Upper Tribunal

(Immigration and Asylum Chamber)

Omenma (Conditional discharge – not a conviction of an offence) [2014] UKUT 00314 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 May 2014	

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Before

MR JUSTICE GREEN

UPPER TRIBUNAL JUDGE DAWSON

Between

MRS IJEOMA GLORY OMENMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms Revill instructed by Peer and Co

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

The effect of section 14(1) of the Powers of Criminal Courts (Sentencing) Act 2000 is that a person who has received a conditional or absolute discharge does not make a false representation if the answer is “no” when asked if he has ever been “convicted” of an offence.

DETERMINATION AND REASONS

Introduction

1. The issue in this appeal is whether a failure to disclose that an appellant has pleaded guilty to shoplifting and was given a conditional discharge for two years constitutes a failure under the Immigration Rules, paragraph 322(1A) which has the effect of disqualifying the appellant from an entitlement to leave to remain. Permission to appeal has been given in this case because it gives rise to a point of law which is to be thought worth clarifying, namely the status of conditional and unconditional discharges in this context. In this case the SSHD has withdrawn the impugned decision and accepts that the appellant had not been dishonest. However, the appellant has not withdrawn the

appeal. The Tribunal is not deprived of jurisdiction and its task pursuant to section 12 Tribunals, Courts and Enforcement Act 2007 remains to determine whether the FtT decision involved the making of an error on a point of law: See SM (Withdrawal of appeal decision effect) Pakistan [2014] UKUT 64 (IAC) paragraphs 27, 70 and 73. We consider that notwithstanding the withdrawal of the decision, not only does it remain our function to bring this appeal to an end but we consider that there is a point of law of some potential materiality on which there is no extant authority. We consider that (although obliquely) the point has been a live one throughout these proceedings, but for the avoidance of any doubt we grant permission to the appellant to raise the point should that be needed.

Facts

2. The appellant, Mrs Omenma, first arrived in the United Kingdom in May 2009. On 8 November 2011 the appellant was convicted of four counts of shoplifting at Woolwich Magistrates' Court. She pleaded guilty and was given, by the magistrates, a two year conditional discharge on each count. The sentence is spent under the Rehabilitation of Offenders Act 1974 (ROA 1974) on 29 October 2013.

3. On 5 August 2012 the appellant made an application for leave to remain in the United Kingdom upon the basis that she was a partner of a Tier 1 Migrant under the Points Based System (PBS) and for a biometric Residence Permit (BRP).

4. Section F of the relevant application form is entitled "Personal History" (criminal convictions, war crimes, etc)." The first part of Section F is in the following terms:

"It is mandatory to complete Section F. If it is not complete the application will be invalid and will be returned to you.

This section asks you about any criminal convictions you have, any civil judgments or civil penalties made against you and details of any involvement you may have in war crimes, genocide, crimes against humanity or terrorism. If you fail to answer all of these questions as fully and accurately as possible, your application may be refused.

Please answer every question in this section. It is an offence under Section 26(1)(c) of the Immigration Act 1971 to make a statement or representation which is known to be false or is not believed to be true. Information given will be checked by other agencies."

5. There followed, as question "F1",, the following: "Have you been convicted of any criminal offence in the United Kingdom or any other country? As to this the appellant ticked the box which stated "No".

6. Had the appellant ticked the "Yes" box she would have been required to give details of each criminal conviction. Section F refers, at the end of the section, to the position of offences pursuant to the ROA 1974. The note attached to Section 5 states:

"The Rehabilitation of Offenders Act 1974 enables criminal convictions to become 'spent' or ignored after a 'rehabilitation period'. The length of the rehabilitation period depends on the sentence given. For a custodial (prison) sentence the rehabilitation period is decided by the original sentence, not the time served. Prison sentences of more than two and a half years can never become spent and should always be disclosed. For information on rehabilitation periods can be found at Nacro's Resettlement Plus Helpline 020 7840 6464 or by obtaining a free copy of their leaflet on 020 7840 6427."

