Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04321/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 August 2013	**On 2 September 2013**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

IMO OKON BASSEY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Okoro of Anthony Ogunfeibo & Co Solicitors
For the Respondent: Ms H Horsley, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria born 16 September 1988. On 3 October 2012 he applied for leave to remain as a Tier 4 (General) Student Migrant under the points-based system. The application was refused on 24 January 2013 on the basis that the UKBA had obtained information that the appellant had been convicted of travelling

on a railway without paying a fare, on 23 June 2012, and therefore that material facts had not been disclosed in relation to his application, which was refused under paragraph 322(1A) of HC 395. Consideration was given to whether or not discretion should be exercised in his favour and it was concluded that it would not be appropriate. The application was refused and in addition a direction under section 47 of the Immigration, Asylum and Nationality Act 2006 was made.

2. The judge accepted the Presenting Officer's submission that the honesty of the appellant in relation to the application of the Rule was irrelevant and that the key question was whether or not there had been false representations made or material facts not disclosed. He concluded that it was clear that the appellant had been convicted of a criminal offence and failed to disclose that in the application form and indeed completed it in a manner which contained the assertion that he had not been convicted of a criminal offence. He noted that it was accepted by the Presenting Officer that whilst she could not guarantee the accuracy of her answer, it was more likely than not that had he disclosed this relatively minor criminal offence the application would have been granted. This was in the context of the question of discretion to be applied. The judge however considered that an important aspect of the Rule was to ensure that the Secretary of State could rely upon full and accurate answers being provided in application forms which were presented to her and considered that there was no flaw in the approach taken by the Secretary of State in not exercising discretion in the appellant's favour in respect of the failing in this case.

3. As regards human rights, the judge noted that there was no imminent removal pending, in light of his allowing of the appeal as being not in accordance with the law to the extent that the direction under section 47 should not have been made, and he noted aspects of the appellant's private life including his relationship with his fiancée which was accepted as being a subsisting and loving relationship and that they intended in due course to marry. He noted that the appellant would have developed a private life not only with his fiancée but also with friends since he had been in the country since September 2009 and that these matters would require to be taken into account if there were a decision to remove the appellant but as the judge had concluded that the section 47 decision was not in accordance with the law that did not arise and therefore the appeal was dismissed on human rights grounds as well as under the Immigration Rules.

4. The appellant sought and was granted permission to appeal against this decision on the basis that the judge had arguably failed to take into account in particular the relevant authority of AA (Nigeria) [2010] EWCA Civ 773 which made it clear that a representation was "false" for the purposes of paragraph 322(1A) only if it had been made dishonestly. Permission was granted on all grounds.

5. Subsequently on 1 July 2013 the Secretary of State put in a Rule 24 response opposing the appeal and arguing that the judge had directed himself appropriately.

6. At the hearing Ms Horsley disagreed with the response and conceded that there was an error of law on the honesty point. This was a matter that should have been considered by the judge. Subsequently, although it is probably best to mention it at this point in the determination, Ms Horsley also sought and was granted permission to withdraw the section 47 decision in light of what had been said by the Court of Appeal in Ahmadi [2013] EWCA Civ 512.

7. Mr Okoro adopted and developed points made in his skeleton argument.

8. The first issue was the question of misrepresentation and whether it was innocent or dishonest. The Presenting Officer at the hearing had not disputed the appellant's account when he had said what he had been told by the ticket officer. It was an innocent misrepresentation. It was an offence which would not usually go before a court and he had offered to pay the balance but was told to pay when he got the penalty letter. He had not disputed the matter when he got the letter from the court and paid. His behaviour had been credible.

9. It was clear from AA that it was necessary to show the element of dishonesty.

10. As regards the material facts point, this was the main point in the Home Office response. To be material the facts should have a direct effect on the decision. It was relevant that the Home Office would have likely allowed the application if the offence had been disclosed. It was a relatively minor offence. The example in the IDI chapter 9 section 4.9.1, set out in the skeleton, was a useful case study and relevant on the point. It was also argued that the general grounds for refusal in the Immigration Rules provided ample scope for considering past criminality where the appropriate level of severity was met, and Mr Okoro referred to paragraph 322(5) of HC 395.

