Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/25962/2012

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 14 October 2015	**On 3 November 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

RASANGA WELLALAGE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Lane, Counsel
For the respondent: Ms Johnrose, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal raises the following single issue: should an applicant be refused leave to remain on a mandatory basis under paragraph 322(1A) of the Immigration Rules, in circumstances where he has submitted a false document, absent evidence that he did so dishonestly?

Background

2. The appellant is a citizen of Sri Lanka. He arrived in the United Kingdom ('UK') on 18 September 2008 with leave to enter as a student until 31 January 2012. On 27 January 2012 he submitted an application for further leave to remain. This application attached a degree certificate

from the Open University of Sri Lanka, said to have been awarded to the appellant in 2006. The application was refused by the Secretary of State for the Home Department ('SSHD') in a decision dated 3 November 2012. The decision states:

> "In your application you submitted a educational document from the Open University of Sri Lanka Faculty of Engineering Technology.
>
> I am satisfied that the educational document was false because D Rexam from the Open University of Sri Lanka have confirmed that the Open University does not offer a degree of Bachelor of Information Technology & Networking and the type of student registration number stated is not relevant to the Open University of Sri Lanka.
>
> As a false document has been submitted in relation to your application, it is refused under 322(1A) of the immigration rules.
>
> For the above reasons I am satisfied that you have used deception in your application."

3. The appellant appealed this decision to the First-tier Tribunal. It is unnecessary to rehearse the lengthy procedural history that followed, save to say that after his appeal was dismissed by the First-tier Tribunal and the Upper Tribunal, the appellant successfully appealed to the Court of Appeal, where the matter was settled by a consent order dated 7 April 2014, in which the appeal was allowed and the matter remitted to the First-tier Tribunal. In the statement of reasons attached to the consent order reference is made to permission having been granted by Moses LJ after an oral hearing on 19 November 2013 in the following terms:

> "The basis of the grant was that the tribunal should have considered newspaper evidence provided by the appellant and that the central question was whether the appellant was aware that his college was bogus."

4. It is helpful to include extracts from the judgment of Moses LJ (RW (Sri Lanka) v SSHD [2013] EWCA Civ 1736) when granting permission to appeal:

> "1. This is an odd case in which the appellant claims that he was, like many others in Sri Lanka, a dupe of those running a college, a man called Sakvithi, who ran a college which was really a front for, and a means of defrauding those who attended the college. There are a number of newspaper reports of the relevant period showing how many people were duped into the belief that this was a genuine college. When this appellant from Sri Lanka relied upon the certificate showing that he had obtained a degree for his further education here it was said that this was a false document and therefore by reference to paragraph 245ZX(a) and paragraph 322(1A) of the Rules, HC 395 of 3 November 2002, not only was he not qualified for the course but it would have the effect that he would not be able to apply again both here and in a large number of other countries within the Commonwealth.
>
> ...

> 5. In short, it seems to me that a considerable muddle has entered into both these decisions which has infected the decision of the single judge refusing permission. The point is whether he appreciated that the certificate he had been given was not genuine…
>
> …
>
> 7. The judge refusing leave seems to have taken the view that because the qualification was not genuine, refusal of the application was mandatory in any event. Again, that does not seem to be the way in which the Rules have been interpreted, see in particular Farqan Ahmed v SSHD [2011] UKUT 00351, where the Upper Tribunal clearly thought that it had to be shown that the person deploying the document knew it was false.
>
> 8. I have been concerned as to whether this is appropriate for a second appeal but bearing in mind the difficulty of understanding what the Rule means in light of the decision of this court in AA (Nigeria) v SSHD [2010] EWCA Civ 773 and whether that can be applied to documents, contrary to the view of the single judge, it seems to me a matter which does merit consideration by this court to clarify the matter."

The decision below

5. In a decision dated 30 April 2015 First-tier Tribunal Judge Pooler concluded that the degree certificate relied upon by the appellant was a false document for the purposes of paragraph 322(1A) of the Immigration Rules. The judge recorded the facts agreed by the parties as follows: (i) the Open University of Sri Lanka did not award the appellant a degree; (ii) there had been dishonesty by someone else. The appellant maintained that he had no knowledge of that other person's dishonesty until he received the SSHD's decision in November 2012.

6. The judge did not consider it necessary for the SSHD to prove that the appellant knew that the certificate was false and / or that he dishonestly used it. The judge concluded that the appellant's acceptance that (i) the certificate was a false document and (ii) there had been dishonesty in relation to it by another, was sufficient to support a finding that a false document had been submitted for the purposes of paragraph 322(1A).

