Upper Tribunal

(Immigration and Asylum Chamber)

Ahmed (general grounds of refusal – material non-disclosure) Pakistan [2011] UKUT 00351 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 August 2011	**19 August 2011**

Before

UPPER TRIBUNAL JUDGE McKEE

Between

FARQAN AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr Sharaz Ahmed , instructed by Khans Solicitors

For the Respondent: Mr Kyri Kyriacou, Senior Presenting Officer

In order to have made false representations or submitted false documents so as to attract a mandatory refusal under Part 9 of the Immigration Rules, an applicant must have deliberately practised 'Deception', as defined at para 6. Failing to disclose a material fact is also classed as 'Deception'. It follows that such failure also requires dishonesty on the part of the applicant, or by someone acting on his behalf.

DETERMINATION AND REASONS

1. The appellant arrived here from Pakistan on 3 September 2009 with entry clearance as a student, which conferred leave to enter until 31 December 2010. On 21 August 2010 the appellant, who has been living in Ilford, travelled for the first time by rail to Gravesend, thinking that he could use his Oyster Card, which still had £15 in credit. On the way there, however, a ticket inspector told him that his Oyster Card was not valid for travel on that route, and that he ought to have bought a ticket in London before setting off. The appellant supplied his name and address, and in due course he received a letter from North Kent Magistrates' Court, asking whether he admitted having travelled on the railway without paying the fare. The appellant wrote back with the requisite admission, and on 11 October 2010 a "Notice of Fine and Collection Order" was sent to him by the Magistrates' Court. He had been fined £80, to which were added compensation of £4.50, a victim surcharge of £15 and costs

of £35, making a total of £134.50. That the appellant did not realize that he now had a criminal conviction was accepted by Immigration Judge Talbot when the current appeal came before him the following year.

2. On 16 December 2010 the appellant made an in-time application for further leave to remain. Among the questions posed in the Tier 4 (General) Application Form, such as whether the applicant was guilty of war crimes or genocide, was question E1:

“Has the student had any criminal convictions in the United Kingdom or any other country (including traffic offences) or any civil judgments made against them?”

3. To this question the appellant ticked the ‘No’ box. When he received the decision on his application, in a letter dated 11 February 2011, he was told that he had scored 30 points for Attributes and 10 points for Maintenance, which would normally have satisfied the requirements of the Points Based System. But paragraph 245ZX(a) of HC 395 stipulates that “ the applicant must not fall for refusal under the general grounds for refusal ”, and the application was indeed said to fall for refusal under one of those general grounds, namely paragraph 322(1A). This provides a mandatory ground on which variation of leave to remain is to be refused:

“where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application.”

4. The refusal letter does not cite any of the above wording, and does not specify which of the various subdivisions of the rule is being relied on to justify refusal, but simply tells the appellant that his application has been refused under paragraphs 322(1A) and 245ZX(a) of the Immigration Rules because of the answer which he gave to question E1 of his Application Form. “ I am satisfied ”, says the author of the letter, “ that you have used deception in this application .”

5. An appeal was duly lodged with the First-tier Tribunal, and when it came before Immigration Judge Talbot on 15 April 2011 copies were handed up of FW (Paragraph 322; untruthful answer) Kenya [2010] UKUT 165 (IAC), the head note to which reads as follows:

“When a direct question is asked, and answered untruthfully, there is both a false representation and a non-disclosure; and it is not open to an Appellant who gives an untruthful answer to a direct question in an application form to say that the matter was not material.”

6. This was a case, very similar to the instant case, in which an applicant had wrongly answered ‘No’ to question E1 on his application form, asking whether he had any criminal convictions. This was said in the refusal letter to be both a false statement and the non-disclosure of a material fact, the author of the letter also being satisfied that the applicant had “used deception”. The Vice-Presidential panel took the view, which was the received wisdom at the time, that it did not matter whether the maker of false representations had made an honest mistake. It was enough that the information given was inaccurate. This view was corrected in Adedoyin – also known as AA (Nigeria) [2010] EWCA Civ 773, holding at paragraph 76 that “ [d]ishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a ‘false representation’ a ground for mandatory refusal .” It was to AA (Nigeria) rather than FW (Kenya) that Judge Talbot turned for guidance, and having found that the appellant had not been dishonest when he ticked the ‘No’ box on the application form, he concluded that he had not made a ‘false representation’ in the required sense.

