Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30077/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
19 November 2015	**26 January 2016**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

PIMSUTHAN CHAIYAMART

Appellant

and

AN IMMIGRATION OFFICER, GLASGOW AIRPORT

Respondent

Representation:
For the Appellant: Mr D Stevenson, instructed by McGill & Co Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of Thailand. She appealed to the First-tier Tribunal against a decision of the respondent on 12 September 2015 cancelling her continuing leave to enter the United Kingdom. The appeal was dismissed by Judge Mozolowski in the First-tier Tribunal. The appellant now appeals, with permission, to this Tribunal.

2. The salient facts are as follows. The appellant entered the United Kingdom on a Tier 4 (Student) Visa valid from 3 January 2012 to 3 October

2013. On 26 August 2013 she married Mr Mark Wallace, a British national. She than applied for and obtained leave to remain as a spouse, valid from 19 September 2013 until 19 March 2016. On about 1 June 2014 the appellant left the United Kingdom. At about the same time Mr Wallace informed the Secretary of State that the marriage had broken down and that he was instigating divorce proceedings. That information was passed to Immigration Officers.

3. On 11 July 2014 the appellant returned to the United Kingdom. She was interviewed, and after consideration by an Immigration Officer and a Chief Immigration Officer her leave was cancelled. The grounds for the cancellation are stated in the notice of decision as being that the withdrawal of Mr Wallace's sponsorship of her was a significant change in circumstances that remove the basis of her entry to the United Kingdom.

4. The grounds of appeal to the First-tier Tribunal were essentially twofold. Substantively, the appellant claimed that the decision was based on an incorrect assessment of the facts. She claimed that she was taken by surprise and had thought that her relationship with Mr Wallace was subsisting; she also asserted that the impending birth of a child gave her a right to enter. The judge heard detailed evidence from the appellant, the important parts of which she did not believe. She concluded that there had indeed been a significant change in the circumstances of the appellant and that the latter had no right to admission. That part of the judge's determination is not contested before us.

5. The appellant also, however, raised a procedural challenge to the decision, submitting that the way the decision was taken meant that the decision was "otherwise not in accordance with the law" within the meaning of s 84(1)(e) of the Nationality, Immigration and Asylum Act 2002. That submission was based on reference to a policy document apparently indicating that in circumstances such as the present, officers should consider whether to curtail the migrant's leave to 60 days and only in certain specified circumstances curtail it with immediate effect. It was argued that the decision that was made, cancelling the appellant's leave rather than curtailing it, was a decision which was made not in accordance with the policy; and, further, that if the appellant's leave had been curtailed rather than cancelled she would have had the opportunity to apply, within the curtailed period of leave, for further leave. Judge Mozolowski rejected that argument.

6. The grounds on the basis of which permission to appeal to this Tribunal was granted are that in rejecting that argument the judge made two errors. She should have decided that the decision was an unlawful one, and so allowed the appeal, leaving no adverse decision in force against the appellant. Further, having done that, she should have recognised that consideration of the merits of the appellant's case needed to be undertaken by the Secretary of State as part of any new decision; it was not for the judge to investigate the merits of a decision which had not yet lawfully been taken.

7. At the hearing, Mr Stevenson presented those arguments to us. We reject them for two reasons. The first is that the policy upon which he relied does not apply to the circumstances of this case. The second is that if the appellant's leave had been curtailed to 60 days, that would have been a disadvantage rather than an advantage to her.

8. The context of the appellant's status following her departure from the United Kingdom is given by art 13 of the Immigration (leave to enter and remain) Order 2000 (SI 2000/1161), the relevant paragraphs of which are as follows:

> "13(2) Subject to paragraph (3), where a person has leave which is in force and which was:
>
> (a) conferred by means of an entry clearance (other than a visit visa) under article 2; or
>
> (b) given by an immigrant officer or the Secretary of State for a period exceeding six months, such leave shall not lapse on his going to a country or territory outside the common travel area.
>
> (3) Paragraph (2) shall not apply:
>
> (a) where a limited leave has been varied by the Secretary of State; and
>
> (b) following the variation the period of leave remaining is six month or less."

Subsequent paragraphs of art 13 enable leave which does not lapse to be curtailed or cancelled whilst the holder is abroad.

9. Paragraph 2A of schedule 2 to the Immigration Act 1971 deals with the examination of persons who arrive with continuing leave and specifically provides in sub-paragraph 2(a) that such a person may be examined by an Immigration Office for the purpose of establishing "whether there has been such a change in the circumstances of his case, since that leave was given, that it should be cancelled". At Paragraph 321A of the Statement of Changes in Immigration Rules, HC 395 (as amended) is, so far as is relevant to this appeal, as follows:

> "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
>
> 321A. The following grounds for the cancellation of a person's leave to enter or remain which is in fore on his arrival in, or whilst he is outside, the United Kingdom apply;
>
> (1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or
>
> … ."

There is an assessment to be made, but once the assessment has been made, the wording of the rule (including its heading) makes it clear that *cancellation* is *mandatory*. The following paragraphs of the rules, 322 –

323C, make different provision in relation to different circumstances, and include a number of *discretionary* powers to *curtail* leave. One of them (in paragraph 323(ii)) arises if a person "ceases to meet the requirements of the rules under which his leave to enter or remain was granted", but there is no specific reference to a change of circumstances in those terms, except in paragraph 321A; and it is that paragraph alone which gives the authority for cancellation of continuing leave. With that in mind, we turn to the guidance upon which Mr Stevenson, on behalf of the appellant, relied. It is headed as follows:

> "Immigration Rules, part 9
>
> 323, 323A, 323B, 323C and part 6A
>
> 245DE(c)-Entrepreneurs and 245EE(c) – Investors."

The opening words of the guidance makes it clear that it is about curtailment.

10. The guidance does not purport to lay down any principles for cancellation of leave; nor does it purport to undermine or comment on circumstances where cancellation of leave is mandatory under paragraph 321A. In the present case the officer assessed the facts of which he was aware and concluded that there had been such a change in the circumstances since it was given, that it should be cancelled. At that point he was obliged to cancel the leave under paragraph 321A. Discretionary curtailment did not arise. The decision is one clearly made under paragraph 321A and the guidance upon which the appellant's representatives have tried to put so much weight was not applicable. That conclusion was reached, in similar terms, by the judge in the First-tier Tribunal. The grounds of appeal to this Tribunal wholly fail to engage with it. The First-tier Tribunal judge was correct.

11. It is, however, worth spending a moment on what the position would be if Mr Stevenson was right and that the leave should have been curtailed to 60 days. If, whilst she was abroad, the appellant's leave had been curtailed so as to have six months or less remaining, it would have fallen within art 13(3) of the Immigration (leave to enter and remain) Order 2000. Paragraph (2) of that article would therefore not apply to it, and on the appellant's return to the United Kingdom she would be treated as a person who required leave to enter. As she is a visa national (Appendix 1 of the Immigration Rules), refusal of leave to enter would have been mandatory. In those circumstances she would not have had an in-country right of appeal, whereas, because of the provisions of paragraph 2A(9) of Schedule 2 to the 1971 Act, cancellation of the appellant's leave gave her the in-country right of appeal which she is exercising. It is, we think, perfectly clear that for that reason cancellation is more advantageous to her than curtailment to 60 days.

12. For the foregoing reasons we are entirely unpersuaded by Mr Stevenson's arguments. The appellant's appeal stands as dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 21 January 2016