Neutral Citation Number: [2024] EWCA Civ 201

Case No: CA-2023-000385

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
UPPER TRIBUNAL JUDGES NORTON-TAYLOR & O'CALLAGHAN
HU/19794/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE GREEN
and
LADY JUSTICE ANDREWS

- -

Between :

Hafiz Aman Ullah	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Zane Malik KC & Mansoor Fazli (instructed by **Chauhan Solicitors**) for the **Appellant**
Sian Reeves (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: Thursday 14th December 2023

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on Wednesday 6th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Green :

A. Introduction

1. Hafiz Aman Ullah ("*the Appellant*" or "*Ullah*") appeals against the decisions of the Upper Tribunal ("*UT*") promulgated on 25 February 2022 and 21 July 2022. By those decisions the UT set aside the decision of the First Tier Tribunal ("*FTT*") and substituted a fresh decision which dismissed the Appellant's appeal from the decision of the Secretary of State for the Home Department ("*SSHD*") to make an order to deprive him of British citizenship. The FTT had originally allowed the Appellant's appeal.

2. This case raises an elementary issue of procedural fairness. It concerns a finding by a FTT that the Appellant, who had committed criminal offences, did not act dishonestly when he answered "*No*" to a question on a form asking whether there was, in effect, anything which might cast into doubt his good character. Before the FTT the Appellant gave oral evidence in chief. He addressed his state of mind at the point in time when he completed the form and gave exculpatory evidence. He denied dishonesty. He was not cross-examined on his evidence. The FTT took into account that his evidence on this key issue was unchallenged and unexplored. The central issue on this appeal concerns the probative weight to be attached to evidence which is not challenged in the context of a finding about dishonesty. The appeal arises in a public law context but draws on the judgment of the Supreme Court in *TUI UK Ltd v Griffiths* [2023] UKSC 48 ("*Tui*") which concerned civil law. This appeal also confirms that the test of dishonesty as set out in *Ivey v Genting Casinos* [2017] UKSC 67 ("*Ivey*") applies in the context of deprivation decisions under section 40(3) British Nationality Act 1981 ("*BNA 1981*").

3. Three grounds of appeal are advanced. First, there was no error of law in the FTT's decision allowing the Appellant's appeal, and therefore it was not open to the UT to set aside that decision and substitute a fresh decision of its own dismissing the appeal. Secondly, if however the UT was entitled to set aside the FTT's decision, it nonetheless erred in retaining the appeal and substituting a fresh decision instead of remitting it for a fresh hearing at the FTT. Thirdly, in any event, when re-making the decision, the UT erred in that it acted in a procedurally unfair manner and dismissed the underlying appeal.

4. After hearing the parties' oral submissions on the first ground of appeal the Court announced that it would allow the appeal with reasons to follow. I address below only the first ground of appeal; it being unnecessary to consider any other of the grounds.

B. Background Facts

5. Ullah was born on 11 November 1979 in Pakistan. He arrived in the United Kingdom in 2004 as a worker permit holder and was granted indefinite leave to remain in 2009. He made an application for naturalisation as a British citizen on 27 June 2012 using Form AN. Page 1 of that form stated: "*Before completing this form, you should read the Guide AN as well as the Booklet AN*".

6. Section 3 of Guide AN is headed "*Good character*". Under 3.12 the following is stated:

> "You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think you are not of good character you should say so."

7. In answer to the question in section 3.12, "*Have you engaged in any other activities which might indicate that you may not be considered a person of good character*", Ullah ticked "*No*".

8. The application was granted. On 18 September 2012, the Appellant was issued with a certificate of naturalisation and he became a British citizen. Shortly thereafter, on 16 October 2012, he was arrested on suspicion of conspiracy to defraud the SSHD, fraud contrary to section 2 Fraud Act 2006, and possession of criminal property contrary to section 329(1) Proceeds of Crime Act 2002. The Appellant's arrest followed a criminal investigation into large scale immigration fraud and the Appellant's involvement with a gang of people associated with that fraud. The fraud involved the highly skilled migrant programme. The conspiracy concerned the creation of false employment or self-employment records to support falsified immigration applications under that programme.

