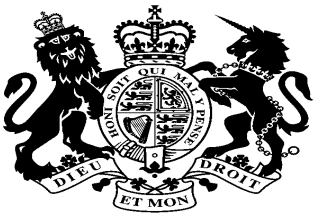

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00620/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 October 2014	**On 10 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

THERESA AGBENAGHAN AKPEDEYE
ANONYMITY DIRECTION NOT MADE

Respondent

Representation:
For the Appellant: Mr S Kandola, Presenting Officer
For the Respondent: Mr M George, Legal Representative, from Jesuis, solicitors

DETERMINATION AND REASONS

Immigration History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 22 July 2014 before Judge Onoufriou. However, for ease of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Therefore Ms Akpedeye is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant had a multi visit visa, which was cancelled on 19 December 2013, when she sought entry to the UK on the basis of her visit visa. She left the UK voluntarily and lodged an out of country appeal. The Respondent did not supply a bundle for the purposes of the hearing before Judge Onoufriou. In the Notice of Refusal of Leave to Enter (the Notice), it is stated:

> "You were given entry clearance which had effect as leave to enter the United Kingdom on 19/12/12 but I am satisfied that there has been a significant change of circumstances since your entry clearance was issued because you owe more than £12,000 to the North East London NHS Treatment Centre in accordance with the relevant regulations on charges to overseas visitors and 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."

3. The Respondent applied for permission to appeal on the basis that the Judge had materially misdirected himself in law because the Appellant was refused under "Rule 321A(i)" of the Immigration rules, which is a non-discretionary provision, but the Judge purported to find it was refused under "Rule 322 (12)", and "allowed the appeal on the basis that the Immigration Officer had failed to exercise the discretion necessary to the operation of that Rule; he then exercised that discretion himself in favour of the Appellant."

4. Permission was granted because an arguable error was disclosed by the application.

5. A Rule 24 response was not filed on behalf of the Appellant. However, at the hearing, Mr George provided a skeleton argument, a copy of **SSHD v Boahen [201] EWCA Civ 585** and **Palisetty v SSHD [2014] EWHC (QB)** on which he sought to rely, and a bundle containing some documents which were before the Judge and updated witness statements. I made it clear that for the purposes of the error of law hearing, I would only consider the documents which were before the Judge and the authorities that Mr George sought to rely on for the purposes of his submissions.

6. Relying on **Boahen**, in his written submissions, Mr George appears to be saying that the Respondent's grounds are a 'misconstruction' of the Notice at best and 'misconception' at worst because for there to be a cancellation based on a change of circumstances, the change must be permanent and the burden of proof was 'a very high degree of probability'.

The Hearing

At the hearing, I handed to the parties copies of Rule 321A (1) and 322 (12) for ease of reference and for context.

7. In submissions, Mr Kandola relied on the grounds of application. He stated that the Judge had made a mistake as to fact (that the cancellation was under Rule 322 (12) when it was in fact under 321A (1)) and this had resulted in a material error of law. He stated that the provision under which leave was cancelled was set out in the explanatory statement that was attached to the Notice and Mr Kandola sought to

adduce it in evidence. He stated that there was a Court of Appeal authority, **E and R**, for which he did not have a citation but which confirmed that where there had been a mistake as to fact, and there was document is objective and the issues could be independently verifiable, then it could be adduced in evidence. He submitted that the document he was seeking to adduce originated from the Secretary of State and referred to the Immigration Rules and therefore should be admitted. He submitted that the error of law was material to the outcome because had the Judge known that the cancellation was under paragraph 321A (1), he would have reached a different decision.

8. Mr Kandola was in fact referring to is **E and R [2004] EWCA Civ 49** in which the Court of Appeal stated that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law…" and when assessing whether or not to exercise the discretion to admit new evidence, "…the principle of finality would be important. To justify reopening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors" (paragraph 92 (iii)).

