Upper Tribunal
(Immigration and Asylum Chamber)

Fiaz (cancellation of leave to remain-fairness) [2012] UKUT 00057(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 January 2012	

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Before

THE PRESIDENT, MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE KING

Between

MIRZA MUHAMMED FIAZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik instructed by Malik Law Chambers

For the Respondent: Ms J Iverson, Senior Home Office Presenting Officer

i) An immigration officer has power to cancel a leave to remain which remains in force under article 13(5) of The Immigration (Leave to Enter) Order 2000 (SI 2000/1161).

ii) The provisions of that article are not unlawful for being **ultra vires.**

iii) A change of circumstances justifying cancellation exists where the basis for the grant of the leave has disappeared: SSHD v Boahen [2010] EWCA Civ 595 applied.

iv) It is possible that a change first occurring before and continuing after the grant of the leave may be “such a change in the circumstances of that person’s case since the leave was given that it should be cancelled”.

v) The powers of curtailment of leave to remain may overlap with the power to cancel leave.

vi) Where either power may be exercised it may be that the duty of fairness requires the leave to be curtailed rather than cancelled.

vii) It is material to whether fairness required curtailment rather than cancellation as to whether the change of circumstance was the responsibility of the claimant or not, and whether he had endeavoured to misrepresent the position during his examination.

viii) The jurisdiction to determine that a decision is not in accordance with the law because of a lack of fairness, is not to be degraded to a general judicial power to depart from the Rules where the judge thinks such a course appropriate, or to turn a mandatory factor into a discretionary one: fairness in this context is essentially procedural.

DETERMINATION AND REASONS

Introduction

1.
The appellant is a citizen of Pakistan born in 1980. He was first issued a student visa to come to the United Kingdom in 2006. After his arrival he was granted extensions of stay to undertake various courses. On 20 October 2010 he was refused an extension of stay to enrol as a student at St Johns College, Harrow in a hotel management course. He successfully appealed that decision in December 2010.

2.
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.

3.
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.

4.
Permission to appeal to the Upper Tribunal was granted on 9 July 2011 and following a “for mention” on 7 October 2011 Upper Tribunal Judge McKee found two material errors of law had been made by the First-tier judge:-

a.
The judge had stated that the burden was on the appellant to demonstrate on the balance of probabilities that there had been no change of circumstances whereas the burden was on the respondent to satisfy the judge that there had been such a change.

b.
Under rule 321 the change of circumstances must be since the leave was granted on 9 February 2011, whereas the judge relied in part on events that preceded that date as being the material change of circumstances.

5.
The matter came before Judge McKee again on 23 November 2011 when the appellant’s representatives canvassed new legal arguments that were the subject of further directions for an exchange of skeleton arguments. The appellant was due to lodge a skeleton argument by 15 December 2011. In fact he only lodged it on 11 January 2012, leaving insufficient time for the Secretary of State to respond. An adjournment was refused. The Secretary of State provided a skeleton argument on 22 January and the case proceeded to a hearing on 23 January 2012.

6.
The appellant advances three grounds on which he contends this appeal should be allowed. We describe them in the following terms and order:-

(i)
The respondent had not established a material change of circumstances since the leave to remain was granted.

(ii)
The statutory scheme did not permit cancellation of leave to remain.

(iii)
It was unfair to exercise the power of cancellation where there was

an appropriate and less draconian power of curtailment.

7.

At the conclusion of the hearing we indicated that we dismissed each of these grounds and that we re-made the appeal by dismissing it. We curtailed time for permission to appeal to five working days from the promulgation of this decision. We now give our written reasons.

The legal background:

8.
Rule 321A of the Immigration Rules provides for grounds for 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. Ground (1) is if "there has been such a change in the circumstances of that person's case since the leave was given that it should be cancelled". The heading to this paragraph states that such leave is to be cancelled if the ground is made out. We were referred to rules 10 to 10 B dealing with the arrangements for cancelling such leave by an immigration officer under the authority of a Chief Immigration Officer.

9.
By contrast rule 323A provides for discretionary curtailment of leave to remain granted under the Points Based system. Our attention was drawn to rule 323A (d) (i) and (iii) that enable curtailment of leave where the migrant fails to commence or ceases studying with the sponsor

10.
The Immigration (Leave to Enter) Order 2000 (SI 2000/1161) is made pursuant to the Secretary of State's powers under s.3B Immigration Act 1971. Article 13 sets out when leave to remain does not lapse on a departure from the United Kingdom. It is in the following terms:-

13.—(1) In this article "leave" means—

(a) leave to enter the United Kingdom (including leave to enter conferred by means of an entry clearance under article 2); and

(b) leave to remain in the United Kingdom.