9. On 18 April 2013, the Appellant pleaded guilty to possession of criminal property. This related to £80,532.35 that had been paid into his bank account. A not guilty plea was entered in respect of the charge of fraud and a verdict to that effect was directed to lie on the file. The remaining charges were stayed. The Appellant was sentenced to 51 weeks' imprisonment. He was released from prison in May 2013. He left the UK in December of that year.

10. In 2014, a trial took place of five other individuals charged with conspiring to defraud in respect of the same immigration fraud. Whilst the Appellant was not a defendant in those proceedings, the sentencing judge referred to the discovery of a ledger at his home address which contained details of payments connected to the conspiracy.

11. On 3 March 2016, the SSHD sent the Appellant an investigation letter to his last known address in the UK, advising him that deprivation of his British citizenship was under consideration. This was on the basis that "*The Secretary of State has reason to believe that you obtained your British Citizen status as a result of fraud*". The letter set out in detail the basis for this belief and directed the Appellant to provide his response to the allegations made within 21 days. According to the Royal Mail Track and Trace service, on 4 March 2016 this letter was signed for by someone using the name "*Ullah*". No reply to the letter of 3 March 2016 was however received. This resulted in the letter being re-sent to a different address on 1 April 2016. No response was received to this letter.

12. On 14 July 2016, the SSHD made the decision to deprive the appellant of his British citizenship pursuant to section 40(3) BNA 1981. This was predicated upon the Appellant's conviction. The following facts and matters were material to the decision:

    a) The Count on the indictment on which he was convicted stated that the possession of criminal property began on 1 January 2010 and ran until 5 March 2012. This meant that the Appellant had been involved in criminal acts prior to applying for British citizenship.

    b) On his Form AN, submitted on 27 June 2012, the appellant had ticked "*no*" in answer to the question in section 3.12.

    c) If the appellant had disclosed his involvement in his criminal activities in the Form AN, his application for British citizenship would not have succeeded and he would have received the response: "*You would not have been deemed of good character in view of your activities with the immigration crime group*".

13. On 24 November 2019, the appellant was stopped at Belfast Docks, attempting to board a ferry with the intention of onward travel to London by bus. He claimed to have left the UK in 2013 and that he had been living in the United States for the past 6 years. The SSHD re-served the decision of 14 July 2016. He appealed against that decision to the FTT.

14. The FTT heard his appeal on 22 February 2021 and promulgated its decision on 4 March 2021. The FTT, after hearing oral evidence from the Appellant, held that he was not dishonest and that the British citizenship was not obtained by fraud, false representation or concealment of material facts. The FTT accordingly allowed the appeal. Further details of the actual appeal proceedings before the FTT are set out below.

15. The SSHD appealed to the UT which heard the appeal on 7 December 2021 and promulgated its decision on 25 February 2022. The UT held that the FTT's findings of fact were wrong in law. The UT set aside the FTT's decision and retained the appeal for the purpose of the re-making of the decision on the underlying appeal. The UT, without further hearing or receiving oral evidence, promulgated another decision on 21 July 2022 dismissing the underlying appeal. It held that the Appellant was dishonest in his application for naturalisation as a British citizen. The UT further held that the Secretary of State's decision disclosed no error of law. The UT refused permission to appeal to this Court on 26 January 2023. The Appellant filed the Appellant's Notice with this Court on 23 February 2023. Phillips LJ, on 16 May 2023, granted permission to appeal on all grounds.

C. Legislative Framework

16. Section 40 BNA 1981, so far as relevant, provides:

    "(1) In this section a reference to a person's "citizenship status"
    is a reference to his status as—

    a British citizen,

    …

> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> …
>
> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, …"

17. Section 40A BNA 1981, so far as relevant, provides:

> "(1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal …"

18. The UT's jurisdiction is governed by sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 ("*TCEA 2007*"). The UT can only exercise its jurisdiction in respect of points of law. Section 11(1) provides:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision."