9. Even applying the **Ladd v Marshall** principles the explanatory statement is not admissible at this stage because it does not comply with the first of the three requirements (it is a document which with due diligence could have been supplied to the First-tier Tribunal), even if it does comply with the other two (the evidence contained within it is apparently true and it is capable of making a material, if not decisive, difference to the outcome).

10. Mr Kandola stated that even if I cannot admit the explanatory statement, it was clear from the Notice (form IS.H2C) that the leave was cancelled due to a change in circumstances.

11. As to the submissions contained within the skeleton argument, the first was that cancellation of leave could only be based on a permanent change of circumstances. However, this was not supported **Boahen**. In that case, the Court of Appeal considered whether a permanent change of circumstances was required before leave could be cancelled under Rule 231A(1) and it was found that it was not. At head note 2 it was stated

> "The immigration judge had been entitled to cancel the respondent's leave to enter on the ground of a change of circumstances under 321A (1) of the Immigration Rules. The learned judge had drawn from the Immigration Directorate's Instructions to its staff a principle as to the permanence of the change contemplated by the rule and had concluded if the change was comprised in alteration of the purpose of the visit in the mind of the visitor, it would be a change which qualified under paragraph 321A (1) only if the material persuades the immigration officer that there is now a permanent desire, or permanent intention not to use the visit visa for proper visits, but only

for visits which are going to be in breach of the terms of the visits. However, no principle of permanence can be drawn from those instructions. It cannot have been the purpose of the legislation to require the immigration officer to be satisfied that the intention of the visa holder was never again during the period of validity of the visa to make a visit for the purpose for which the visa was granted."

12. Therefore, the fact that the Appellant was willing to pay the NHS charge, so that it may not be a permanent change in circumstances, did not affect materiality.

13. Mr George relied on the skeleton argument. He submitted that the explanatory statement should have been provided to the Judge and was not. I pointed out that Mr Kandola was in fact saying even in the absence of the explanatory statement that the terms of the Notice were clear. Mr George than submitted that paragraph 321A (i), as referred to in the grounds of application, did not exist. However, although there had clearly been a typographical error it was clear that the reference to paragraph 321A (i) was in fact a reference to paragraph 321A (1). His submissions then were:

    a. When reading the terms of the Notice, as set out above, the wording "…you owe more than £12,000 to the North East London NHS Treatment Centre in accordance with the relevant regulations on charges to overseas visitors…" as the 'main clause' and the wording "… I am satisfied that there has been a significant change of circumstances since your entry clearance was issued" was the sub clause and the Judge was therefore not wrong to have relied on paragraph 322(12).

    b. Referring to paragraph 11 of **Palisetty**, he submitted that the burden of proof was on the Respondent and the standard of proof was 'a high degree of probability' and he invited me not to admit the new evidence;

    c. To cancel leave under paragraph 322A (1) the Respondent would have to establish that the change was permanent, as provided at paragraph 8 of **Boahen**, and at paragraph 37, that the intention of the Appellant was relevant. The NHS treatment could not amount to a permanent change of circumstances because the evidence before the Judge was that the Appellant's family had offered to pay it. The Appellant had required urgent medical treatment which had resulted in the charges;

    d. The preamble to paragraph 322 (12) confirmed that that this was the correct provision; it is headed "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused" and the reference to NHS charges is set out in paragraph 322 (12). The Notice clearly set out the terms of paragraph 322 (12) and it was open to the Judge to apply it.

14. Mr Kandola submitted that the issue was very narrow. It was that the Judge relied on the wrong Immigration Rule. The facts were accepted; the Appellant accepted that she had incurred £12,000 of NHS charges. The Court of Appeal had rejected the

permanence argument; the court stated "It is legitimate to ask whether, if the entry clearance officer had known that the applicant would use the visa for purposes other than those authorised, whether mistakenly or deliberately, he would have issued it" (paragraph 37). If the ECO had known that the Appellant had incurred £12,000 worth of NHS charges, he would not have issued the visa.

15. Mr Kandola asked that if I find there had been a material error of law, I admit the explanatory statement. Paragraph 321A (1) was non-discretionary and the appeal therefore fell to be dismissed.

