



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/51970/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 29 September 2014

Determination Promulgated  
On 6 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

MR UMAIR AHMED

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms A Nazimi (Counsel)  
For the Respondent: Mr S Kandola (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Pakistan. He applied for leave to remain in the United Kingdom ('UK') as A Tier 4 (General) Student Migrant but this was refused on 22 November 2013 by the respondent, who also gave directions for his removal.

## **Procedural history**

2. This is a matter that has previously been considered by First-tier Tribunal Judge Hembrough in a determination promulgated on 25 July 2014. The Judge considered the issues in dispute with the representatives before hearing from the appellant. Irrelevant issues were ruled out and the Judge made it clear that a key issue to be determined was whether or not a false representation was made [10-13].
3. The Judge considered the explanation provided by the appellant, having directed himself to the relevant authorities and concluded that the appellant had deliberately and dishonestly failed to declare his criminal conviction in his application form and dismissed his appeal [23].
4. The appellant appealed against this decision arguing inter alia that the Judge had erred in his approach to the burden of proof and dishonesty, and permission was granted by First-tier Tribunal Judge McDade for the reasons identified in the grounds of appeal.
5. The matter now comes before me to decide whether or not the determination contains an error of law.

## **Hearing**

6. At the hearing Ms Nazimi focused on the Judge's failure to direct himself to the burden of proof resting on the respondent to establish dishonesty. Mr Kandola asked me to find that the Judge was entitled to reach his findings of fact and there was no error of law.
7. I reserved my decision, which I now provide with reasons.

## **Findings**

### *Ground 1 – 320(7A)*

8. Throughout the determination the Judge referred to rule 320(7A). This applies to entry clearance applications when the present application was made in-country. The identical provision for such applications is rule 322(1A). The Judge has clearly erred in referring to the wrong rule but I accept the respondent's submission that this is not a material error of law. The Judge clearly had in mind that this was an in-country applicant and a key issue for him to determine was whether or not the appellant

had dishonestly made a false representation in his application form such that a mandatory refusal was justified.

*Ground 2-4 – Burden of proof / dishonesty*

9. I accept that the Judge could have been clearer in relation to the burden of proof where dishonesty is in issue. I bear in mind that the Judge did not refer to the burden of proof in any detail and at [8] wrongly implied that the burden rested with the appellant to establish the facts in relation to all of the grounds of appeal. It should however be recalled that the burden of proof was on the appellant in relation to rule 245ZX(a) and the Judge found in the appellant's favour in relation to this aspect of the appeal.

10. In **Shen (Paper appeals: proving dishonesty)** [2014] UKUT 236 (IAC) the Upper Tribunal gave guidance on the way in which the burden of proof operates where there is an allegation of dishonesty. The relevant parts of the headnote state as follows:

*“(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.”*

11. It would have been more helpful for the Judge to have referred to **Shen** when making his factual findings. He does not seem to have been referred to **Shen** by either party. However, I am satisfied that the Judge has adopted an approach that is consistent with **Shen** and has not committed an error of law. His approach is summarised below.

(i) The appellant's representative and the appellant were clearly told by the Judge that the appellant's reason for not disclosing his conviction in his application form and the issue of the use of dishonesty were in issue. That is clear from the summary of the discussion at the beginning of the hearing [12-13]. Before me Ms Nazimi

accepted that the Judge was entitled to consider the issue of dishonesty (but she submitted it was how he approached the issue that she objected to).

- (ii) The appellant's application form is false in a material way in that it makes no reference to the appellant's recent criminal conviction. This may be relied upon as prima facie evidence which assists in establishing dishonesty.
  - (iii) The Judge heard evidence from the appellant as to his explanation for not disclosing the conviction [14 and 15]. The Judge referred to his contradictory responses and did not accept his explanation [22]. He took into account that at the time of submitting his application he had been in the magistrates court on two occasions regarding the offence and was convicted a mere six days previously, before concluding that his failure to declare it was deliberate and dishonest [23]. The inference of deception in this case is strengthened by reference to other facts – recent attendance at the magistrates' court and conviction shortly prior to the time when the application was submitted meant that the conviction must have been high on the appellant's mind.
  - (iv) The Judge regarded the explanation advanced by the appellant as contradictory and unreliable. No doubt that if the parties had directed the Judge to **Shen** at the hearing (the decision was referred to in the grounds of appeal drafted some two weeks after the hearing) the Judge would have found the appellant's explanation devoid of a basic level of plausibility.
12. Whilst the SSHD generally bears the burden of proof where dishonesty is alleged, this is a case in which the Judge found prima facie evidence to establish dishonesty. This is not a case in which the Judge found there to be an innocent explanation or could reasonably find there to be an innocent explanation. The relevant question in the application form was clear and straightforward '*Have you ever been convicted of any criminal offence in the UK or any other country?*'. The appellant answered 'no'. He accepted this was false. He told the Judge that he did not understand whether to answer the question. This is a wholly implausible explanation. The appellant did not leave the space for this question blank but answered no. He effectively said he was not sure whether to answer the question but then answered the question falsely. The Judge was entitled to find that he did so

dishonestly in all the circumstances of the case for the reasons he has provided.

13. Although the Judge did not give a clear self direction on the burden of proof regarding dishonesty, when the determination is read as a whole I am satisfied that the Judge was clearly aware of the burden of proof and has approached the case in accordance with the guidance set out in **Shen**.
14. Ms Nizami also criticised the Judge for reaching a finding on dishonesty when this was not clearly put by the respondent. I was not provided with a witness statement to indicate what was or was not put by the Judge. In any event I am satisfied that the appellant was asked clear questions and the Judge was entitled to make a finding on dishonesty based on those questions. The appellant and his representative both knew that the Judge regarded dishonesty as a key issue and the questions asked were plainly relevant to dishonesty. The Judge has adequately reasoned why he found the appellant to be dishonest.

### **Decision**

15. I do not set aside the decision of the First-tier Tribunal and I dismiss the appellant's appeal.

Signed:

Ms M. Plimmer  
Deputy Judge of the Upper Tribunal

Date:  
30 September 2014