19. Similarly, section 12 TCEA 2007, in material part, states:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and

> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

D. Applicable Legal Principles

20. Under section 40(3) BNA 1981, the Secretary of State may deprive a person of citizenship status if the registration or naturalisation was obtained by fraud, false representation or concealment of material fact. As was made clear in *Pirzada (Deprivation of citizenship: general principles)* [2017] UKUT 196 (IAC), at (iii):

> "The power under sub-section (3) arises only if the Secretary of State is satisfied that registration or naturalisation was obtained by fraud, false representation or concealment of a material fact. The deception referred to must have motivated the grant of (in the present case) citizenship, and therefore necessarily preceded that grant."

21. It is common ground that a finding of dishonesty in the application for naturalisation is needed so as to justify a deprivation decision. Accordingly, the key issue of fact before the FTT was whether the Appellant was dishonest when he ticked "*No*" to the question asked in the application form as to whether he has engaged in any activities which might indicate that he might not be considered a person of good character.

22. The legal burden of proving that the Appellant acted dishonestly lies upon the Secretary of State. There is a three-stage process: (i) the Secretary of State first must adduce *prima facie* evidence of deception ("*the first stage*"); (ii) the Appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility ("*the second stage*"); and (iii), if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this explanation is to be rejected ("*the third stage*"). This staged approach was approved by the UT in *SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC), by the High Court in *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), and, by the Court of Appeal in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615 and *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167.

23. The civil standard of proof applies and is flexible in its application. Where there are allegations of fraud or deception, which if established will have serious consequences, a careful examination of the standard and quality of the evidence adduced is required: *R v SSHD ex parte Khawaja* [1983] UKHL 8, [1984] AC 74; *SSHD v Rehman* [2001] UKHL 47. The allegation against the Appellant, made by the SSHD, was plainly of high seriousness given it consequences.

E. Ground I: The UT's decision as to error of law

The FTT's Decision

24. The Appellant chose to give oral evidence before the FTT. The FTT recorded, at paragraph [63], that the Appellant's evidence in chief was that he ticked "*No*" because he honestly believed that it was the correct answer. The Appellant was only arrested, charged and sentenced as to the offence of possessing criminal property after his application for naturalisation and the grant of that application. Most of the charges against him were not pursued.

25. The SSHD did not challenge during cross-examination the Appellant's evidence as to the genuineness of his belief. Instead, the questioning focused upon the details of the Appellant's conviction in 2013. The FTT accepted the Appellant's submission that the SSHD could not, without challenging the Appellant's evidence on the central issues of the Appellant's state of mind and the genuineness of his belief, contend that he was dishonest exclusively upon the basis of his conviction. The existence of a prior criminal offence did not, in and of itself, necessarily indicate dishonesty. The fact that the offence in question was committed prior to the application was not determinative. The FTT was required to examine the Appellant's mental state at the time of completing the application form. On the evidence before it, the Appellant had advanced plausible evidence that he had no intention to deceive. The FTT reminded itself that the power contained within section 40(3) was restricted to where there was deception that had "*motivated the grant of citizenship*". The SSHD had not discharged the burden of proof of demonstrating the Appellant had completed his application with the deliberate intention to deceive.

UT's jurisdiction and errors of law

26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:

    (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];

    (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at paragraph [45];

    (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];

    (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];

(v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];

(vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107].

