IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000236
First-tier Tribunal Nos:
EA/08528/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KASTRIOT ISMALAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A Basraa, Senior Presenting Officer
For the Respondent: In person

Heard at Field House on 6 July 2023

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the Respondent" and Mr Ismalaj is "the Appellant".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Hena ("the Judge"), promulgated on 4 January 2023. By that decision, which was taken without a hearing at the Appellant's request, the Judge allowed the Appellant's appeal against the Respondent's refusal of his EUSS application.

3. The Appellant is an Albanian national born in 1974 and currently residing in Greece. He applied for a family permit in order to join his wife and daughter in this country. The application was refused by a decision dated 19 August 2022. That refusal decision stated in terms that "Home Office records show that on the 29 June 2009 you received a custodial sentence of 9 months for the altercation/possession of a false document". The refusal went on to note that the Appellant had said "No" when asked on the application form whether he had ever been convicted. The Respondent concluded that the Appellant had provided false or misleading information in support of the application.

4. The Appellant appealed and elected to have his appeal determined without a hearing.

5. The Respondent prepared an appeal bundle which included the refusal decision and the visa application form, but no evidence relating to the alleged conviction. The Appellant provided his own bundle of documents.

The Judge's decision

6. The Judge accurately set out the Respondent's case which, I emphasise, was based solely on the alleged failure to have disclosed the 2009 conviction. The Judge then set out the Appellant's case in which he asserted that he had declared an arrest in the United Kingdom, that he had breached immigration laws, but that he had not been found guilty and so had answered "No" to the question of whether he had been convicted in the United Kingdom.

7. The Judge correctly directed herself that the burden of proof was on the Respondent as regards the allegation that the Appellant had been convicted in the United Kingdom.

8. Under the heading "Findings and Reasons", the Judge concluded at [15] and [16] that the Appellant had not misled the Respondent. She found that the Appellant had disclosed that he had been detained by the United

Kingdom authorities for three months and had in effect declared that he had been arrested by virtue of his admission that he had been held in detention before subsequently being found, on his case, not guilty and so honestly did not think he needed to declare the arrest.

9. At [17] the Judge noted the Appellant's lack of legal representation and that he may well have completed the form himself. In the circumstances the Judge found that the Appellant had not been dishonest in respect of the arrest issue.

10. In terms of the conviction, which of course the Respondent's refusal was predicated on, at [20] the Judge reiterated her self-direction that the burden rested with the Respondent and noted the absence of any evidence of the alleged conviction. At [21] the Judge stated that "The respondent has not discharged the burden upon them to prove the allegation they have made. They have provided no factual evidence as to this conviction ...".

11. The appeal was accordingly allowed.

The grounds of appeal

12. The Respondent's grounds of appeal are also entirely predicated on the conviction issue, making no reference to any alleged non-disclosure about an arrest.

13. Ground 1 asserted that "the appellant bears the burden of proving his unsubstantiated fact that he was not convicted in 2009 ...". Ground 1 goes on to state that the Respondent "now has a PNC" to prove the fact of conviction and that an application under Rule 15(2A) of the Tribunal's Procedure Rules would be made to adduce it.

14. Ground 2 appears to assert that the Judge should have of her own volition had the appeal listed for an oral hearing. It is said that "when making the respondent's bundle we did not fully have the appellant's case on these matters. Had the respondent been aware, it is submitted

that his conviction would have been evidenced". It was said that the Appellant had wilfully misled the Tribunal.

15. Permission to appeal was granted by the First-tier Tribunal in what I would describe as somewhat loose language: "It is arguable that the Appellant materially misled the Judge regarding his offending record". That grant of permission makes no reference to the well-established proposition that the party making an allegation must prove it, especially when it comes to the question of dishonest conduct.

16. Subsequently, I issued a directions notice in which I required an explanation from the Respondent as to when the PNC had come into her possession and why it had not been provided to the Judge. This direction was complied with and I shall address the response, below.

The hearing

17. At the hearing the Appellant and his daughter attended remotely. The Appellant was in Greece and I ensured that I received no evidence from him as opposed to him being able to comment on the Respondent's case.

18. I was satisfied that the PNC had been served on the Appellant's daughter (it had not gone directly to the Appellant due to data protection issues).

19. Mr Basraa suggested that the PNC was "irrelevant" and that the application form was the crucial evidence in this case because the Appellant had said therein that he had not had a criminal conviction. Mr Basraa had nothing to add to the explanation put forward by the Respondent in response to directions I had previously issued as to why the PNC had not been put before the Judge.

Decision

20. As I announced to the parties at the end of the hearing, I conclude that the Judge did not materially err in law and that her decision should stand.

21. It is plain that the Respondent was aware of the Appellant's case on appeal to the Judge, such as it was. From the face of the application form it was apparent that the Appellant was asserting that he had not been convicted of an offence, but had only been arrested. The fact that he was, on his case, found not to be guilty led him to think that he did not need to disclose the arrest. The Respondent's refusal letter focused squarely on the assertion that the Appellant had in fact been convicted in 2009 and that his failure to disclose this would lead to refusal of the application. On any sensible view the Respondent was on notice that she was required to provide evidence to back up the assertion in the refusal letter.

22. It is so well-established by now that it ought not to need repeating, but I will say it anyway. In cases where an allegation of dishonest conduct is relied on by the Respondent, she bears the burden of demonstrating this.

23. In the present case the Respondent's explanation as to the absence of the PNC in the bundle provided to the First-tier Tribunal is in one sense somewhat disturbing: "There is nothing to suggest that the PNC print would have been unavailable in advance of the hearing before the First-tier Tribunal. However, the SSHD does not routinely produce PNCs as part of her appeal bundle". At a very general level that may well be the case and in some cases there may be no dispute as to a criminal record. However, the present case could not have been clearer as to the different positions adopted by the parties. It was obvious that the PNC should have been provided to the First-tier Tribunal. The failure to do so has not in any way been adequately explained. The Respondent cannot satisfy the requirements of the guidance set out in E and R [2004] EWCA Civ 49.

24. The Judge directed herself correctly as to where the burden of proof lay (the assertion made in the grounds of appeal to the contrary was entirely misconceived and not pursued by Mr Basraa at the hearing). The Judge was entitled to decide the appeal based on the evidence put before her. She was entitled to conclude as she did.

25. Mr Basraa's reliance on the visa application form and assertion that the PNC was "irrelevant" was misconceived. Firstly, the refusal of the application and the grounds of appeal were predicated entirely on the conviction issue, not on any alleged failure to have specifically mentioned the arrest. Secondly, and in any event, the Judge considered the arrest issue and made a finding in the Appellant's favour. That finding was open to her.

26. For the avoidance of any doubt, I do not admit the PNC in evidence.

27. Having said that, there is a PNC in existence and it is in principle open to the Respondent to seek to rely on its contents in the future. The Respondent is bound to give effect to the Judge's decision, albeit that she may have the power to take further steps once this has been done.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision stands.

The appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 18 July 2023