(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 immigration 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 months or less.

(4) Leave which does not lapse under paragraph (2) shall remain in force either indefinitely (if it is unlimited) or until the date on which it would otherwise have expired (if limited), but—

(a) where the holder has stayed outside the United Kingdom for a continuous period of more than two years, the leave (where the leave is unlimited) or any leave then remaining (where the leave is limited) shall thereupon lapse; and

(b) any conditions to which the leave is subject shall be suspended for such time as the holder is outside the United Kingdom.

(5) For the purposes of paragraphs 2 and 2A of Schedule 2 to the Act (examination by immigration officers, and medical examination), leave to remain which remains in force under this article shall be treated, upon the holder's arrival in the United Kingdom, as leave to enter which has been granted to the holder before his arrival.

(6) Without prejudice to the provisions of section 4(1) of the Act, where the holder of leave which remains in force under this article is outside the United Kingdom, the Secretary of State may vary that leave (including any conditions to which it is subject) in such form and manner as permitted by the Act or this Order for the giving of leave to enter.

(7) Where a person is outside the United Kingdom and has leave which is in force by virtue of this article, that leave may be cancelled:

(a) in the case of leave to enter, by an immigration officer; or

(b) in the case of leave to remain, by the Secretary of State.

(8) In order to determine whether or not to vary (and, if so, in what manner) or cancel leave which remains in force under this article and which is held by a person who is outside the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may seek such information, and the production of such documents or copy documents, as an immigration officer would be entitled to obtain in an examination under paragraph 2 or 2A of Schedule 2 to the Act and may also require the holder of the leave to supply an up to date medical report.

(9) Failure to supply any information, documents, copy documents or medical report requested by an immigration officer or, as the case may be, the Secretary of State under this article shall be a ground, in itself, for cancellation of leave.

(10) Section 3(4) of the Act (lapsing of leave upon travelling outside the common travel area) shall have effect subject to this article ."

11.
As the appellant's leave to remain was for more than six months, it did not lapse when he left the United Kingdom. We note that Article 13(7) enables such leave to be cancelled when an appellant is out of the United Kingdom by either an Immigration Officer (if the leave being cancelled was leave to enter) or by the Secretary of State (where the cancelled leave was leave to remain). However, the cancellation in this case was whilst the appellant was physically in the United Kingdom on his return.

12.
Article 13(5) treats such leave to remain as leave to enter that has been granted prior to entry to the United Kingdom for the purposes of Schedule 2, paragraphs 2 and 2A of the Immigration Act 1971.

13.
Paragraph 2A(1), (2), (8) and (9) of that Schedule provides as follows:

(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;

……..

(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 as if he had been refused leave to enter at a time when he had a current entry clearance.

Ground 1: Change of circumstances

14.
Mr Malik's submission on this point was succinct. He says that on the 9 February 2011 the evidence reveals that the appellant was not studying at St John's College. This remained the position on his return. There was accordingly no change of circumstances since the leave was granted.

15.
We do not accept this submission. The Immigration Officer's investigations into the case lead him to contact St John's College on 11 April and he received two faxes from the Principal of the college that day. They revealed first that the appellant had not kept the college updated with the circumstances of his appeal since it was lodged, and second that the college had decided to remove him from the course in the light of the time he had spent off and his unapproved visit to Pakistan.

16.
In our judgment the appellant's failure between 9 and 26 February 2011 to inform the college of the grant of leave to remain to study with them was a change of circumstance since the leave was granted. The appellant was aware that his suspension from the course was pending appeal and the grant of leave to remain to enable him to study. The failure to lift his suspension when he was eligible to do so, changed his suspension from an involuntary one at the direction of the college into a voluntary one at the instigation of the appellant. That voluntary failure to seek to resume studies was material to whether the appellant continued to be eligible to remain as a student of St John's College in April 2011.

17.
Further, the second fax reveals another change of circumstance, namely that in the light of the amount of time the appellant had missed from the course since it began, and absence of communication seeking enrolment and a leave of absence before travelling to Pakistan for 40 days during term time, the College was not prepared to keep his place open or take him back. This was a materially different position to that prevailing on 9 February 2011, when he had been given leave to study at this specific college.