11. With regard to human rights issues, a section 120 One-Stop Warning had been served on the appellant and he had made a human rights claim and that should have been considered.

12. In her submissions Ms Horsley argued that it should be found that the appellant knew he had been convicted of a criminal offence and acted dishonestly in failing to disclose it. He had pleaded guilty by post and had been told, as could be seen from section 6 of the judge's determination, that he had been told, he had been convicted of an offence. The form he had had to fill in about personal history was very clear. It was not reasonably likely that he had failed to realise he was convicted in a criminal court. He had had the option to plead not guilty. The notification in respect of this and the payment of a fine was a month before the application was made and it would have been fresh in his mind. There was no discretion within the Rule.

13. It was argued that the matter was material to the application. The appellant had signed to say that the form contained truthful information. The example given in Mr Okoro's skeleton concerning child benefit was a different scenario from that in the

instant case which involved a failure to disclose criminality. The Secretary of State expected to have disclosure. There was an element of trust. The Tribunal was referred to the decision in FW [2011] EWCA Civ 264. At paragraph 21 there was a reference to the need to draw inferences and that could be done in this case from the fact that the appellant had pleaded guilty by post and would have been aware of the effect of that.

14. With regard to Mr Okoro's point concerning what had been said by the Presenting Officer at the hearing, it should be noted from paragraph 13 of the determination that the Presenting Officer had said what she said preceded by the caveat that she could not guarantee the accuracy of her answer. It was not a concession. She was not able to say that his application would have been granted.

15. Paragraph 322(5) was not argued to be applicable. The case fell under paragraph 322(1A). It was clear in the decision letter why that was relied on. The burden on the Secretary of State had been met by the appellant failing to put the conviction on his form, and he had acted dishonestly.

16. With regard to Article 8, if the Tribunal found that the Immigration Rules decision was made out then this could not assist. It would be proportionate to remove the appellant. He had been in the United Kingdom in a temporary capacity as a student since 2009 and had been engaged since 2011. He could not succeed either under paragraph 276ADE or on the basis of Article 8 outside the Rules. He could enjoy private life in another country. He could also study in another country. There were certain categories where a breach of paragraph 322(1A) would not be taken into account and they included an application to join a wife or a fiancée.

17. By way of reply Mr Okoro argued that Ms Horsley had not said that the offence met the appropriate severity test in terms of the IDIs or the threshold. It was submitted that the Presenting Officer before the judge had rightly admitted that if the conviction had been disclosed the application would likely have been allowed. There had been a failure to consider the impact of the refusal decision on his future career and on his relationship. His fiancée was British and had not been to Nigeria. She had an inalienable right to enjoy her marriage in the United Kingdom and her human rights also had to be considered and it was necessary to consider the impact of the appellant's removal on her.

18. There was no point in the determination where the judge or the Presenting Officer doubted the appellant's account. Paragraph 322(5) dealt with the issue of previous convictions, such matters as character, conduct and associations. It was not argued that subparagraph (5) would replace subparagraph (1A), but the onus was on the Secretary of State to say why the particular ground was relied on and why the appellant would fall within subsection (5). The Presenting Officer had failed to draw the appropriate distinction between the two separate limbs of paragraph 322(1A) i.e. false representations and nondisclosure. If it was a material fact, then whether the

misrepresentation was innocent or not, it was immaterial. It was argued that it was not a material issue.

19. I reserved my determination.

20. There are, as was made clear in Mr Okoro's skeleton, three issues for determination. The first two of these come under paragraph 322(1A) of HC 395. That states as follows:

> "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."

21. This is a mandatory ground of refusal. The refusal was made on this basis because it was noted in the refusal letter of 24 January 2013 that at section 1 on the application form the appellant declared that he had no criminal convictions (including traffic offences), civil judgments and/or charges made against him in the United Kingdom or any other country. Through routine checks made by the UKBA it had been discovered that he had not disclosed his conviction of travelling on a railway without paying a fare, on 23 June 2012.