7. The judge did not consider it was strictly necessary to assess whether the appellant had been shown to have acted dishonestly but went on to do so on an alternative basis. In this regard it was agreed that newspaper articles referring to the fraud were reliable, in October 2008 allegations of fraud against Sakvithi became public knowledge and Sakvithi was arrested in 2010 but by January 2013 he had not been convicted. Having considered all the relevant evidence the judge was not satisfied that the appellant had discharged the burden upon him that he "*was not complicit in the dishonesty which resulted in his obtaining a degree certificate*". The judge went on to address Article 8 of the ECHR, and dismissed the appeal both under the Rules and Article 8.

The issues in dispute between the parties

8. Mr Lane relied upon his skeleton argument. He submitted that the First-tier Tribunal erred in law in failing to recognise that both Adedoyin v SSHD [2010] EWCA Civ 773; [2011] 1 WLR 564 (also known and hereinafter referred to as 'AA Nigeria') and Ahmed (general grounds of refusal – material non-disclosure) Pakistan [2011] UKUT 00351 (IAC) support the proposition that there needs to be dishonesty or deception in the application either by the applicant or someone acting on his behalf. Mr Lane therefore submitted that the judge erred in law in failing to consider whether or not there was dishonesty *in this* application.

9. Mr Lane also submitted that the judge erred in law when assessing the appeal in the alternative i.e. on the basis that dishonesty on the part of the appellant was required, in placing the burden of proof on the appellant to establish he was not dishonest. Ms Johnstone conceded that the judge erred in law in his application of the burden of proof but submitted this was not material as the judge was entitled to conclude that it was sufficient that the appellant submitted a false document, having correctly directed himself to AA (Nigeria). Both parties agreed that in these circumstances the only issue in dispute was whether the judge was entitled to this conclusion. If yes, the appellant's appeal fell to be dismissed. On the other hand, if dishonesty on the part of the applicant is necessary, then both parties agreed that the decision would need to be remade and that fresh findings would be necessary.

Legal framework

10. Paragraph 322(1A) of the Immigration Rules provides a mandatory ground on which variation of leave to remain is to be refused:

> "… 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."

11. Paragraph 320(7B) sets out the circumstances under which a previous breach of the UK's immigration laws attracts a mandatory refusal of entry clearance. One such breach is:

> "… (d) using Deception in an application for entry clearance, leave to enter or remain (whether successful or not) …"

12. There are a number of exceptions to this that apply dependent upon the time that has elapsed since the applicant left the UK and the mode of departure.

13. The grounds on which entry clearance should normally be refused includes the following at 320(11):

> "(11) where the applicant has previously contrived in a significant way to frustrate the intentions of these Rules. Guidance will be

published giving examples of circumstances in which an applicant who has previously overstayed, breached a condition attached to his leave, been an illegal Entrant or used Deception in an application for entry clearance, leave to enter or remain (whether successful or not) is likely to be considered as having contrived in a significant way to frustrate the intentions of these Rules."

14. AA (Nigeria) (supra) considered the effect of 322(1A) and the meaning of the word 'false' i.e. whether it is used in the meaning of 'incorrect' or in the meaning of 'dishonest'. Rix LJ (with whom Longmore LJ and Jacob LJ agreed) preferred the latter meaning [66] for reasons he articulated at [66-75]. Rix LJ said this:

> "76. For these reasons, I conclude that Mr Malik's basic submission is correct. Whether as a matter of the interpretation solely of the relevant rules in paragraphs 320(7A), 320(7B) and 322(1A), but in any event when consideration is also given to the assurances given in the Lords debate as supplemented by the minister's letter to ILPA dated 4 April 2008, and to the public guidance issued on behalf of the executive, the answer becomes plain, and in essence is all of a piece. Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a "false representation" a ground for mandatory refusal.
>
> 77. If it were otherwise, then an applicant whose false representation was in no way dishonest would not only suffer mandatory refusal but would also be barred from re-entry for ten years if he was removed or deported. That might not in itself be so very severe a rule, if only because the applicant always has the option of voluntary departure. If, however, he has to be assisted at the expense of the Secretary of State, then the ban is for five years. Most seriously of all, however, is the possibility, on the Secretary of State's interpretation, that an applicant for entry clearance (not this case) who had made an entirely innocent misrepresentation, innocent not only so far as his personal honesty is concerned but also in its origins, would be barred from re-entry under paragraph 320(7B)(ii) for ten years, even if he left the UK voluntarily."

Discussion

15. Many of the reported decisions addressing 322(1A) and its sister provision in relation to entry clearance (320(7A)), have concerned applications where it is said by the SSHD that false representations have been made by an applicant. For example in Harinder Singh (paragraph 320(7A)-IS151A forms - proof) [2012] UKUT 00162 (IAC) the Tribunal held that it was for the respondent to displace the burden upon her to establish that the appellant had dishonestly answered 'no' when asked if he had ever been deported, removed or otherwise required to leave any country including the UK in the last ten years. In Ahmed (supra) the applicant was said to have wrongly answered 'no' to a question in his application form asking whether he had any criminal convictions. This was considered under the false representation and material non-disclosure limbs. The Tribunal observed in accordance with FW (Paragraph 322; untruthful answer) Kenya [2010] 165 (IAC) that there was no essential difference between the two in circumstances such as these.