27. The UT's reasons for setting aside the FTT's decision are set out at paragraphs [30]-[32] of its decision:

> "30. What was self-evidently of potential significance is the fact that the Appellant had pleaded guilty to an offence which involved him knowing, or at least suspecting, that he was in possession of criminal property during a lengthy period of time which pre-dated his application for naturalisation as a British citizen. That factual matrix had been clearly raised by the Respondent in her decision letter and was relied on by the Presenting Officer at the hearing. In our judgment the absence of cross examination on this particular issue could not have excused the judge from specifically addressing it.
>
> 31. What is clear from [63]-[70] is that the judge failed to engage with, or at least provide adequate reasons in respect of, not simply the fact of the conviction (which did of course post-date the application and decision thereon), but the obvious implications of that conviction. The acceptance by the Appellant (by virtue of his guilty plea) to knowing or suspecting that he had been in possession of a significant amount of criminal property for an extended period of time between 2010 and 2012 was, on the face of it, highly relevant to his state of mind when he ticked the "no" box at section 3.12 of Form AN. If, having properly assessed the circumstances underlying the conviction, the judge nonetheless took the view that these were insufficient to affect the Appellant's honesty, clearly expressed reasons were required.
>
> 32. In the event, there was neither a proper analysis, nor adequate reasons. This is particularly so in respect of the judge's findings that: (a) there was an "evidential gap" in the Respondent's case; (b) it had not been established that the Appellant knew his conduct between 2010 and 2012 had been criminal; and (c) that his conduct might count against the "good character" requirement in the naturalisation application. As regards the first point, the reality was that there was no such "gap" in the evidence: the conviction and relevant supporting documentation spoke for itself. In terms of the second, the *mens*

> *rea* of the offence went to the issue of knowledge, although of course mere suspicion was sufficient. Finally, any evidence provided by the Appellant as to the relevance of past conduct to "good character" would have had to be assessed in the context of that conduct and, in light of what we have already said, this had not been properly analysed or reasoned."

F. Conclusion

The two stage test for dishonesty

28. A finding of dishonesty in the application for naturalisation is needed so as to justify deprivation. In *Ivey,* Lord Hughes set out the test for dishonesty (see paragraph [74]). The Court of Appeal in *R v Barton and another* [2020] EWCA Crim 575 ("*Barton*") sitting as a five judge panel, confirmed that this approach applied in the criminal context. As the Court in *Barton* explained at paragraph [84], the test involves two stages: (i) What was the individual's actual state of knowledge or belief as to the facts; and (ii) was his conduct dishonest by the standards of ordinary decent people? The Court of Appeal in Northern Ireland in *LLD v Secretary of State for the Home Department* [2020] NICA 38 ("*LLD*") at paragraph [62] summarised the approach in the following terms:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

29. In *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, an immigration appeal relating to alleged dishonesty in the context of an earnings discrepancy case, the Court of Appeal stated: "*…the principles summarised by Lord Hughes at para [74] of his judgment in that case will apply in this context, but we cannot think that in practice either the Secretary of State or a tribunal will need specifically to refer to them*" (paragraph [37]). As the Court of Appeal in *LLD* (ibid) at paragraph [41] said:

> "We consider that Lord Hughes' formulation regarding dishonesty, provided as it was in the context of a civil case, should be accorded broad application. We are unable to identify any reason in principle or otherwise why it should not apply to the relevant provisions of the Immigration Rules. Coherence and predictability in the legal system are long recognised and essential attributes. The DNA of dishonesty is the same, in whatever legal context it features."

30. In the present case the SSHD accepts that the test in *Ivey* applies. The SSHD's second ground of appeal to the UT was that the FTT had failed to "*apply the second part of the Ivey test from the Supreme Court as to whether an objective bystander would consider the Appellant's actions to be dishonest*". The UT at paragraph [35] accepted this stating "*In a sense, what we have already said goes to address the second element of the Respondent's challenge relating to the test set out in Ivey. By failing to provide adequate reasons in respect of the implications of the conviction, the judge also failed to properly address the objective limb of the test for dishonesty*." In *Pajtim Berdica v The Secretary of State for the Home Department* [2022] UKUT 00276 (IAC) at paragraph [30], the UT seemed to suggest that reliance on *Ivey* in the immigration context was misplaced. With respect, that is not correct.

