Upper Tribunal
(Immigration and Asylum Chamber)

Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 May 2014	

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Before

THE HON MR JUSTICE GREEN

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MISS YALIAN SHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: No Appearance

For the Respondent: Ms K Pal, Home Office Presenting Officer

(1) In terms of the approach that a tribunal should adopt towards decisions of the Secretary of State in which dishonesty or deception is alleged against an applicant for leave to remain, the starting point should be, as the Court of Appeal in Adedoyin (formerly AA (Nigeria) v SSHD) [2010] EWCA Civ 773 have made clear, that pursuant to paragraph 322 of the Immigration Rules, the reference to "false" means "dishonestly" false.

(2) Where an application form etc is false in a material way, this may be relied on by the Secretary of State as prima facie evidence establishing dishonesty. The inference of deliberate deception can be strengthened by other facts: eg if a criminal conviction (not disclosed in an application) occurred shortly before completion of the application form. Here, the conviction must have been high in the applicant’s mind and any explanation based on oversight would carry little weight. But it is always open to an appellant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the Secretary of State to answer that evidence. At the end of the day the Secretary of State bears the burden of proving dishonesty.

(3) The internal organisational decision by the Secretary of State not to engage with paper appeals means that the appellant's evidence goes unchallenged. In that regard, it must be remembered, that in the absence of evidence from the Secretary of State putting the appellant's prima facie plausible explanation into doubt, it would be wrong to find dishonesty. Thus, in view of the possible evidential difficulties confronting a judge when deciding a paper application, where the appellant's evidence is not met (see para (2) above), a tribunal should be slow to find dishonesty, particularly without hearing evidence and submissions on the point from the appellant and/or the Secretary of State.

(4) A finding of dishonesty can have catastrophic consequences for the appellant in social and economic terms and is not to be made lightly. Thus, in a paper case, if a judge entertains doubts as to the appellant's account, he or she should be mindful of the powers of rule 45 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 to give directions regarding supporting documentary evidence, or for the Secretary of State to respond to the appellant's evidence as she considers appropriate.

DETERMINATION AND REASONS

A. The issue

1.
This appeal concerns the approach that the Tribunal should adopt towards decisions of the SSHD in which dishonesty or deception is alleged against an applicant for leave to remain. It also highlights a particular problem faced by the First-tier Tribunal (FtT) in relation to dealing with allegations of dishonesty on paper appeals.

2.
There is before the Tribunal an appeal against the determination of Designated Judge Zucker in the FtT of 12 February 2014. In that determination the Judge dismissed, on paper, the Appellant’s appeal against the decision of the SSHD of 18 September 2013 (“the decision”) refusing the Appellant’s application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points Based System (PBS) and for a Biometric Residence Permit. The Appellant did not appear before us to make representations. However no explanation has been given for this absence and no request has been received for an adjournment. In the circumstances Ms Pal requested that we proceed. In the circumstances we have decided, in the exercise of our power under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to proceed to determine this appeal.

B The facts

3.
The decision was to remove the Appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. The basis of the decision was that the Appellant failed to meet the requirements of paragraph 245ZX(a) of the Immigration Rules. Further it was stated that in the Appellant’s Tier 4 application, at question J16, she said that she had never used “deception” to gain leave to remain in the United Kingdom. The operative part of the decision was in the following terms:

“At section P on the Tier 4 (General) application form you declared and confirmed that the information you gave in that form was complete and true to the best of your knowledge and agreed to the sharing of information held about you by other government departments, agencies, local authorities, the police, foreign governments and other bodies and that if such bodies provided the Home Office with any information held about you which may be relevant for immigration purposes it may be used in reaching a decision on your application.

At section J on the Tier 4 (General) application form you declared that you have no criminal convictions (including traffic offences), civil judgments and/or charges made against you in the United Kingdom or any other country. Through routine checks made by the Home Office we have information that you have not disclosed your driving offences. Your driving offences are as follows:

Conviction(s):

1. 22.01.13 Neath Port Talbot Magistrates

Yalian, Shen

1. Failing to stop after accident on 11.05.12

No separate penalty.

2. Drive mechanically propelled vehicle without due care and attention on 11.05.12

No separate penalty.

3. Using a vehicle while uninsured on 11.05.12

Fine £600.00

Victim surcharge £15.00

Costs £85.00

Disqualified from driving – discretionary 56 days.

Conviction not spent until 22.01.2018

Therefore your application for Tier 4 (General) Student has been refused under the published Immigration Rules."

