Upper Tribunal
(Immigration and Asylum Chamber)

FW (Paragraph 322: untruthful answer) Kenya [2010] UKUT 165 (IAC)

THE IMMIGRATION ACTS

Heard at: Newport (Columbus House)	
On: 20 November 2009	

Before:

Mr C M G Ockelton, Vice President
Senior Immigration Judge Grubb

Between

FW

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Zia Nasim, instructed by Dexter Montague & Partners
For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

When a direct question is asked, and answered untruthfully, there is both a false representation and a non-disclosure; and it is not open to an Appellant who gives an untruthful answer to a direct question in an application form to say that the matter was not material.

DETERMINATION AND REASONS

1. The Appellant, a national of Kenya, appealed to the Asylum and Immigration Tribunal against the decision of the Respondent on 13 July 2009 refusing his application for leave to remain in the United Kingdom as a Tier 1 (post-study work) Migrant. An Immigration Judge dismissed his appeal. The Appellant sought and obtained an order for reconsideration. Thus the matter is before us. This case is governed by paragraph 4 of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21) and accordingly continues as an appeal to the Upper Tribunal.

2. One of the grounds for refusal was that the Appellant did not meet the maintenance requirements of the relevant rules and guidance. At the hearing before the Immigration Judge the Home Office Presenting Officer acknowledged (in our view clearly correctly) that that was a mistake, and we need say no more about it. The other ground for refusal was based on the way in which the Appellant had filled in his application form. Section E of the form is headed "Personal History (criminal convictions, war crimes, etc.)". Before any of the questions is the following note:

> "Please answer every question in this section. It is an offence under Section 26(1)(c) of the Immigration Act 1971 to make a statement or representation which is known to be false or is not believed to be true. Information given will be checked with other agencies."

"E1. Has the Applicant had any criminal convictions in the United Kingdom or any other country (including traffic offences) or any civil judgements made against them?"

There is a note:

> "Note 1: convictions spent under the Rehabilitation of Offenders Act 1974 need not be disclosed. More information about this Act is given towards the end of this section",

as indeed it is.

3. The Appellant had been convicted in 2007 on an offence of driving with excess alcohol; he was fined, and disqualified from driving for twelve months. But he answered "no" to question E1.

4. The relevant part of the Respondent's letter of refusal reads as follows:

> "In your application, you said that you have never been convicted of a criminal offence.

Failure to disclose material fact.

I am satisfied that the statement was false and I am satisfied that this fact was material to the application because it is a mandatory field on the application form for which you signed a declaration stating that the information given by yourself was true.

As material facts were not disclosed in relation to your application, it is refused under paragraph 322 (1A) of the Immigration Rules."

5. That paragraph provides for mandatory refusal of an application "where false representations have been made or false documents have been submitted (whether or not material to the application and whether or not to the applicant's knowledge), or material factors have not been disclosed in relation to the application". The grounds of appeal to the Tribunal on this point were, if we may summarise, that the Appellant's failure to disclose his conviction was not deliberate, that the non-disclosure was not relevant to the decision because the Appellant would have been granted the leave he sought even if he had disclosed the conviction, and that refusal of his application was contrary to his right to non-interference with his private life under Article 8.

6. The Immigration Judge treated the refusal as one based on the making of a false representation. He noted that it was for the Respondent to prove that a false representation had been made for the purpose of obtaining leave. He heard evidence from the Appellant, including a number of excuses and explanation for question E1's having been answered in the way it was. His conclusions, at paragraph 9 of his Determination were as follows:

> "I find the appellant has made a false representation in answering no to this question. Paragraph 322(1A) required the respondent to refuse his application because this false representation had been made. I am satisfied upon the balance of probabilities that the appellant chose not to answer the question truthfully and withheld this information to enhance the chance of the application being granted. The appellant's application form that he has completed when read as a whole document shows that the appellant was thinking carefully about his answers in giving detailed information about other things. The question asked the appellant whether he had ever been convicted of a criminal offence, including traffic offences, and he replied no. It is not credible that the appellant believed that his conviction was spent and need not be disclosed so soon after 2007 by reason of the fact that his twelve month disqualification period had been completed and the fine paid. If I apply the appellant's reasoning he would have thought no convictions need be disclosed save those where the sentence was still being served or the fine unpaid. He is an intelligent man educated in this country who understood the questions on the form. I do not accept he believed this in answering no to this important question."

7. He went on to say that there was no merit in the submission made on behalf of the Appellant that the failure to disclose was not material and, so far as concerns Article 8, he remarked that Article 8 does not provide a right to work in the UK and that he had not been assisted in discovering how any right of the Appellants had been breached by this decision. He said: "it appears unarguable because the refusal has not interfered with this private life in denying him something he did not have". He thus dismissed the appeal.

