Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21124/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 February 2015	**On 16 February 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Michael Chukweuemeke
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr S Umigwe, instructed by Harrison Morgan Solicitors
For the appellant: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Afako promulgated 10.10.14, allowing the claimant's appeal against the decision of the Secretary of State to curtail his leave to remain in the United Kingdom. The Judge heard the appeal on 17.9.14.

2. First-tier Tribunal Judge White granted permission to appeal on 11.12.14.

3. Thus the matter came before me on 3.2.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Afako should be set aside.

5. The brief history is that the claimant arrived at Heathrow on 17.5.13 with a passport bearing leave to enter, issued on 22.8.11 (a five-year multi-entry visit visa). However, the immigration officer concluded that false representations, or material facts had not been disclosed, for the purpose of obtaining that leave to enter. Enquiries revealed that on his previous visit to the UK on 8.11.12 he claimed to have stayed only 12 days, supported by an entry stamp showing returning entry to Nigeria on 20.11.12. However, he actually left the UK on 28.4.13. He had obtained a number of false Nigeria entry stamps to falsely demonstrate that he had been in the UK a shorter period of time than he had. In fact, over the preceding 36 months he had been in the UK over 25 months. He stated that he had come to the UK for a period of two weeks, to visit his girlfriend Lisa Martin and his baby daughter, whilst staying with his cousin. In fact, he had a return flight booked for 27.10.13.

6. The immigration officer concluded that in the light of the claimant's attempts to conceal the true length of his previous stays he had not come to the UK on this occasion for the purpose and period claimed, but rather to reside in the UK and that he had used deception. Thus his leave was cancelled.

7. In summary, Judge Afako concluded that the cancellation of leave must have been pursuant to paragraph 321A(2) and thus the false representations or failure to disclose material facts had to be "in relation to the application for leave.." At §8 the judge considered that the false representations, etc., relied on by the immigration officer only emerged after the decision to cancel leave and were thus irrelevant to the making of the decision and not within the terms of paragraph 321A(2).

8. The judge also considered, but discounted as not applicable, paragraph 321A(1), "such change in the circumstances of that person's case since the leave was given, that it should be cancelled."

9. Further, the judge regarded the cancellation of leave as not having been sanctioned by a Chief Immigration Officer or Immigration Inspector, as stated in paragraph 10 of the Immigration Rules, which states that the power is not to be exercised by an Immigration Officer acting alone. "The authority of a Chief Immigration Officer or of an Immigration Inspector must always be obtained."

10. In granting permission to appeal, Judge White found it arguable that Judge Afako made an error of law in finding that the Secretary of State "had to prove more than that the stamps were falsified in order to discharge the burden of proof (para 13)," "… given that it is arguable that dishonesty may be inferred from the circumstances in the absence of a plausible, innocent explanation from the appellant (see the discussion in Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC)).

11. For the Secretary of State, Mr Nath relied both on false representations or failure to disclose material facts, and change of circumstances.

12. It emerged at the hearing before me that the claimant still does not accept that he obtained false immigration stamps in his passport, as stated in his witness statement of 2.9.14. However, his interview on the day of arrival, the contemporaneous record of which was before the Tribunal, amounts to clear admissions of everything alleged in the Notice of Refusal of Leave to Enter. I note that the claimant did not give evidence at the First-tier Tribunal and thus the only relevant evidence before the Tribunal fully supported the claim of false representations or failure to disclose material facts, despite the witness statement and grounds of appeal to the First-tier Tribunal.

13. As the judge correctly observed at §8 and the wording of paragraph 321A(2), the false representations or failure to disclose material facts must relate to the application for leave, in other words the five-year multi-entry visit visa issued on 22.8.11. There was no evidence of false representations or failure to disclose material facts in the application for that leave.

14. However, it is clear from the immigration history that the claimant had stayed longer than claimed in the UK on his previous visit, having entered on 8.11.12 and left on 28.4.13, and sought, by the dishonest use of false Nigerian entry stamps, to hide the true length of his visit and the fact that over the preceding 36 months he had spent over 25 months in the UK. In the notice of refusal of leave to enter, the immigration officer stated, "From the length of time you have spent in the United Kingdom, I consider your true purpose is to reside here, a purpose other than that for which your visa was issued. 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."

15. Paragraph 320(1) of the Immigration Rules provides as the first ground on which entry clearance is to be refused, a mandatory ground: "The fact that entry clearance is being sought for a purpose not covered by these Rules." It is clear on the evidence that the claimant was seeking leave to enter for a purpose not covered by the Rules. He was in fact seeking to reside in the UK for lengthy periods. Even though none of those periods may have individually exceeded the 6 months visit visa limit, entry under paragraph 41 is for "a limited period as stated by him." The claimant falsely stated that he was coming for only two weeks, when he had a return flight booked for 27.10.13. In the light of the false representations or failure to disclose material facts, he was not believed. It follows that the refusal of leave to enter is consistent with reliance on paragraph 320(1). Even though the decision does not specifically refer to that provision, or indeed 321A, the wording is entirely consistent with 320(1).