7. The application form was duly submitted by the appellant to the UK Border Agency. On 18 March 2013 the application was refused. Although not relevant to the matter before us, her partner was successful with his application. For present purposes the following is the relevant part of the decision:

“In your application, you answered ‘no’ to question F1 on the application form, therefore stating that you have not had any criminal convictions in the UK, or any other country (including traffic offences) or civil judgments made against you.

I am satisfied that this statement was false, because extended checks carried out by the UK Border Agency have revealed that on 08 November 2011, you were given a conditional discharge for shoplifting which is spent on 29 October 2013.

I am satisfied that these facts were material to the application because it is, as stated in the declaration which you have signed upon submitting your application, an offence under the Immigration Act 1971, as amended by the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002, to make a statement or representation which you know to be false or to seek to obtain leave to remain in the United Kingdom by means which include deception.

As false representations have been made and material facts were not disclosed in relation to your application, it is refused under paragraph 322(1A) of the Immigration Rules.

For the above reasons, I am also satisfied that you have used deception in this application.”

8. Paragraph 322(1A) of the Immigration Rules identifies grounds upon which leave to remain and variation of leave to enter or remain in the United Kingdom “are to be refused”. This is to be distinguished from, inter alia , Immigration Rule paragraph 322(2)-(12) which identifies grounds upon which leave to remain and variation of leave to enter or remain in the United Kingdom “should normally be refused”.

9. Sub-paragraph (1A) states that leave to remain is to be refused:

“….where false representations have been made or false documents or information… had 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.”

10. The appellant appealed the decision of the SSHD to the FtT. In a determination promulgated on 13 September 2013 the appeal was dismissed. In paragraph 5 the Judge addressed the relevant standard and burden of proof. This has been made the subject of a ground of appeal. Paragraph 5 is in the following terms:

“In Immigration Appeals, the burden of proof is upon the Appellant and the standard of proof required is upon a balance of probabilities. In Non-Entry Clearance cases, i.e. In-County Appeals, I can also take account of evidence right up to the date of the hearing as per the case of LS (Gambia) [2005] UKIAT 00085 if it relates to the application which led to the decision under appeal. In Human Rights Appeals, it is for the Appellant to show that there has been an interference with his or her human rights. If that is established, and the relevant Article permits, it is then for the Respondent to establish that the interference was justified. The appropriate standard of proof is the normal civil standard of the balance of probabilities as per the case of Box [2002] UKIAT 02212.”

11. The Judge recorded that the appellant had given oral evidence and he had received oral and written submissions from representatives from both parties. In relation to the shoplifting the Judge

recorded that the appellant gave a variety of reasons (not always consistent) for her failure to record the fact of those proceedings in Section F. The reasons were: that she had not taken legal advice; that she had successfully completed such forms in the past; that a conditional discharge was not a conviction and was not a criminal offence; that the judge had said to her that if she did it again she would go to prison; that this was not a criminal conviction because she did not go to prison; and, that she had forgotten all about it.

12. The Judge in the FtT was unimpressed. He applied the dishonesty test set out in the judgment of AA v SSHD [2010] EWCA Civ 773. In that case, the essential question before the court was whether "false" in either paragraph 320(7A) or paragraph 322(1A) is used in the meaning of "incorrect" or in the meaning of "dishonest". As to this the court preferred the meaning of "dishonest" for a number of reasons set out in paragraphs 67-75. Lord Justice Rix, giving the leading judgment of the court, identified eight grounds justifying his conclusion. The second ground was that a false representation stated in all innocence may simply be a matter of mistake, or an error short of dishonesty. He stated that: " In such a case there is little reason for a requirement of mandatory refusal, although a power, even a presumption, of discretionary refusal would be understandable. " Judge Hawden-Beal stated that she had to decide whether, in the light of that case law, the appellant's answer to Section F1, that she had not been convicted of any criminal offence in the UK or any other country, was honest and whether by answering "no" to that question she failed to disclose a material fact. With regard to this the Judge stated as follows:

"16. I am satisfied that her answer was not honest and it was a material fact relevant to her application. The appellant before me cannot be considered to be an honest woman because she has physically appeared in front of a court of law in the UK and pleaded guilty to stealing items which she knew did not belong to her. She has lost her good character as the phrase is. She knew full well that she had been in a court and had been told by the Judge that if she committed any other offences in the two years from that date she would go to prison. Any member of the public, who has pleaded guilty in a court to an offence, knows very well that they will in all cases be given a punishment, whether it be at the lower end of the scale such as the appellant's conditional discharge or whether it is imprisonment. Theft cannot be equated to speeding for example, whereby you may be given a fixed penalty ticket for that offence, pay the fine and never appear in court. In those circumstances a member of the public may be forgiven for thinking that because they did not go to court, it does not count as a conviction. This is not the case for this appellant.

17. She claims to have forgotten all about it, yet she was sentenced in November 2011 and by August 2012 had completed this form. The form must have jogged her memory. Section F is quite clear when it asks for details of any criminal offence and what sentence you received. The appellant cannot say that she did not think that a conditional discharge was a sentence because question F2 asks clearly what sentence you received and IF it was imprisonment how long was it for. The 'IF' gives it away that another sentence may have been imposed. Theft is a crime whichever country you come from and I am satisfied that the appellant knew that, had not forgotten about it and did not make an innocent mistake by not disclosing it on her form. The appellant deliberately concealed her convictions for shoplifting in an attempt to obtain further leave to remain in the UK with her husband and has been found out.

18. I am therefore satisfied that the appellant did make a false representation by signing her form to the effect that the information therein was true to the best of her knowledge and belief and did fail to disclose a material fact in relation to her application and has thus attempted to deceive the

respondent into granting her further leave to remain. I therefore find the decision of the Respondent appealed against is in accordance with the law and the applicable Immigration Rules."

13. The determination has been subject to criticism in two principal ways. First, it is submitted that the judge erred by failing to apply the correct burden and standard of proof to cases of dishonesty. Secondly, the judge erred in concluding that the appellant's conduct was dishonest. In granting permission to appeal the UT has identified an issue of public interest arising out of this case. Permission was granted for the following reasons:

"The judge should have avoided giving the impression that her general, correct statement of the burden of proof applied also to the deception issue. I should not have given permission on this point alone, since, as the permission judge said, she clearly found that the appellant had deliberately concealed the fact that she had been found guilty of four offences of shop-lifting. However, she had been conditionally discharged on these, which for a number of purposes does not amount to a conviction in law. The explanatory notes to the visa application form do not seem to explain that any finding of guilt must be disclosed, and in my view the public interest requires that the question of whether the form required the disclosure of a conditional discharge to be authoritatively settled."

14. On 15 th April 2014 the SSHD, accepting the legal error inherent in her decision, withdrew the decision, notwithstanding the determination in her favour. The SSHD does not therefore oppose discontinuance of the appeal upon this basis.

Analysis

15. We consider that the starting point is the approach that the Judge adopted towards the analysis of conditional discharges.

16. In particular we need to address whether a conditional discharge constitutes a criminal conviction such that the appellant should have answered "yes" to the question whether she had been convicted of any criminal offence in the United Kingdom or in any other country.

17. In this regard it is necessary to consider the terms and effect of sections 12-14 of the Powers of Criminal Courts (Sentencing) Act 2000. Section 12(1), under the heading "absolute and conditional discharge" states, so far as is relevant:

"(1) where a court by or before which a person is convicted of an offence… is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order either –

(a) discharging him absolutely; or

(b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified in the order."

18. Pursuant to section 12(4) before making an order for conditional discharge any court is required to explain to the offender in ordinary language that if he commits another offence during the period of the conditional discharge he will be liable to be sentenced for the original offence. Pursuant to section 12(7) the making of an absolute or conditional discharge does not prevent a court from imposing a costs order, an order of disqualification, or a compensation, deprivation or restitution order.

19. Section 14(1) of the Act, entitled "effect of discharge" provides:

“(1) Subject to subsection (2) below, a conviction of an offence for which an order is made under section 12 above discharging the offender absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under section 13 above.”