The UT's reasoning

31. The UT treated as decisive the fact that the Appellant had pleaded guilty to an offence which involved him knowing or suspecting that he was in possession of criminal property. In my judgment that amounts to an error of law. There may be cases where an individual's conduct almost inevitably leads to an inference of dishonesty; but that is by no means an immutable rule. As the UT noted, in my view correctly, in *Sleiman (deprivation of citizenship; conduct)* [2017] UKUT 00367 (IAC) at paragraph [53]:

> "… in the cases of obvious fraud, such as in relation to identity or nationality, it is much easier to see the causative link between the conduct of the appellant and the granting of citizenship. In other cases the link may be less clear…"

32. Here the Appellant gave oral evidence as to his state of mind and understanding when he completed the application form. He committed the offence of possessing criminal property. The *mens rea* of this offence requires knowledge or mere suspicion: *R v Gabriel* [2006] EWCA Crim 229, at paragraph [26]. The Appellant pleaded guilty to the offence. There was no Newton hearing challenging the basis of plea. It must be assumed that he was sentenced upon the basis of the lesser *mens rea* i.e. mere suspicion.

33. On the facts of the case, the FTT treated this explanation as plausible under the first subjective limb of the dishonesty test. The judge then measured this against the objective second limb of the test. In determining what weight to give to the evidence of Ullah the judge was entitled, and indeed bound, to attach relevance to the decision on the part of the Respondent not to cross-examine him in order to test and challenge his evidence. The conclusions of the Judge on the evidence are well within the bounds of the discretion to be accorded to a judge required to find facts. The FTT was therefore entitled to refer to an "*evidential gap*" in the SSHD's case arising from this failure to cross-examine upon this essential component of the case. The UT therefore erred when it said, at paragraph [32]: "*the reality was that there was no such "gap" in the evidence: the conviction and relevant supporting documentation spoke for itself*".

34. Before this Court the SSHD argued that the appeal was a collateral attack upon a final decision of a criminal court and amounted to an abuse of process. This is misconceived. The criminal offences were not based upon dishonesty and in any event did not negate the duty of the FTT to apply the *Ivey* test to the facts before it.

35. It appears from the judgment of the UT (paragraph [32]) that the Presenting Officer assumed (wrongly) that the Appellant had put forward an account of being unaware of wrongdoing at the Crown Court but had nonetheless been found guilty (by a jury) and thereby disbelieved. The Appellant in fact pleaded guilty and there is no evidence that either expressly or impliedly he did so upon a basis amounting to an admission of dishonesty.

TUI v Griffiths

36. The recent judgment of the Supreme Court in *TUI* reinforces the above conclusion. The Court, at paragraph [42], cited with approval paragraphs [12-12] of *Phipson on Evidence 20th Edition* (2022), as follows:

> "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases … In general the CPR does not alter that position.
>
> This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

37. As was pointed out, cross-examination enables a witness to explain, in greater detail, his position. True it is that cross-examination might undermine the evidence of a witness but not infrequently it serves to reinforce and strengthen it. In paragraph [70(vi)] of *TUI* Lord Hodge observed:

> "(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty."

38. Lord Hodge emphasised that the rule was not to be applied rigidly and there was bound to be some relaxation depending upon the circumstances. He identified cases where the rule might not apply. The examples he provided at paragraphs [60] – [70] were not intended to be exhaustive.

39. Mr Malik KC argued that although *TUI* concerned evidence in civil proceedings the principle applied *a fortiori* in the field of public law, given the high importance attached to both fairness of procedure and the potentially serious consequences in law for Ullah if he lost before the UT and his right to nationality was taken away from him by the SSHD. Although the facts of *TUI* related to an expert witness the Supreme Court recognised that its reasoning applied with equal force to witnesses of fact: paragraph [70(i)]. Indeed, Lord Hodge acknowledged at paragraph [43] that many of the cases which supported the statement of law in *Phipson* related to challenges to the honesty of a witness. I agree.

40. Ms Reeves, for the Respondent, argued that the present case fell within the second exception listed by Lord Hodge at paragraph [62] namely, that the evidence was "*manifestly incredible*" such that the loss of an opportunity to cross examine "*would make no difference*". For this reason, she argued that the UT was correct to identify an error of law in the FTT's reasoning. She developed this with two points.