16. AA (Nigeria) is also a 'false representation' case. The appellant was said to have falsely answered 'no' to the question of whether he had any criminal convictions. It is therefore understandable that the focus of the judgment is upon the correct approach to false representations and not the use of false documents. However in concluding that 'false' requires 'dishonesty' Rix LJ specifically considered the position regarding false documents at [67] (underlined emphasis added):

> "First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge."

17. Rix LJ contrasted this with a false representation as follows [68]:

> "Secondly, however, a false representation stated in all innocence may be simply a matter of mistake, or an error short of dishonesty. It does not necessarily tell a lie about itself. 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. It is noticeable that paragraphs 320 and 322 also contain grounds on which entry clearance, leave to enter, or leave to remain, as the case may be, "should normally be refused". If on the other hand a dishonest representation has been promoted by another party, as happened with the sponsor husband in *Akhtar*, then it is entirely understandable that the rule should require mandatory refusal, irrespective of the personal innocence of the applicant herself. Therefore, the reason of the thing, as well as the natural inference that "false" in relation to "representations" should have the same connotation as "false" in relation to "documents", together argue for a conclusion that "false" requires dishonesty – although not necessarily that of the applicant himself."

18. It is clear from the Rix LJ's obiter remarks in AA Nigeria that the mere fact that a dishonest document has been used in an application is sufficient for there to be mandatory refusal under 322(1A). This is consistent with the ratio in AA Nigeria that 'false' requires dishonesty. As Rix LJ made clear, the false document itself is dishonest. A false document is therefore different from a false representation. A false representation may simply be a mistake and does not tell a lie about itself in the way that a false document does. It follows in accordance with this analysis that it is not necessary to go further and determine

whether or not a document accepted to be dishonest in itself, was used dishonestly or innocently.

19. This analysis is consistent with the approach in JK (India) v SSHD [2013] EWCA Civ 1080. In that case the SSHD refused the application to vary leave to remain on the basis that the applicant had submitted a false bank statement. The applicant argued before the First-tier Tribunal that an agent had been involved in the submission of the application on her behalf and she was unaware that he had used a false document. By the time the matter reached the Court of Appeal the applicant's representative no longer relied upon this argument. Tomlinson LJ recorded the applicant's position as follows [7]:

> "It is now accepted by Mr Slatter on the appellant's behalf that the question of the appellant's personal dishonesty is of no relevance to the determination of the question whether the appeal can succeed in reliance upon the Immigration Rules. He concedes that in the light of the decision of this court, to which I have referred, in Adedoyin, and given the plain meaning of rule 322(1)(a), the application to vary the leave to remain fell to be refused."

20. Tomlinson LJ approached the appellant's remaining submissions on the basis that the appellant had not been complicit in the submission of the false document and said this [14]:

> "It seems to me, even assuming in the appellant's favour that she was entirely innocent, as she suggests, that the case that is put forward on her behalf under Article 8 is simply very far short of that which would be required in the present situation to outweigh the policy considerations which plainly underlie the adoption by Parliament of rule 322(1)(a). That rule is deliberately couched in terms intended to prevent the making of dishonest applications and involves the result that applications are to be refused even though the dishonesty employed may not be that of the applicant himself or herself."

21. The approach to false documents adopted by Rix LJ in AA (Nigeria) and Tomlinson LJ in JK (India) is consistent with the Immigration Directorate Instructions ('IDI') of July 2009 for paragraph 322 (as set out in AA Nigeria at [32]):

> "4. Paragraph 322(1A) – Deception used in a current application
>
> …
>
> 4.6 An application should be refused even where the applicant does not know (or claims not to know) it is a false document."

22. In AA Algeria Rix LJ was prepared to consider what the executive said publicly about the Rules in light of the genuine ambiguity in the word 'false' [70]. It is pertinent to note that in his exchange with the Immigration Law Practitioners Association, Lord Bassam, who spoke in the debate for the Government and gave certain assurances defined a false document in this way "*We mean a document that is forged or has been altered to give false information. If people submit such documents, our belief is that they should be refused. It will be for the*

BIA to prove that a document is false, and the standard of proof has to be very high".

23. Mr Lane submitted that the remarks of Rix LJ concerning false documents in AA (Nigeria) should not be read in isolation and that Ahmed (supra) supports the proposition that what is required is dishonesty on the part of the applicant, or by someone acting on his behalf, *in the course of the making of the application*. In support of this submission Mr Lane has pointed to the implicit requirement derived from [67] of AA (Nigeria) that "*some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use"* of the false document. Mr Lane submitted that the short question should be whether or not there was dishonesty in the application i.e. if the document was not dishonestly promoted in the application then the requisite requirement of dishonesty would be missing. Mr Lane also sought to derive support for this from the reasons provided by Moses LJ when granting permission.

