enter or remain '**is to be cancelled**' on these grounds*". Paragraph 321A was added to the Immigration Rules from 30th July 2000 by HC 704. It is clear to us that the rules contained in the paragraph were intended to be mandatory. The words "*is to be cancelled*" are used. These are in clear contrast to the preamble to paragraph 321 "*may be refused leave to enter*" which are arguably discretionary.

18. The new paragraph 321A was in our judgement inserted to define occasions when cancellation of leave to enter was mandatory. Had it not been so paragraph 321 could in most cases of any similarity to this one have been used to create a discretionary ground for preventing a person with a visa entering the country. On appeal it would then be open to them to assert that such discretion as there is in paragraph 321 should be exercised differently.

19. We conclude therefore that the immigration judge was wrong in law when he held that the immigration officer had a discretion under rule 321A. He does not. If the grounds in 321A are made out then any entry clearance which a passenger arriving in the United Kingdom may have is to be cancelled.

Conclusions

20. Here the immigration judge accepted that the appellant has been using the services of the National Health Service for many years. As a matter of law she has not been entitled to use those services. It appears from the evidence that since about May 2006 as she is aware of the position she is meeting her bills for healthcare privately.

21. The immigration judge concluded that she had been receiving this treatment "*in all innocence*" since 1983. We note that the appellant has three adult children living in the United Kingdom now. All those children appear to have been at school in the United Kingdom. At least one was born here. One is a doctor. The appellant is running a successful business. She has been in the UK on many occasions. It is clear to us that this appellant has a significant and detailed knowledge of British society. We find the immigration judge's conclusion that the appellant did not know that a Nigerian citizen was not entitled to free treatment under the Health Service extremely surprising. But he did see and hear the appellant. It was not however submitted to us that this decision was perverse and we do not think it right in these circumstances to disturb those findings by the judge.

22. The visa, the subject of these proceedings was issued in 2003. The reasons given as to why the appellant was going to the UK were "*holiday and shopping".* The immigration judge found the appellant did not know she should not receive free NHS treatment. There is no evidence to support any assertion that when the appellant applied for the visa in 2003 she intended or proposed to make use of the National Health Service as a result of her entitlement to enter the United Kingdom.

23. When the appellant applied for the visa she completed a standard application form. There is nothing on the form, unsurprisingly, about medical issues. There is no evidence that the appellant was interviewed in 2003 . We do not therefore conclude that there is any evidence to support a finding that in 2003 when the visa was granted the appellant gave "*false information*" or, given the immigration judges finding "*failed to disclose material facts*". We cannot see therefore that grounds under 321A(2) are made out or that the visa should be cancelled on that ground. It appears from the evidence that since May 2006, when she indicated she became aware of the position, the appellant has been meeting her healthcare bills privately.

24. On the other hand it is clear on the appellant's own admission, as accepted by the immigration judge, that the appellant overstayed for a period of approximately six months between September 2005 and March 2006. She lied about this overstaying when interviewed by the immigration officer. When she arrived on 16th May 2006 the appellant clearly had a leave to enter which was "*in force"*. The question is must that leave be cancelled because the appellant overstayed for a period of six months prior to attempting to re-enter the United Kingdom. In other words is an overstaying for a period of six months "*such a change of circumstances ... since the leave was given that it should be cancelled".* If so then because of the mandatory nature of paragraph 321A (1) the appellants leave to enter was properly cancelled and the appeal must be dismissed.

25. The appellant was an experienced traveller to the UK when she applied for her visa in 2003. She acknowledged in signing her visa application form that she was only entitled to stay for a "*maximum of six months at any one time*". At that time she indicated on the form that she only intended to stay for 4 weeks for holiday and shopping. She told an untruth about her six months overstay when interviewed in May 2006. That very lie points in our judgement to a clear knowledge on her part of the six month rule.

26. In the body of the immigration officers decision the use of the National Health Service and the overstaying by six months are

both described as "*such a change of circumstances since the grant of leave to enter conferred by the passenger's entry clearance that it should be cancelled".* In our judgement the phrase "such a change of circumstances" must be interpreted to mean a change of such a nature as to remove the basis of the holder of the visas claim to admission. That is a matter of fact and degree. A rule which permits multiple entries for limited periods of six months on each occasion is in our view clearly broken by any person who remains in the UK for a further 6 months over and above the time properly allowed. We therefore regard the appellants overstaying as "such a change in the circumstances" of the appellant since the leave was granted as to mean the leave should be cancelled as the immigration officer did in his decision on 16th May 2006.

Decision

27. For the reason given above we regard the immigration judge's decision to disclose a material error of law. On the facts as found the cancellation of the visa was mandatory and accordingly the appellants appeal is dismissed.

Mr Justice Hodge OBE
President
06 November 2006