4.
It is to be observed that the failure relied upon by the SSHD was the failure to disclose the offences by which we interpret the decision to refer specifically to mean the convictions which are then set out in the letter all of which relate to a single incident on 11 May 2012.

5.
We would note that whilst the decision refers to the declaration, which it is said was wrongly made, that the Appellant had no "criminal convictions (including traffic offences), civil judgments and/or charges", this is not, in actual fact, a faithful reflection of the application form that the Appellant was required to complete in conjunction with her application. In the application there is no reference to convictions including "traffic offences".

6.
The Appellant appealed to the FtT. In her application form (IAFT1) in Section 8, she gave the following reasons and evidence:

"When submitting my Tier 4 (General) application for further leave to remain in the UK, I stated in question J16 that I had never used deception to gain leave to remain in the UK. At Section P on the Tier 4 (General) application form, I declared and confirmed that the information I gave in the form was complete and true to the best of my knowledge. Furthermore, at Section J on the Tier 4 (General) application form, I declared that I had no criminal convictions (including traffic offences), civil

judgment and/or charges made against me in the UK or any other country. Unfortunately, I was not aware that I was required to disclose the following convictions given to me on 22/01/2013."

She then proceeded to set out the convictions in issue. She recorded that as a result of these convictions she was disqualified from driving for a discretionary 56 days and required to pay a fine of £700.00. She then proceeded to state as follows:

"I was informed by the police that I would receive a letter by post disclosing the penalty charges, however I had still not received any letter by the time I had moved to temporary accommodation elsewhere in June 2012. I continued to contact my friends who were continuing to live at my previous address to enquire if the letter had been received. However my letter had still not been posted. In October 2012 I moved address once again in order to commence my studies at Swansea University and I updated my new address with the police. At this time, I had still not received a letter to my previous address. As I had still not received the letter by October 2012 and since I had updated the police with my new address in Swansea, I had presumed that my case had been closed and that no further action would be taken. When I made my Tier 4 (General) application on 21/08/13 in order to study at Cardiff Metropolitan University I did not understand that I should disclose information about my traffic offences as I believed the police had taken no further action to convict me."

7.
The appeal was submitted together with an application, as was the Appellant's right, that it be heard on paper. The Appellant was a litigant in person and she had no legal advisors to assist her. The facts as set out in her application have not been challenged by the SSHD. In the course of submissions during oral argument it was explained to us by Counsel for the SSHD that, internally , the SSHD had no process or mechanism pursuant to which appeals submitted to the FtT on paper were appraised with a view to be responded to in the course of the paper appeal process. It was for this reason that the facts and matters set out by the Appellant in her appeal documentation were not put in issue or otherwise challenged.

8.
Judge Zucker issued his determination on 12 February 2014 dismissing the appeal. The Judge in paragraphs 1-3 recites, briefly, the facts that we have referred to, in somewhat greater length, above. In paragraph 4 he states:

"In a case such as this the burden is upon the Secretary of State to demonstrate on balance of probabilities that the Appellant does fall for refusal under the general grounds."

9.
In paragraph 5 he recites paragraph 322(1A) of the Immigration Rules. He summarises it in the following form:

"By Paragraph 322(1A) 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, or in order to obtain documents from the Secretary of State or a third party required in support of the application leave to enter or remain in the United Kingdom is to be refused."

10.
In paragraphs 6 and 7 the Judge recites the Appellant's arguments. The crucial reasoning for the purpose of this appeal is found in paragraph 8 and it is in the following terms:

“8. The grounds for refusal are mandatory. Though the Appellant says that she informed the police of her change of address there is no sufficient evidence from her to support that contention. One might have expected some correspondence from her to the police and vice versa. That the Appellant has not been entirely honest in her approach to this application is demonstrated by the fact that she asserted that she believed the police were taking no further action, but that would not have justified answering the question concerning charges in the negative. Whilst the legal burden is upon the Respondent, in the face of sufficient evidence there is an evidential burden on the Appellant to refute what is being said against her. She has failed in this regard.”

C. Analysis

11.
We turn now to our analysis of the reasoning in the decision. We have come to the conclusion that in his reasoning the Judge erred. There are a number of reasons for this which relate to the approach adopted towards the allegation of deception or dishonesty made in the decision.