24. It is clear that Moses LJ regarded it as arguable that it needs to be demonstrated that a person deploying a false document in an application, knew that it was false, and derived support for this from Ahmed. However, it is important to note that Moses LJ also considered the application of the ratio in AA (Nigeria) to documents, merited further consideration and clarification. It does not appear that Moses LJ was provided with a copy of JK (India).

25. I now turn to Ahmed. Ahmed was of course a material non-disclosure case. The Tribunal focused upon the proper approach to a false representation and material non-disclosure, having found that they are opposite sides of the same coin, requiring a consideration of the applicant's state of mind. After this, the UT went on to observe at [15]:

> "All aspects of paragraph 322(1A) and its sister paragraphs 320(7A), 321(i) and 321A(2) are treated as 'Deception' under paragraph 6 of HC 395, which strongly implies that *mens rea* is required on the part of the applicant. If that were not so, it would lead to the extraordinary situation that a person who had made a perfectly honest mistake in filling out his application form for further leave to remain would be subject to a re-entry ban under paragraph 320(7B)(d) for "*using Deception*" in his previous application. The consequence is positively draconian under paragraph 320(7B)(d)(ii) if an applicant for entry clearance "*used Deception*" in a previous application for entry clearance. The re-entry ban would be for ten years. That can hardly be the intended consequence of a wholly inadvertent failure to answer correctly one of the questions in an application form. To include such a failure under the rubric of 'Deception' would divorce that word, used as a term of art, from its ordinary meaning, which is not the way in which the Immigration Rules are normally construed."

26. In my judgment it cannot be said that mens rea is *always* required on the part of the applicant in order for the Secretary of State to invoke 320(7A) or its sister paragraphs.

27. First, the very wording of the relevant Rules are inconsistent with such a construction. A representation and / or a document may be false, "*whether or not to the applicant's knowledge*". As Rix LJ observed in AA (Nigeria) at [68] where a dishonest representation is promoted by another party, then the rule requires mandatory refusal "*irrespective of the personal innocence of the applicant herself*". Rix LJ went on to say ""*false*" *requires dishonesty – although not necessarily that of the applicant himself*". At [76], Rix LJ also stated that: "*Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a* '*false representation*' *a ground for mandatory refusal*."

28. Second, the blanket requirement of mens rea on the part of the applicant fails to make the necessary distinction between false documents and false statements for the reasons identified by Rix LJ in AA Nigeria at [67 and 68] as set out paragraphs 16 to 18 above. I accept that Rix LJ's remarks regarding documents are obiter but his reasoning is persuasive and has been accepted by Tomlinson LJ in JK (India), albeit that appeal did not turn on the issue.

29. Third, the fact that the theme of deception runs through the relevant IDI and entry clearance guidance (see Ahmed at [10 and 11]), does no more than serve to identify the importance of dishonesty. Indeed the IDI states that "*an application should be refused even where the applicant does not know (or claims not to know) it is a false document".* As Rix LJ explained, the necessary ingredient of dishonesty lies in the false document itself.

30. I acknowledge that the consequence of this approach may be draconian. However the use of false documents is a serious matter even if the falsity is unknown to the applicant. The use of false documents can be distinguished from making perfectly honest but inaccurate statements.

Approach to Mr Wellalage's case

31. In my judgment Judge Pooler did not err in law in concluding that the appellant's acceptance that the degree certificate that he submitted with his application was false and there had been dishonesty by another, was a sufficient basis for paragraph 322(1A) to apply. Judge Pooler was correct to find that it was not necessary for there to be evidence of dishonesty on the part of the appellant or anyone acting on his behalf during the course of his application.

32. When refusing the application under the Immigration Rules the SSHD was therefore entitled to be satisfied that the appellant had used deception in his application. This must be considered in the context of deception as set out in the Immigration Rules and the IDI, and as explained in AA Nigeria. As discussed above this includes submitting a false or dishonest document, whether or not to the applicant's knowledge. In this case the appellant submitted a false document in relation to which it is accepted there had been dishonesty by another.

33. It follows that contrary to Mr Lane's submissions, there has been dishonesty in this application – a dishonest document was submitted, whether or not to this appellant's knowledge. It matters not that the party who promoted the document is not a parent, sponsor, agent or representative of the appellant's. What matters is whether or not a false or dishonest document has been submitted.

34. For the above reasons, the appeal is dismissed.

Decision

35. The decision of the First-tier Tribunal does not contain a material error of law and is not set aside.

Signed

Upper Tribunal Judge Plimmer
Immigration and Asylum Chamber

Dated
2 November 2015