18.
We are satisfied that both or either of these matters constituted a change of circumstance, and cumulatively both factors removed the entire basis on which the leave to remain had been granted

pending appeal. This case fell into the class where cancellation of leave was appropriate applying the terms of the Rule, UKBA's internal guidance and the decision of the Court of Appeal in SSHD v Boahen [2010] EWCA Civ 595 where Pitchford LJ said the following at [37]

"The context of the illustrations in the guidance is important. What is envisaged is that, while the visa holder's intention may remain to enter for the authorised purpose, the factual basis upon which the visa purpose was founded has been undermined. Accordingly, leave to enter to take up employment may have been undermined by withdrawal of the offer of employment; leave to enter for study may have been undermined by withdrawal of sponsorship; or leave to enter as a child for settlement may have been undermined by the permanent departure of the child's sponsor from the UK. In other words, had the entry clearance officer been aware of these eventualities, he would not have issued the visa for the purpose he did, however genuine the application was. There is, in my opinion, no underlying premise to these examples that the change of circumstances must be permanent, nor is there, in any event, a true comparison to be made between the examples given and Mr Boahen's case, in which the visa holder had, on the immigration officer's finding, evinced an intention to visit for purposes other than that authorised. The only legitimate analogy lies, in my view, in the judgement of the probable effect of the circumstances as they have turned out to be upon the mind of an entry clearance officer considering the original application. 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. In the light of the development with which the chief immigration officer was faced in Mr Boahen's case, the question she had to consider was whether the entry clearance should continue, or the visa holder should be required to make a further application. Consideration of cancellation on the ground of change of circumstances required an assessment from the immigration officer of all the circumstances including, for example, whether there remained a continuing legitimate purpose for the visa holder's visits with which the visa holder could and should be entrusted for the remainder of the period of validity. The purpose of the power of cancellation is to ensure proper immigration control, and the use of a visa by a visa national for a visit whose purpose is unauthorised is, on the face of it, a serious matter."

19.
Finally, we would add that the terms of rule 321A need to be read sensibly in the light of its language and context. Where leave to remain is granted on appeal for a particular purpose but that purpose disappears between the determination of the appeal and the grant of the leave to remain, we see no reason why that change of circumstance does not continue through to the period when the leave was granted and thus enable cancellation.

20.
For all these reasons we are satisfied that the respondent has satisfied us that by 11 April 2011 there had been a change of circumstances since the leave of 9 February 2011 removing the basis of stay for which the leave had been granted. The precondition for cancellation has been made out.

Ground 2: Power to cancel leave to remain

21.
The appellant next disputes that although the Immigration Rules may permit cancellation of leave to remain, the statutory context does not.

22.

Although Schedule 2, paragraph 2A(1) refers to an immigration officer cancelling leave to enter (rather than leave to remain), the Immigration (Leave to Enter) Order 2000 (SI 2000/1161) Article 13(5) provides that for the purposes of Schedule 2, paragraphs 2 and 2A, leave to remain which remains in force shall be treated on the holder's arrival as leave to enter. Thus the Order applies the examination powers to leave to remain in these circumstances.

23.
Mr Malik accepts that to mount the submission that he does he must persuade us that the terms of article 13 (5) of the Order are outside the enabling powers of the Secretary of State is thus a nullity in law because it is ultra vires . He reminds us that a strict construction should be taken to the grant of law making powers to amend the statutory scheme.

24.
Mr Malik then directed our attention to s. 3B(1) of the Immigration Act 1971 as amended (the enabling power) and points out that it is confined to "further provision with respect to the giving, refusing, or varying of leave to remain in the United Kingdom" and not to the cancelling of such leave, while s.3B(3) gives powers incidental, supplemental and consequential to the principal one.

25.
Where this submission falls down is the failure to place article 13(5) in the context of the other changes made by article 13 of the Order. Before the enactment of this provision, any leave to remain lapsed on a departure from the common travel area and the migrant had to apply for a fresh leave to enter on re-entry. The Order changed that and enabled leave of more than six months to continue in force and enable a migrant to re enter without examination of their eligibility. However, just as an entry clearance or a previous leave to enter did not give an unqualified right of admission to the United Kingdom and could be set aside or cancelled on the basis of misrepresentation or change of circumstance, those long established powers were now being applied to leave to remain that still existed on return to the UK. [1]

26.
In our judgment, therefore, the Secretary of State was not creating novel powers of cancelling a limited leave that was outside the purpose of s.3B rather her predecessor was creating a novel class of non-lapsing leave to remain that would justify admission to the United Kingdom after a trip abroad, but needed to temper this new provision by applying the same powers of cancellation to it as if it had been a form of entry clearance of leave to enter. The power to cancel such leave was needed as an ancillary provision to the new class of non-lapsing leave.

27.
We are therefore satisfied that article 13(5) of the Order is lawful and accordingly so is the exercise of a power of cancellation by an immigration officer. Our conclusion is also thus an answer to the doubt expressed about the Immigration Rules on this point in Macdonald's "Immigration Law and Practice" 8 th Edition at 4.35 footnote 6.