12.
First, the only evidence before the Judge as to the facts surrounding the Appellant’s state of mind, and whether this amounted to dishonesty, were those set out in form IAFT1 in Section 8, to which we have already made reference. The SSHD did not adduce any evidence to gainsay this account. When we make this point we should put it into context. As we have explained the SSHD does not have any internal processes for dealing with paper applications submitted to the FtT. Accordingly it is not therefore surprising that the SSHD did not adduce evidence in the present case. However, nothing prevented, as a matter of principle or law, the SSHD adducing evidence. She was entitled so to do. Further it is common ground that she had a copy of the Appellant’s application and, therefore, was aware of the position adopted by the Appellant in relation to her decision. On the face of the Appellant’s explanation it is plausible. Nothing leaps out from the page which would lead a reader to doubt its veracity. The starting point is therefore that the SSHD identified a a materially inaccurate application form and concluded that this gave rise to a case of deception or dishonesty; but the appellant then provided a plausible explanation for the mistake. What inferences is it possible to draw from this state of affairs about dishonesty?

13.
Two points were taken by the Judge as set out in paragraph 8 of his determination.

14.
The first point concerned the criticism made by the Judge that the Appellant did not produce any evidence to support her contention that she informed the police of her change of address. However, the evidence of the Appellant that she did communicate a change of address to the police was not challenged by the SSHD. Further it has to be remembered that there is a requirement for international Tier 4 Students to keep the police and the Home Office up-to-date with the student’s movements. Documents on the file attest to the fact that the Appellant was in regular contact with the police and in such circumstances it would, perhaps, have been surprising had she not kept the police up-to-date with her movements and changes to her address. Given that the SSHD did not challenge her evidence no one, therefore, put the Appellant to proof of the facts that she asserted in her appeal documentation. Had they done so she might well have adduced an e-mail or a letter or some other proof of communication with the police. For the Judge to use the absence of proof in such circumstances as grounds for suspecting a lack of honesty, which is the inference to be drawn from paragraph 8 of the determination, was in our view procedurally and substantively unfair.

15.
More fundamental however is the second point. Here the Judge concluded that the Appellant has “not been entirely honest in her approach to this application”. The Judge then stated that this was “demonstrated” by the fact that the Appellant believed the police were taking no further action. From this the Judge proceeded to the conclusion that this would “not have justified answering the question concerning charges in the negative” (our emphasis).

16.
As to this, the starting point for the analysis is that the Court of Appeal in Adedoyin (formerly AA (Nigeria) v SSHD) [2010] EWCA Civ 773 has made clear that pursuant to Immigration Rules paragraph 322 the reference to “false” means “dishonestly” false. There is no reference in the determination to the ruling of the Court of Appeal in Adedoyin **(** ibid) nor is there any reference to the meaning which the Judge attributed to the concept of “dishonesty” and which the Judge considered he was applying.

17.
The SSHD’s Decision focuses upon the failure of the Appellant to acknowledge her conviction . On the basis of unchallenged evidence the Appellant has stated that she thought that the police had decided not to take further action against her. She said that she had both notified the police of her change of address and also that she regularly checked with former flatmates to see whether correspondence from the police or the courts had been sent to her at that address. As we have already observed there is nothing intrinsically implausible about a student moving addresses and, in consequence, not picking up all of the mail addressed to her. Once again as we have observed this evidence is unchallenged. If the evidence is taken at face value then it provides a good faith explanation as to why the Appellant did not say “yes” in response to the question in the application form asking her whether she had previous convictions – in short she simply did not know that she had been convicted and thought that the police had decided not to pursue the matter. The negative answer that she gave was false in the sense of being inaccurate but upon this factual premise it could not be said to be dishonest by reference to any standard or test in law of dishonesty.

18.
We observe that in paragraph 8 of the determination the Judge seeks to draw a distinction between “ convictions ” and “ charges ”. We can understand why he did this. His logic seems to be that even if the Appellant was unaware that she had been convicted she was not unaware that she had been “ charged ”. The application form poses questions about charges which are quite discrete from those about convictions. However, whilst we understand the Judge’s reasoning, his task was to assess whether the decision of the SSHD could be upheld upon the basis of a finding of dishonesty. There are the following difficulties with his conclusion. First, the actual decision of the SSHD does not refer to charges, only to convictions. Secondly, in her evidence the Appellant states:

“I was informed by police that I would receive a letter by post disclosing the penalty charges.”