22. It is clear that there are two alternative bases upon which the mandatory refusal may be made under paragraph 322(1A). The first is where false representations have been made and the second is where material facts have not been disclosed. It is clear from the decision of the Court of Appeal in AA, to which I have referred above, that a representation is "false" for the purposes of paragraph 322(1A) of HC 395 only if it has been made dishonestly. Ms Horsley, in my view entirely correctly, accepted that the judge had erred in regarding the honesty of the appellant in relation to the application of the Rule as irrelevant. AA makes it clear that it is not just relevant but it is at the centre of the assessment that has to be made.

23. Both parties were content for the appeal to proceed on the basis of the evidence that had already been given, and accordingly I did not hear from the appellant or from his fiancée Priscilla Sarpong.

24. In his witness statement of 5 February 2013 the appellant said that the offence he committed was not one of non-payment of a train fare but not having the appropriate train ticket. He said that he slept on train transit and the train took him to Dartford instead of Rochester. He had tried to explain to the railway officer but he insisted he should be booked although he had offered to pay for the outstanding fare. He says that the officer told him not to worry that the matter would not be taken to the court and if he admitted liability he would only get a fine and it would end the matter but if he denied liability he could be charged to the court and get a bigger fine but it

would not affect his criminal record. He thought that this was the truth so he believed the officer and admitted liability. He said that he did not know that they would take the matter to court. He pleaded guilty by post and paid the fine. I note from the oral evidence of the appellant as recorded by the judge, that after he pleaded guilty by post the court sent him a notice dated 3 September 2012 that he had been convicted of an offence of travelling on the railway without paying a fare and was liable to a fine and costs, which he paid. Although it is obviously hearsay, it is relevant to note that his fiancée confirms his account of what he said happened to him, in her statement of 5 February 2012.

25. As was said by the Court of Appeal in FW, to which I have referred above, at paragraph 21, it can often be difficult to decide whether a person has acted dishonestly, because they will usually protest their innocence, leaving the Tribunal of fact to draw inferences from other evidence. In that case it was noted that the conviction was very recent and the appellant had been directed by the notes in the form to a source of information that would have made it clear that it was not spent. In the appeal before me, Ms Horsley made the point that the appellant had pleaded guilty by post and had been aware of the effect of that. The notification about the payment of the fine came a month before the application was made and it would have been fresh in his mind. For the appellant Mr Okoro has argued that he conducted himself credibly all along, having admitted to the offence on the spot and offered to pay the balance, pleaded guilty and paid the fine and his account throughout was consistent. He also makes the point that the Presenting Officer did not cross-examine the appellant on the statement. In the circumstances it is argued that the misrepresentation was an honest one.

26. Two particular matters seem to me to be key in this aspect of the appeal. The first is that, as I have referred to as set out at paragraph 6 of the determination the appellant in oral evidence to the judge said that he was sent notice on 3 September 2012 that he had been convicted of an offence. This was a month before he made the application for leave to remain. Whatever he may have thought or understood by what was said by the train official and indeed whatever may have been said by that official, the fact remains that the appellant received a notice making it clear to him that he had been convicted of an offence. Tier 4 (General) application form at I1 specifically asks: "Have you ever been convicted of a criminal offence either in the UK or in another country?". In the light of the specific question asked and the specific information given to the appellant a month previously, I consider that the necessary element of dishonesty has been shown in this case. He is clearly an intelligent and educated man, and must have been aware that he had been convicted of a criminal offence and chose not to mention that in the application form. I think this is the only reasonable inference that can be drawn from the circumstances, and accordingly I consider that the Secretary of State properly concluded that false representations had been made in this case.