41. First, the application form asked, "Have you engaged in any other activities which might [emphasis added] indicate that you may not be considered a person of good character?" Ms Reeves argued that even if Ullah was convicted upon the basis of suspicion he still provided an incomplete answer on his application form. Although Ms Reeves accepted that the Appellant filled out the form prior to being arrested, let alone being charged with, or convicted of, an offence she argued that the presence of unidentified money in his bank account at the relevant time meant he should have provided a more complete answer on his form. With respect this argument simply reflects disagreement with the trial judge who heard the evidence and found it plausible and then took it into account in applying the Ivey test of dishonesty. Even if another judge might have agreed with the analysis of Ms Reeves, it is not a legitimate criticism to be advanced at the FTT that it took a different position (see summary of case law at paragraph [29] above).

42. Secondly, Ms Reeves pointed out that before the FTT Mr Malik KC had asked the Appellant in examination in chief whether he had committed any crime before 18 September 2012 to which he answered "*no, I did not*". Ms Reeves argued that this response was remarkable so as to not call for cross-examination. By the time the FTT hearing took place in February 2021 Ullah had, some years earlier, pleaded guilty to an offence that took place between 1 January 2010 and 5 March 2012 and was sentenced in April 2013. Ullah had made no complaint about the legal advice he had received prior to pleading guilty nor had he appealed his conviction. Ms Reeves argued that these circumstances clearly fell within the exception set out at paragraph [62] of Lord Hodge's judgment.

43. I do not accept that this response obviated the need for cross-examination. The relevant point in time for the assessment was when the application form was completed, not the later FTT hearing. As to the evidence given from the witness box it was for the judge to assess in the round and then to form a view in the context of the relevant test for dishonesty. Mr Malik KC argued that the Appellant's answer was to be understood in a "*practical*" rather than a "*technical*" sense. He was simply saying that he had no actual knowledge of the crime. This is consistent with the *mens rea* of the offence as including suspicion. At all events the judge accepted this as "*plausible*" which was all that was required: e.g. *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. Again, the issue for the UT was not whether it disagreed with the findings of fact made by the FTT but only whether those finding, generous or otherwise to Ullah, were outside the bounds properly to be accorded the fact finder.

44. Finally, the failure to cross-examine and the wide ranging criticisms made by the SSHD of the approach of the UT must be placed into context. This case had a frustrating history as the FTT judge, with an evident and weary sense of resignation, described in detail at paragraphs [13] – [24] of the decision. Between the Appellant lodging his initial bundle on 11 March 2020 and the FTT hearing on 22 February 2021, the SSHD was given four opportunities to address deception and dishonesty,

but did not do so. The SSHD also failed to comply with a series of procedural directions relating to preparation for the hearing and breached an undertaking it had given to the FTT on 11 January 2021. The Appellant's position on dishonesty was set out in the original grounds of appeal to the FTT and skeleton dated 28 November 2019 so amounted to a central issue in dispute between the parties from the outset. One judge, intent upon placing the SSHD squarely on notice, warned that unless the Appellant's case was addressed: *"…there may be a presumption made that the Respondent does not take issue with the submissions contained in the Appellant's Appeal Skeleton Argument*". The actual hearing during which Ullah gave evidence was the fifth (lost) opportunity to allege deception. The FTT decision, at paragraph [40], records that in closing submissions Mr Malik KC emphasised that the Appellant's evidence had not been challenged in cross-examination, yet the Presenting Officer did not, *even at that late stage*, invite the Judge to recall the Appellant. This was the sixth missed opportunity to raise dishonesty. The FTT also recorded, at paragraph [21], that the Presenting Officer had only received the case shortly before the FTT hearing took place on 22 February 2021. In short there was no conceivable excuse for the Respondent not to challenge Ullah's evidence on this pivotal issue, and the criticisms made of the approach of the FTT are without basis.

Conclusion

45. The reasons given above explain why I was content for the appeal to be allowed.

Lady Justice Andrews :

46. I agree.

Lord Justice Lewison :

47. I also agree.