19.
There is therefore some evidence that the “charges” that the Appellant thought had to be disclosed were penalty charges i.e. fines and as to these she had given evidence that she thought the police were not pursuing the proceedings. We recognise that “charges” in the application form might more logically be interpreted as charges put before a court; but in the absence of clear evidence that the Appellant was not confused about this, we do not think that the evidence comes close to justifying a conclusion of dishonesty.

20.
In these circumstances, and upon the basis of the Judge's logic in paragraph 8 of his decision, we cannot see a basis whereby it is was proper in law to uphold a finding of dishonesty.

21.
We should add that we have some sympathy with the Judge. He had to determine the appeal on paper. He was given no assistance from the SSHD. The internal, organisational, decision by the SSHD not to engage with paper appeals meant that the Appellant's evidence went unchallenged. The Judge evidently became sceptical of the Appellant's case and he proceeded to act upon his scepticism.

22.
However, it must be remembered that in the absence of evidence from the SSHD putting the Appellant's prima facie plausible explanation into doubt then it was, in our judgment, wrong to find dishonesty. The Appellant's version of events was credible and unchallenged. It was more than sufficient to switch the burden of proof back to the SSHD to prove her case on deception and dishonesty. For whatever reason she declined to do so.

23.
In the last two sentences of paragraph 8, the Judge referred to the burden of proof. We have already referred to this above. The relevant words used were:

"Whilst the legal burden is upon the Respondent, in the face of sufficient evidence there is an evidential burden on the Appellant to refute what is being said against her. She has failed in this regard."

24.
A question was raised by the Upper Tribunal Judge granting permission as to whether, on analysis, Judge Zucker was saying that there was an evidential burden upon the Appellant to prove that she was not being dishonest; in which case the permission Judge was of the view that this was incorrect.

25.
On analysis we believe that the way in which the burden of proof operates is as follows. We accept that if an application form is false in a material way, that this may be relied upon as some prima facie evidence which assists in establishing dishonesty. The inference of deliberate deception can be strengthened by reference to other facts, for example if the conviction is shortly prior in time to the completion of the application form this will furnish circumstantial supporting evidence that the conviction must have been high in the applicant's mind and any explanation based upon oversight would carry little weight. However, this is not dispositive of dishonesty and it is open to an Appellant to proffer an innocent explanation. If an innocent explanation is advanced (by which we mean one that meets a basic, minimum level of plausibility) then the burden switches back to the SSHD to answer that evidence. At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions: eg JC (Part 9 HC395 – burden of proof) China [2007] UKAIT 00027 para 10; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919 para 25; Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143 (IAC)

26.
Where the appellant's evidence is not met, a Tribunal should be slow indeed to find dishonesty, particularly without hearing evidence and submissions on the point from the Appellant and/or the SSHD. It must be recorded that a finding of dishonesty can have catastrophic consequences for the applicant in social and economic terms. It is not to be found lightly. What should the Judge have done?

We are very conscious that this case was decided as a paper application and of the evidential difficulties confronting the Judge.

27.
In our view if the Judge entertained doubts as to the Appellant's story, he should have sought to investigate further. He could have exercised the powers that he has pursuant to rules 45 and/or 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 to require, for example, the Appellant to adduce supporting documentary evidence, or the SSHD to comment upon the Appellant's evidence and adduce such evidence as the SSHD considered appropriate to refute the Appellant's evidence. In extremis the Judge could remit the matter for oral hearing. A further alternative would have been for the Judge to have allowed the appeal but to have remitted the matter to the SSHD to be re-taken, this time with a proper focus upon the evidence, with the Appellant's explanations and evidence now clearly upon the table, and having regard to the dishonesty test.

28.
With respect to the Judge we believe that dismissing the appeal was not the proper way to resolve any doubts outstanding in his mind in a case of dishonesty.

29.
We turn finally to consider what we should do in these circumstances.

30.
The facts fall into a very limited compass. We can see no utility or benefit in burdening the FtT again with this matter. The SSHD has had an opportunity to respond to the Appellant's factual and evidential case and, for good reasons or ill, has chosen not to do so. In the circumstances we consider that it is appropriate to take the decision ourselves.

31.
For the above reasons we therefore conclude that the FtT erred in law in a manner material to the decision. The Tribunal erred in both failing to set out the test for dishonesty which was being applied to the facts and in inferring from the facts before it that they amounted to dishonesty.

D. Conclusion

32.
The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

33.
We set aside the decision.

34. We re-make the decision in the appeal by allowing it.

Signed Date

Mr Justice Green