8. The grounds for reconsideration were, first, that the refusal had been not on the basis of false representations but on the basis of failure to disclose a material fact; secondly, that, in accordance with Immigration Directorates Instructions, there should have been refusal only if the non-disclosure was material and that the refusal was therefore not in accordance with the law; thirdly, that there was no evidence that the Appellant would not have been granted leave if he had disclosed his conviction; fourthly, in making his decision under Article 8, the Immigration Judge failed to consider that the Appellant's private life included the pursuit of a career or business. Mr Nasim expanded on those grounds before us.

9. It is fair to say that Mr Nasim had some difficulty in showing how the application should have been granted under the rules. His submissions were devoted to the materiality of non-disclosure but he was unable persuasively to explain how, given the false representation, the application could have succeeded. The truth of the matter is that this is a case where there is no essential difference between false representation and non-disclosure. The non-disclosure *was* a false representation, because it was an answer to a direct question. The answer "no" both was false and constituted a failure to disclose what would have been disclosed if the question had been answered truthfully. That is not to say that there is always no difference between false representation and non-disclosure. If, for example, an application form contained a space in which an applicant was invited to disclose anything else he thought might be of relevance in deciding whether he should be granted leave, and he left that part of the form blank, it might be found that he had failed to disclose a material fact, without making a false representation. But that is not this case.

10. In any event, we entirely reject Mr Nasim's submissions on materiality. It is not for a person who has untruthfully answered a direct question in an application form to assert that the answer was not material in any event. If it was not material, it is difficult to see why the question should have been asked. There is no basis on which it can be said that, in making a decision whether to grant leave in this category, the Secretary of State was obliged to condone an offence of driving with excess alcohol; and it seems to us there is also a sense in which a failure to answer questions truthfully is a further factor which the Secretary of State is entitled to take into account. It may be, therefore,

that a person who honestly admits an offence may be granted leave, whereas a person who untruthfully denies the same offence is properly refused leave.

11. We should add another point on false representations. It was inherent in Mr Nasim's submissions that a false representation made innocently ought not to cause paragraph 322(1A) to be applied. We are unable to accept that submission. It does not seem right to us to say that the Secretary of State ought to grant leave on a false basis, provided only that the falsity was unknown to the applicant. If a false statement is made in an application, the Secretary of State must be entitled to refuse it. That, indeed, appears also to be the effect of the words in parenthesis in paragraph 322(1A) itself.

12. No point was raised before us on the precise formulation of paragraph 9 of the Immigration Judge's determination. It might be conceivably said that, if it was for the Secretary of State to prove intention in these circumstances, the Immigration Judge should look for a greater level of certainty than that expressed by the phrase "upon the balance of probabilities". Whether or not that is right in the light of the authorities on the standard of proof, it is not an issue in this case. There is no doubt that the statement was untrue.

13. For those reasons we are perfectly certain that the refusal under paragraph 322(1A) was correct in the circumstances of this case. There is, of course, no merit in Mr Nasim's submission that the Tribunal should consider the exercise of discretion outside the rules.

14. We turn now to Article 8. The argument under Article 8 put to the Immigration Judge was that as the Appellant had been in the United Kingdom lawfully for a period of (then) over two and a half years, and as he was entitled to remain, because he met the requirements of the rules, his exclusion by refusing him leave could not be "necessary" within the meaning of Article 8. It was therefore disproportionate. Nothing substantially more appears to have been said by Mr Nasim at the hearing before the Immigration Judge. As we have already noted, the Immigration Judge dismissed the appeal on this ground, because he did not think that the arguments put before him established that the Appellant had a viable claim under Article 8. At the hearing before us we asked Mr Nasim what evidence there was of the incidents of the Appellant's private life protected by Article 8. Mr Nasim's response was simply to assert that the Appellant was "one of the best people" and therefore entitled to leave to remain.

15. The position is that the Appellant had a period of leave in this country, during which he committed a criminal offence, which he subsequently denied in an application for further leave. Other than the fact that he has been in this country for a few years, and that Mr Nasim describes him as "one of the best people", nothing has been said on the basis of

which it could be concluded that he has a right to remain here despite not complying with the immigration rules. In our view, he simply does not. The Article 8 claim is entirely insubstantial and, in the circumstances, the Immigration Judge dealt with it entirely appropriately.

16. For these reasons we find that the Immigration Judge made no material error of law and we order that his determination, dismissing this appeal, shall stand.

Mr C M G Ockelton
Vice President of the Upper Tribunal, Immigration and Asylum Chamber