7. The judge then turned, however, to the ‘material non-disclosure’ aspect of paragraph 322(1A). Although the refusal letter was silent as to which aspect of the rule was being relied on, saying only that the appellant had “ used deception ”, the Presenting Officer canvassed this aspect before Judge Talbot, who agreed that the question whether the appellant had a criminal conviction was material to the application. That, he concluded, was the end of the matter. The non-disclosure was material, and therefore the appeal fell to be dismissed. Nothing was said about whether the appellant’s state of mind was relevant to this aspect of the rule.

8. Permission was sought to appeal to the Upper Tribunal, on the grounds that material non-disclosure ought to be treated in the same way as false representations, so that dishonesty would be required for both. Permission was indeed given, and when the matter came before me today I came to the conclusion, after hearing submissions from the two representatives, that dishonesty is indeed required for all aspects of paragraph 322(1A). True it is that at paragraph 69 of his leading judgment in AA (Nigeria) , Lord Justice Rix declined to say anything about the material non-disclosure aspect of the rule, because “ the rule does not at this point speak in terms of what is ‘false’… In my judgment, it cannot be decisive as to the meaning of ‘false’ .” The court confined itself to construing ‘false representations’, but it seems to me that the material on the basis of which Rix LJ concluded that dishonesty is required for ‘false representations’ applies equally to the interpretation of non-disclosure within the context of paragraph 322(1A).

9. I turn first to paragraph 320(7B), under which a previous breach of the UK’s immigration laws attracts a mandatory refusal of entry clearance. One such breach is “ (d) using Deception in an application for entry clearance, leave to enter or remain (whether successful or not) .” The refusal letter in the instant case told the appellant that he had “ used deception ”, although without a capital D. The capital letter suggests that Deception is a term of art, and indeed it is defined as follows at paragraph 6 of the Immigration Rules:

“‘Deception’ means making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts.”

10. The association of Deception with false representations was a principal reason why Rix LJ held that dishonesty was required. Since failure to disclose material facts is also a species of Deception, by parity of reasoning that too requires dishonesty on the part of the applicant. The theme of Deception runs through the guidance in the Immigration Directorates’ Instructions given to UKBA caseworkers on the application of paragraph 322(1A), which is headed ‘Deception used in a current application’ and encompasses false representations, false documents or information, and non-disclosure of material facts. Paragraph 320(7A) is in identical terms to paragraph 322(1A), and Chapter 26 of the Entry Clearance Guidance uses a similar rubric for the benefit of entry clearance officers considering that rule: ‘RFL04 Deception in an application’.

11. But Rix LJ places particular weight on a letter of 4 April 2008 from Liam Byrne, then the Immigration Minister, expanding upon what his colleague, Lord Bassam, had said in a recent debate in the House of Lords about the newly inserted paragraphs 320(7A), 320(7B) and 322(1A). The following passage from Mr Byrne’s letter is highlighted at paragraph 37 of AA (Nigeria) :

“The new Rules are intended to cover people who tell lies – either on their own behalf or that of someone else – in an application to the UK Borders Agency. They are not intended to catch those who make innocent mistakes in their applications.”

12. His Lordship makes the following comment about the above passage at paragraph 44 of his judgment:

“[Mr Byrne] means exactly that : he is asked for an assurance that the assurance [Lord Bassam] gave in the Lords debate about false documents applies also to false representations, and supports it by demonstrating that published guidance puts false documents and false representations (and for good measure false information) all in pari materia .”