28.
We are equally unimpressed with the submission that the power to promote the Immigration Rules under s.3(4) Immigration Act 1971 is limited to promoting rules of practice for the administration of the scheme under the statute rather than the administration of the scheme under Orders made pursuant to the statute. Here the statutory scheme included s.3B that entitled the Secretary of State to create a non-lapsing leave by order. The administration of the Act required rules to be promoted for how functions created under the scheme of the Act were to be exercised.

29.
In any event it is the terms of the Order combined with Schedule 2, paragraph 2A that gives authority to the immigration officer to make the decision in question, rather than the Rules alone.

Ground 3: unfair to cancel rather than curtail

30.
It was common ground between the parties that:-

a.
Curtailment of leave to remain can be exercised where a migrant ceases to study with a sponsor institution.

b.
Curtailment is discretionary under the Immigration Rules as opposed to cancellation that is mandatory.

c.
There may be circumstances where it would be unfair to the migrant to exercise a power of cancellation where the power of curtailment is more appropriate to the circumstances at the relevant time.

d.
Where the immigration decision is taken in a manner that is conspicuously unfair and thus contrary to the common law duty of fairness, such a decision is not in accordance with the law and the Tribunal judge has power to so determine with the consequence that the decision must be re-made and until it is a lawful decision remains outstanding.

31.
We agree with each of these propositions and do not need to recite the authority that underpins them.

32.
Mr Malik then submits that it was unfair to cancel the appellant's leave to remain when:

a.
There was a less drastic alternative, namely curtailment that was tailor- made for the situation that arose in this case and afforded a judge a discretion on appeal to determine whether it should have been exercised.

b.
Curtailment of leave keeps the leave in existence pending the appeal (see s.3D Immigration Act 1971) whereas cancellation does not.

c.
A person whose leave is cancelled is therefore forced into an unlawful position pending any appeal and falls into the same situation deprecated by Laws LJ in JM (Liberia) [2006] EWCA Civ 1402 at [17] to [18] approved by Sedley LJ in TE (Eritrea) [2009] EWCA Civ 174 at [15].

d.
In any event the appellant was unable to pursue his studies pending the appeal and was thus disadvantaged.

33.

We disagree that the common law duty of fairness prevented the immigration officer from exercising the power of cancellation of leave in this case. We reach this conclusion for the following reasons:-

a.
On the facts of the case, already examined under ground 1 above, this was a case where the total collapse of the purpose for which the leave had been given made it appropriate for the power to cancel to be exercised.

b.
The appellant was not the victim of a change of circumstances outside his control arising during his departure. His failure to enrol with the college following his successful appeal was voluntary as was his decision to depart for an extended stay in Pakistan without securing the college's agreement to re admit him to a course that was due to have needed in august or any later course.

c.
It is relevant to the content of the duty of fairness, as Mr Malik accepts, that the appellant was found by the judge to have endeavoured to mislead the immigration officer on 11 April 2011 about the status of his studies with St Johns College and whether he had actually attended for studies in 2011.

d.
The appellant is deemed not to have entered the United Kingdom on his return in April (see s.11(1) Immigration Act 1971) and thus was not remaining in breach of the terms of his leave pending an appeal.

e.
It was always open to an appellant, whose original purpose in being here had failed, to make a fresh application for a fresh course of studies from abroad.

f.
At the time of the decision the appellant had provided no good reason why apart from his studies with St Johns College (now terminated) he should be permitted to remain in the United Kingdom. In particular there was no credible human rights claim why removal was disproportionate.

34.
We would add that the jurisdiction of this Tribunal to determine that a decision is not in accordance with the law because of a lack of fairness, is not to be degraded to a general judicial power to depart from the Rules where the judge thinks such a course appropriate or to turn a mandatory factor into a discretionary one. Fairness in this context is essentially procedural: a course of action that prevents the claimant from drawing a relevant document or other information to the attention of the decision maker, or preventing the claimant from switching colleges to one that is currently approved by the Secretary of State rather than substantive: an untrammelled exercise of discretion to permit people to remain who have failed to use the previous permission for the purpose for which it was granted and who have no other claim to remain under the rules.

35.
Although it has not been raised in argument before us we entirely agree with the First-tier judge's decision on the private life claim. There was no established private life deserving of respect or making cancellation and removal disproportionate to the legitimate aim of preserving social and economic order by consistent application of the Immigration Rules.

36.

It is a matter of some regret that a properly investigated and well reasoned decision to cancel leave taken in April 2011 has been followed by four judicial hearings before the First-tier and Upper Tribunal and two further occasions when judicial time was spent in giving directions and nine months have elapsed since the original decision.

Decision

37.
The First-tier judge's decision contained a material error of law already identified and has been set aside. We re-make the decision by dismissing the appeal for the reasons we have given above.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber

Date: 25 January 2012

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[1] See also sub-paragraph (9)