20. The effect of section 14(1) the Powers of Criminal Courts (Sentencing) Act 2000 is that a person who has received a conditional or absolute discharge does not make a false representation if the answer is “no” when asked if he has ever been “convicted” of an offence. This was so held in R v Patel (Rupal) [2007] 1Cr. App. R12 (CA). In that case the defendant applied for a job on the civilian staff of the Metropolitan Police and on the application form ticked “No” in answer to the question “whether she had ever been convicted of an offence”. Nine years earlier she had appeared in the Magistrates Court and the Court had made an order for her conditional discharge. She had been indicted for an offence of obtaining a pecuniary advantage by deception. The trial judge had accepted a half-time submission that in the light of section 14(1) there was no case to answer. The Court of Appeal dismissed the appeal by the prosecution. Lord Justice Hughes gave the judgment of the Court. He observed that the position would be different if a person were asked whether he had ever been “found guilty” of an offence. The Court considered that to say “no” to this would “undoubtedly” have been false (ibid paragraph 13). The Court stated that the solution to all of this lay in “asking properly framed questions” (ibid paragraph 17).

21. We observe that the authors of Archbold (2014) page 623 view this latter point as obiter and they make the following observation in relation to this statement:

“This however, must remain open to argument; a conclusion so completely at odds with the purpose and intent of the provision could hardly be justified on the basis of semantics.”

22. In the present case the appellant was asked whether she had been “convicted of any criminal offence in the United Kingdom”. Pursuant to section 14(1) of the Act she was entitled to answer “no”, as indeed she did. Accordingly it follows from an analysis of the Powers of Criminal Courts (Sentencing) Act 2000 that she answered question F1 correctly. In these circumstances she plainly did not answer it dishonestly.

23. It is notable that she was not asked, on Section F, whether she had ever been “found guilty”. On the basis of the obiter observation in R v Patel (Rupal) (ibid) the position, had this alternative question been posed, might have been more nuanced, especially given the (critical) observations of the authors of Archbold . The basis in law under the Act for the imposition of a discharge (conditional or otherwise) is that it is “inexpedient to inflict punishment”; if this is so then it might be considered that the view of Parliament is that the commission of an offence for which the sentence turns out to be a discharge is not one which should warrant potentially very severe adverse consequences in other areas, such as immigration control. Whether that is correct is however for another day.

24. The statutory position does not appear to have been cited to the Judge at first instance. Had it been cited we have no doubt but that the Judge would have decided otherwise. However the statutory position is in our view clear and as such the Judge erred. In the circumstances it is not necessary to consider the second question namely whether if a conditional discharge amounted to a criminal conviction the appellant was dishonest, in all the circumstances, in failing to record that fact in Section F of the application form.

25. There is one other matter we wish to refer to. This is the meaning of the phrase “dishonesty”. It is clear that for the SSHD to conclude that the inaccurate completion of an application form amounts to

a false statement there must be an element of dishonesty. However there is no definition of that term in the Immigration Rules or in statute which is not surprising given that it has been injected into the Rules by subsequent judicial interpretation and intervention. It is a well known concept in the realm of criminal law where it involves the classic "Ghosh" [1] two part (objective and subjective) test. In such cases it must be proven to the criminal standard of proof. In the present context the burden of proof is the civil standard (balance of probabilities). We would simply point out that at some stage the Tribunal will have to address this issue and in particular whether the criminal law test is the correct formulation of the test, and if not, what the proper test is. The Judge in the present case did not grapple with this. We have not heard argument on the point, given the withdrawal of the decision, and we hence do no more than flag it as an issue of some importance for future consideration.

Decision

It follows then from the above that the decision of the FtT is set aside for error of law. We re-make the decision and allow the appeal. The sole reason why the respondent refused the application was unlawful and we therefore direct that the appellant be granted the leave sought.

Signed Date 21 May 2014

Mr Justice Green

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[1] R v Ghosh [1982] EWCA Crim 2