13. It would be illogical to treat the non-disclosure of material facts otherwise than in pari materia with the rest of paragraph 322(1A). That indeed is how Mr Ockelton treated it in FW (Kenya) , a case which also involved an applicant answering ‘No’ to question E1 on his application form, asking whether he had any criminal convictions. At paragraph 9 of the determination we read:

“The truth of the matter is that this is a case where there is no essential difference between false representation and non-disclosure. The non-disclosure was a false representation, because it was an answer to a direct question. The answer ‘no’ was both false and constituted a failure to disclose what would have been disclosed if the question had been answered truthfully. That is not to say that there is always no difference between false representation and non-disclosure. If, for example, an application form contained a space in which an applicant was invited to disclose anything else he thought might be of relevance in deciding whether he should be granted leave, and he left that part of the form blank, it might be found that he had failed to disclose a material fact, without making a false representation. But that is not this case.”

14. I respectfully adopt the Vice-President’s reasoning in the above passage. In many, if not most, cases false representations and material non-disclosure will be opposite sides of the same coin. If the applicant has failed to disclose a material fact he will also have made a false representation, and vice versa . Of course, at the time when the Upper Tribunal ‘reported’ FW (Kenya) it was thought to be irrelevant whether the applicant had intended to deceive or had made an honest mistake. Thanks to AA (Nigeria) , we now know that the applicant’s state of mind is crucial to determining whether he made false representations. Where material non-disclosure is the opposite side of the same coin, it would be illogical, and indeed unfair, if an applicant who had honestly made an incorrect representation could nonetheless have his application refused, and his appeal dismissed, on the basis that he had not disclosed a material fact.

15. All aspects of paragraph 322(1A) and its sister paragraphs 320(7A), 321(i) and 321A(2) are treated as ‘Deception’ under paragraph 6 of HC 395, which strongly implies that mens rea is required on the part of the applicant. If that were not so, it would lead to the extraordinary situation that a person who had made a perfectly honest mistake in filling out his application form for further leave to remain would be subject to a re-entry ban under paragraph 320(7B)(d) for “ using Deception ” in his previous application. The consequence is positively draconian under paragraph 320(7B)(d)(ii) if an applicant for entry clearance “ used Deception ” in a previous application for entry clearance. The re-entry ban would be for ten years. That can hardly be the intended consequence of a wholly inadvertent failure to answer correctly one of the questions in an application form. To include such a failure under the rubric of ‘Deception’ would divorce that word, used as a term of art, from its ordinary meaning, which is not the way in which the Immigration Rules are normally construed.

16. The above reasoning is, I think, compatible with FW [2011] EWCA Civ 264, in which FW (Kenya) went on appeal from the Upper Tribunal to the Court of Appeal. The grounds of appeal ran to almost four pages, which Lord Justice Moore-Bick thought excessively long (although not, it has to be said, unusually long in this jurisdiction). But the court had nothing to say about the correct interpretation

of material non-disclosure. The appellant had been found at first instance to have deliberately given a wrong answer to question E1 in the application form. So although the Tribunal had been wrong to suppose that the appellant's state of mind when he gave that answer was irrelevant, he had in fact been deliberately dishonest, and so there was no error of law in the finding that he had made false representations. That outcome is certainly compatible with a requirement for dishonesty in material non-disclosure as well.

17. In the instant case, on the contrary, Immigration Judge Talbot found that the appellant had not been dishonest. It was an error of law to suppose that this finding was irrelevant to the question whether there had been non-disclosure of a material fact. The appeal should not have been dismissed just because the fact was material. The First-tier determination is therefore set aside, and the decision on the appeal must now be re-made. As the respondent acknowledged in the refusal letter, the appellant has scored sufficient points to satisfy the requirements of the Points Based System. It having been found that the general grounds for refusal do not apply to the present case, it follows that the appeal must be allowed.

DECISION

18. The appeal is allowed under the Immigration Rules.

Signed

Upper Tribunal Judge McKee

Immigration and Asylum Chamber