27. In the alternative is the question of whether material facts have not been disclosed. On behalf of the appellant Mr Okoro argued that the facts were not material in this

case since the Presenting Officer had admitted that if the relatively minor offence had been disclosed the application would more likely than not have been allowed, citing the example of a person who has applied for indefinite leave to remain as a spouse and not declaring that they are in receipt of child benefit. Another example given is that of spent convictions which are not required to be disclosed under the Rehabilitation of Offenders Act because they would be immaterial in determining the applicant's current application. It is also argued that the general grounds for refusal provide ample scope for considering past criminality, citing in particular paragraph 322(5) which is a discretionary ground for refusal concerned with the undesirability of permitting the person concerned to remain in the United Kingdom in the light of their character, conduct or associations or the fact that they represent a threat to national security.

28. It is however I think, a matter for the Secretary of State whether she decides that the conduct in question falls within one particular Rule or another and it is then for her to substantiate it. It is relevant to note, as Ms Horsley reminded me, that the Presenting Officer as recorded at paragraph 13 of the determination accepted that while she could not guarantee the accuracy of her answer it was more likely than not that disclosure of the offence would not have precluded the application being granted. This was in no sense a concession or a guarantee. It is also relevant to note that the Tier 4 (General) application form at section I refers in the head note "any criminal convictions you have" and the specific question asked does not distinguish between different types of criminal offence but simply asks if the person has ever been convicted of a criminal offence. In this regard I see force to the point made by the judge at paragraph 13 of his determination where he said: "The integrity of the system depends upon those who seek entitlements from it participating in the process in a way which provides the respondent with the fullest possible information and Rule 322(1A) is part of the means to that end." Whatever the view that was expressed in any event in far from absolute terms by the Presenting Officer at the hearing, that could in no sense bind the Secretary of State, and the decision had already been taken to refuse the application in relation to this aspect of the Rule. As Ms Horsley said, the remarks of the Presenting Officer cannot be taken to be a concession of any kind. I consider that it has been shown that material facts were not disclosed in this case in the failure to disclose the conviction, and accordingly paragraph 322(1A) was properly applied in this regard also. The appeal is therefore dismissed under the Immigration Rules.

29. As regards Article 8, it is the case that the appellant has been in the United Kingdom since September 2009, having completed a first degree in 2012 and being, at least at the time when the statement was signed on 5 February 2013, engaged on a Masters course at Cranfield University. Quite apart from the time he has spent in the United Kingdom, the studies he has undertaken and the friendships he has made, he is also engaged to Ms Sarpong having been engaged since 2011 and he says in his statement they are only waiting to register and celebrate their marriage when he completes his Masters degree. He makes the point that she is British born and brought up. This is a point repeated in Ms Sarpong's statement. She says that if he is removed it would

frustrate their marriage plans and it would neither be reasonable nor proportionate to ask her to follow him to Nigeria so as to marry him because she was born and brought up in the United Kingdom.

30. The judge accepted that the appellant was in a subsisting and loving relationship with Ms Sarpong and that they intended in due course to marry. He erred in dismissing the appeal in this regard on the basis that no valid removal decision had been made. It may well be that matters in respect of Article 8 would need to be addressed at the time when a removal decision has been made, but that does not preclude an obligation to assess it as of now. As so often with Article 8 cases the question comes down to one of proportionality. I accept that the appellant has a private life in the United Kingdom, and his relationship with Ms Sarpong can either be regarded as falling within that or as part of his family life. I think it is probably better regarded as private life since they are engaged rather than married and I have not been told that they live together. Clearly the appellant's removal would be an interference with that private life. Equally that would be in accordance with the law. The question is whether it has been shown that the interference would be proportionate. On the one hand there would be the disruption to the appellant's private life, in particular his relationship with Ms Sarpong and his studies. On the other side of the line is the importance of maintaining an effective system of immigration control, and in the context where I have found that both elements of paragraph 322(1A) are applicable in this case. It is not as though the appellant would necessarily be prevented for a significant period of time from returning to the United Kingdom, bearing in mind the provisions of paragraph A320 of HC 395. Bearing in mind these matters and the interests of both the appellant and Ms Sarpong, I have concluded that his removal would not be disproportionate. In this case I consider the interests of immigration control outweigh his private and family life interests. Accordingly the appeal is dismissed under Article 8 also.

Signed Date

Upper Tribunal Judge Allen