16. From §7 of the First-tier Tribunal decision, Judge Afako assumed that the decision could only have been made under paragraph 321A. Perhaps this was because the judge considered that there had been a decision to cancel leave at port. However, the decision itself is headed 'Notice of Refusal of Leave to Enter.' Paragraph 320 sets out

grounds for refusing either entry clearance or leave to enter. However, paragraph 320 is subject to 321, which provides for refusal of leave to enter in relation to a person in possession of an entry clearance "duly issued to him and is still current" only where the Immigration Officer is satisfied that, either false representations were made in relation to the application for entry clearance, or that "a change of circumstances since it was issued has removed the basis of the holder's claim to admission…"

17. The wording of the refusal decision relies on both false representations or failure to disclose material facts and that "there has been such a change of circumstances in your case since the leave was granted that it should be cancelled," which suggests reliance also on paragraph 321A.

18. Either under paragraph 321 or 321A, the Secretary of State was entitled to rely on change of circumstances since the leave was granted. At §13 Judge Afako considered this a "possible" argument but stated that the point needed to be explained in the decision and argued on appeal by the Secretary of State who had the burden of proof. The judge concluded that this had not been done beyond the bare assertion. That is not accurate. It is clear that the facts and immigration history as set out in the notice of decision demonstrate the clear use of deception, admitted by the claimant, to disguise the true length of his visits to the UK. That is a clear and obvious change of circumstances. The claimant was in fact seeking to reside in the UK, a purpose not covered by the grant of entry clearance as a family visit for a short period "as stated by him" following which he intends to leave the UK. In the circumstances, the refusal to grant leave to enter and to cancel leave was fully justified by the decision of the Secretary of State.

19. An issue relied on by the judge at §14 of the decision, relates to the exercise of the power to refuse leave to enter or cancel entry clearance, which requires the authority of a Chief Immigration Officer or an Immigration Inspector. This issue appears to have been raised by the judge alone; it was not raised as a ground of appeal by the claimant. Neither was the Secretary of State put on notice that this issue was to be raised. The grounds of appeal assert that this is an internal procedure and that the decision was countersigned by the Chief Immigration Officer. Mr Unigwe sought to persuade me that I could compare the signature on the interview record with that on the refusal notice and see that the same person had signed both. However, I am not an expert in handwriting and cannot make such a comparison. It is the assertion of the Secretary of State that it was duly authorised. How that is done in practice is very likely to be an internal process. There is nothing in the Rules to require the signature of a Chief Immigration Officer or an Immigration Inspector to the refusal decision. In the circumstances, I find that the Secretary of State was not required to demonstrate to the First-tier Tribunal that the decision had been authorised by a Chief Immigration Officer or an Immigration Inspector and that this was not a matter fatal to the decision, as claimed by the First-tier Tribunal Judge.

20. In the circumstances, there were material errors of law in the making of the decision of the First-tier Tribunal such that it cannot stand and must be set aside and remade,

which I do by dismissing the appeal on immigration grounds, for the reasons set out above.

21. I do not deal with human rights and article 8 ECHR. Although addressed in the most vague and general terms in the written submissions of the claimant's representative to the Upper Tribunal, it was not raised in the grounds of appeal to the First-tier Tribunal, or in submissions before the First-tier Tribunal, and did not form any part of the decision of the First-tier Tribunal. In Sarkar [2014] EWCA Civ 195, the Court of Appeal held that even when Article 8 is in the grounds of appeal, if no evidence is adduced and no submissions made the appellant can be taken to have abandoned it as a ground of appeal and the Judge does not err in failing to deal with it. In the circumstances, I need not address article 8 at all. Furthermore, it is open to the claimant to make application for further entry clearance as a visitor, or indeed for the purpose of settling in the UK as a spouse. What he was doing was to subvert immigration controls by misusing the visit visa process for effective residence in the UK, without making the appropriate immigration application. In the circumstances, even if article 8 is engaged in this case, in any Razgar balancing exercise between on the one hand the rights of the claimant and his now wife and child and on the other the legitimate and necessary public interest in protecting the economic well-being of the UK through immigration control, bearing in mind section 117B of the 2002 Act, I would have found that the decision was entirely proportionate and not unduly harsh (Nagre).

Conclusion & Decision:

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed:  Date: 13 February 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal of the claimant has been dismissed and thus there can be no fee award.

Signed:  Date: 13 February 2015

Deputy Upper Tribunal Judge Pickup