



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29221/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 July 2015

Determination Promulgated
On 30 September 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR VINAY BABU KOLA
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Shah, Legal Representative

For the respondent: Mr Dwnycz, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of India born on 21 January 1987. He appeals to the Upper Tribunal against the determination of Immigration Judge AW Khan dated 18 November 2014 refusing his appeal against the decision of the respondent refusing him further leave to remain as a Tier 1 (Entrepreneur) Migrant under the points based system.

2. Permission to appeal was initially refused by First-tier Tribunal Judge JM Holmes on 28 January 2015 but granted by a Judge Reeds of the Upper Tribunal, on 14 May 2015. He was of the view that it was arguable that the Judge may have erred by failing to apply the decision of **AA the SSHD [2010] EWCA Civ 773** and **Ahmed (general grounds of refusal-material nondisclosure) [2011] UKUT 351** as the Judge made no finding of deception nor was any consideration given to the contents of the appellant's statement by reference to the explanatory statement of the Secretary of State and also his claim that the conviction was spent.
3. The Judge in his determination made the following findings in dismissing the appellant's appeal pursuant to the Immigration Rules. At section 2 part E of the application form for a Tier 1 (entrepreneur), there is a section about disclosing any criminal convictions. The appellant has clearly failed to mention the fact that not only was he convicted of driving a motor vehicle without insurance but also the fact that he was disqualified from driving. The appellant's explanation is wholly inadequate in that he miss read the application, misunderstood it and became confused. The Judge was "entirely satisfied that the respondent was correct in respect of the decision to refuse the appellant's application under paragraph 322 (1A) of the Immigration Rules because material facts were not disclosed in the application". The Judge also found that the appellant has failed to produce a letter from a financial institution holding the funds to confirm the amount of money available to him as required under paragraph 41-SD in respect of the specified documents in provision (d) in the first row of Table 4 of Appendix A of the Rules for having access to £50,000.
4. The Judge dismissed the appeal both under the relevant Immigration Rules and paragraph 322 (1A).
5. The appellant grounds of appeal only pertain to paragraph 322 (1A) and are as follows. On 6 June 2014 the appellant applied for leave to remain as a Tier 1 (entrepreneur) Migrant. The respondent finds that the appellant failed to disclose the fact that he was convicted of using a vehicle uninsured for which he received a fine and was also disqualified from driving for six months. The respondent alleges that this material fact was not disclosed in his application and therefore the application was dismissed primarily under paragraph 322 (1A).
6. The Judge found that the appellant clearly failed to mention the fact of his conviction. The appellant's explanation that he misread the application, misunderstood it and became confused to be wholly inadequate is an error. The authority for general grounds of refusal on the aspect of material nondisclosure is **Ahmed**. The Judge dismissed the appellant's appeal and said nothing or assessed the appellant's state of mind which was relevant to this aspect of the Rule. It is pertinent to note that even if the appellant had given this information in his application, it would not have affected his application adversely. The appellant had no dishonest intention or any intention to

deceive. All aspects of paragraph 322 (1A) and its sister paragraph 320 (7 A), 321 (i) and 320 1A (2) are treated as deception under paragraph 6 of the Immigration Rules which strongly implies that *mens rea* is required on the part of the applicant. The Judge did not consider the element of *mens rea* or any dishonest intention in this case. This amounts to the error of law.

7. The respondent in her rule 24 response stated the following. The respondent will argue that the Judge directed himself appropriately. The appellant declined to fully engage with the appellant process and sought a paper hearing. The Judge was deprived of the appellant's oral evidence in assessing the appellant's appeal. The Judge was wholly entitled to conclude for the reasons given that he did not accept the appellant's explanation for the Permission of the conviction in his application form. The grounds amount to a disagreement with the decision.
8. At the hearing, Mr Shah on behalf of the appellant said that the Judge was highly critical of the actions of the appellant and that it never dawned on him that refusal for deception will affect his immigration history adversely. He said that it was foolish for the appellant not to attend the hearing and to ask for it to be determined on the papers. The Judge had to be sure that the appellant has used deception. *Mens rea* is required when analysing paragraph 322 (1A).
9. The Home Office presenting officer stated that he relies on the Rule 24 response. He said that this was a paper appeal and the appellant said that his conviction was "spent". He said that *mens rea* is difficult to prove. The appellant crossed the box "no" in his application about his conviction. He accepted however that the Judge did not make a distinct finding that the appellant had been dishonest.

The error of law decision

10. This appeal was dismissed on the papers pursuant to the request made by the appellant. The grounds of appeal only refer to the appellant's appeal being dismissed under paragraph 322 (1A). There was no issue that the appellant did not meet the requirements of the Immigration Rules because it was accepted that the correct documents were not supplied with his applications. The appeal therefore was refused under The Immigration Rules and no issue has been taken with this.
11. The only issue, which is the subject of the appeal, is the appellant's failure to disclose his conviction for driving without insurance and his consequent disqualification from driving in June 2013. The Judge rejected the appellant's explanation that he had "misread the application, misunderstood it and became confused". However, the judge did not consider or make any finding as to whether the appellant was dishonest as it was incumbent upon him to do.

12. in the case of **Ahmed** it was found that 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.
13. I find that the Judge made a material error of law in his failure to make a finding whether the appellant used deception in his application by failing to disclose his conviction and disqualification from driving.
14. I therefore remit this appeal to the First-tier Tribunal so that findings of fact can be made as to whether the appellant used deception in his application when he failed to disclose his conviction for driving without insurance and a suspension from driving for six months. The appeal be placed before any Judge other than First-tier Tribunal Judge AW Khan, on the first available date.

DECISION

Appeal be remitted to the First-tier Tribunal

Dated this 26th day of September 2015

Signed by

A Deputy Judge of the Upper Tribunal

.....

Mrs S Chana