16. Both parties agreed that if I found that the Judge had materially erred in law I had sufficient material before me to remake the decision.

Decision and reasons

17. For the purposes of my decision, I do not in fact need to admit any additional evidence. I find, as submitted by Mr Kandola, that the visa was cancelled due to a change in the Appellant's circumstances. This is the plain and ordinary meaning of the text set out at paragraph 2 above. It cannot be artificially construed by references to main and sub-clauses. The basis of the cancellation is set out at the beginning, the reason is given as the NHS charges and the result is that leave is cancelled.

18. Dealing with the reference to NHS charges, Mr George stated that the Appellant had needed urgent NHS treatment, which resulted in the charges. However, it is clear from the witness statements submitted that the Appellant had an asthma attack for which she required urgent treatment but thereafter due to pains in her knees and related follow up she had two knee replacements and associated treatment. This could not be classified as 'urgent' treatment. Whilst NHS charges are not referred to in paragraph 321A (1), the fact that the Appellant received NHS treatment when she came to the UK as visitor is evidence that the purpose of her entry to the UK was not solely as a visitor. If she required treatment, an application should have been made as a medical visitor with the appropriate evidence. Therefore, strictly speaking, the reason for the cancellation was that the NHS charges were evidence of a change of circumstances rather than a reason for cancellation.

19. There is no merit in Mr George's submission that the preamble to paragraph 322 (12) supported the Judge's reliance on that provision. It refers to 'leave to remain' and 'variation of leave to enter or remain' which is made when the Appellant is in the UK and to the application 'being refused'. The Appellant was not seeking leave to remain, nor was she seeking a 'variation of leave to enter or remain'. Furthermore, an application she had made was not 'being refused'. In contrast, the heading for paragraph 321A (1) reads, "Grounds on which leave to enter or remain which is in force is to be cancelled at port or where the holder is outside the United Kingdom". Her visa was cancelled before she was allowed to enter the UK. It was clear that the Appellant's leave was 'cancelled'; this is clearly stated in the Notice and cancellation cannot take place under paragraph 322 (12).

20. There is no merit in Mr George's submission that the immigration officer needed to demonstrate a permanent change in circumstances. The parts of **Boahen** he referred to were taken from the determination of the Judge whose decision was the subject of the proceedings before the Court of Appeal. On a full reading of the judgement, it cannot be said that a permanent change of circumstances needed to be established or that the Appellant's intention was relevant.

21. As to the need to prove the change in circumstances (without any reliance on **Palisetty**, which in fact relates to the burden of proof in cases of unlawful detention) under part 9, it is always for the Respondent to prove. However, the facts of the case (i.e. that NHS charges had been incurred) were not in dispute and there had, therefore, been a relevant change in circumstances.

22. I find that the Judge did err in determining the Appellant's case against the provisions of paragraph 322 (12) of the Immigration Rules and that this error was material. I have considered whether relying on the wrong Immigration Rule had the effect of prejudicing the Appellant if I were to go on to remake the decision. I find it does not because the underlying facts of the case are clear. She had two surgical procedures (one in February 2012 and the other in February 2013 as per the witness statement of her son dated 21 July 2014). It is therefore clear that the Appellant received treatment over a considerable period of time and at no time sought to change the basis of her stay in the UK. Even if the case were remitted to the First-tier Tribunal, there could only be one outcome; the appeal would be dismissed because the provisions of paragraph 321A (1) are not discretionary.

23. I therefore remake the decision to dismiss the appeal.

Decision

24. It follows from the above that there is a material error of law in the decision of Judge Onoufriou. I set aside his decision. I remake the decision to dismiss the appeal under the Immigration Rules.

Anonymity

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date **22 October 2014**

M Robertson
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

In light of my decision, as I have remade the decision to dismiss the appeal, I make no fee order.

Signed Dated **22 October 2014**

M Robertson
Deputy Upper Tribunal Judge