**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/14017/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 12 August 2014** | **On 26 August 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MR HASHAM BUTT**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Coleman (Counsel)
For the Respondent: Mr E Tufan (Senior Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. In a determination promulgated on 9 June 2014, I found that the decision of the First-tier Tribunal in this case contained an error of law and fell to be set aside. The appellant's appeal against a decision to refuse to vary his leave was dismissed by a First-tier Tribunal Judge in November 2013. The Secretary of State made favourable findings regarding the points claimed by the appellant in the attributes and maintenance (funds) categories but

refused his application on the sole basis that paragraph 322(1A) of the rules was made out, as false representations were made in his application.

2. In answer to question J18 in the application form, the appellant ticked a box indicating that he had never previously been refused entry clearance, leave to enter or leave to remain in the United Kingdom. In the notice of decision which followed, the Secretary of State drew attention to at least three earlier occasions on which the appellant was refused leave to remain, the most recent on 29 September 2011. In his evidence to the First-tier Tribunal, the appellant accepted that the answer he gave to question J18 – "no" – was incorrect. He said that he thought the question was directed at decisions by Entry Clearance Officers to refuse entry outside the United Kingdom. He had never been refused an application of this type in the past. The forms used in his earlier applications for leave were all completed for him by his lawyer or an agent of the college where he was studying at the time.

3. The judge drew an inference that the appellant gave his answer to question J18 dishonestly on the basis that the earlier application forms contained questions equivalent to, or at least similar to, question J18. On behalf of the Secretary of State, the Senior Home Office Presenting Officer at the "error of law" hearing (Mr Deller) said that J18 in fact appeared only in the most recent application form and that there was no question equivalent to it in the earlier forms, although there were questions regarding illegal entry and deception. He said that it was likely that a set of the application forms completed by the appellant would be with the Home Office and that they might be made available to the Upper Tribunal in re-making the decision.

4. Mr Tufan was able to hand up copies of four earlier application forms and I am very grateful to him for locating them. The three earliest included questions at pages 20 and 21 regarding staying beyond the period of a person's leave, working without permission, illegal entry to the United Kingdom, the use of deception in applications and removal or deportation from the United Kingdom. The form which led to refusal of leave in September 2011 included questions on page 12 regarding staying on beyond a period of leave, working without permission, illegal entry and the use of deception in applications seeking leave to enter or remain and, as with the earlier forms, removal or deportation. It is, therefore, readily apparent that Mr Deller was correct in his submission to the Upper Tribunal at the error of law hearing that question J18 was rather different.

5. In re-making the decision, in issue between the parties is whether the ground of refusal under paragraph 322(1A) is made out. If it is, the appeal falls to be dismissed. If it is not, the appellant succeeds and he may then rely on the favourable findings already made by the Secretary of State regarding the substantive requirements of the rules.

6. Mr Coleman submitted that the evidence showed that the appellant's answer to question J18 was simply a genuine mistake. He was a man of good character and there was nothing in his past to suggest dishonesty. The appellant had nothing to gain by concealing the past refusals as they were all readily available to the Secretary of State. Question J18 did not appear in the previous application forms and so the appellant could not have had any knowledge of a similar question when he applied for leave previously. It was clear from Re B at paragraph 62, the Opinion of Lord Hoffman, that the more serious the allegation, the stronger the evidence required to make it out. It was improbable that the appellant would have lied about something which would gain him nothing. He could have mentioned the earlier refusals without any difficulty being caused thereby. There was no evidence of dishonesty and the answer to J18 simply showed a mistake.

7. The appellant's oral evidence was recorded by the First-tier Tribunal Judge at paragraphs 8 and 9 of his determination. The appellant offered an explanation for the mistake. At paragraph 4 of the witness statement he made, which was before the First-tier Tribunal, he made clear that he did not intend to deceive. In the absence of evidence enabling an inference to be drawn that the appellant had answered the same or a similar question in the past differently, the Secretary of State's case fell away.

8. Supporting the appellant's explanation and case were question J16 in the current form, where he had answered "no" in the context of deception used in earlier applications and the first part of question J18, which was clearly directed to entry clearance or leave to enter. This supported the appellant's explanation that he thought that he was being asked about applications from abroad.

9. Mr Tufan said that the burden of proof clearly fell on the Secretary of State in this context but the standard of proof was that of a balance of probabilities, as was made clear in Re B. The Secretary of State was able to show dishonesty because J18 was a straightforward question. It was difficult for the appellant to argue that he did not understand it. He was an educated man. A straightforward answer was required. The appellant was refused leave on several occasions in the past and it was no answer to say that the application forms were completed by lawyers or advisors. After all, the appellant received notice of the refusals from the Secretary of State and so he was well aware of the outcome. He was required to give a straightforward answer but failed to do so.

10. In a brief response, Mr Coleman said that had the appellant given no explanation and provided no evidence in support of his case, things would have been very different. However, he was able to rely on his good character and he had spoken to the issue and provided an explanation. The Secretary of State was required to show dishonesty and she was unable to do so, in the context of the new question which appeared in the current form, at J18.

## Findings and Conclusions

11. In this appeal, the burden lies with the Secretary of State to show that the ground of refusal under paragraph 322(1A) is made out: JC (China) [2005] UKAIT 0312. The standard of proof is that of a balance of probabilities (Re B) but cogent evidence will be required: NA (Cambridge College of Learning) [2009] UKAIT 00031.

12. There has been no need to hear evidence in re-making the decision. The appellant was able to put his case before the First-tier Tribunal and his oral evidence was summarised at paragraphs 8 and 9 of the determination. Mr Coleman drew attention to the witness statement which was before the judge, and the appellant's denial there that he had used deception.

13. With the benefit of the four application forms completed by the appellant on earlier occasions, provided by Mr Tufan, a full picture has emerged. Question J18 in the current form, which the appellant answered inaccurately, does not appear in the earlier forms although there are questions concerning overstaying, deception and related matters. It is not in issue that the earlier forms were all completed correctly and honestly. The appellant said that lawyers and advisors completed those forms but, as Mr Tufan submitted, this is neither here nor there. He signed the individual forms and was well aware of the earlier refusals of leave.

14. The critical question is whether the straightforward answer the appellant gave to J18 is sufficient, when weighed with all the evidence, to enable an inference to be drawn that he gave his answer dishonestly. It is relevant, in this context, that the other forms were answered correctly, albeit on the appellant's behalf. A series of honestly and accurately completed forms tends to suggest that it is less likely that the appellant would seek to introduce dishonesty in a form completed subsequently. After all, he was well aware of the adverse outcomes in the earlier applications and he would have known that the Secretary of State, having made those decisions, was also aware of them. He had nothing to gain by answering the question dishonestly.

15. Relevant also is the explanation he has given. He thought J18 was directed to applications from abroad. The question itself does provide some support for this explanation as it asks whether an applicant has ever been refused entry clearance, leave to enter or leave to remain in the UK, a natural reading of those words suggesting that the first two types of application are made abroad. The form also shows that the appellant was required to disclose aspects of his immigration history and that he did so, accurately. Questions J4 to J13 required him to give details of his entry to the United Kingdom, including the reference number of his visa. At N4 and N5, he disclosed his most recent grant of leave, as a Tier 4 student. The appellant was not seeking to conceal or disguise these aspects and he

would have known that the Secretary of State would have readily identified any inaccuracies (as she did, in fact) from her own records.

16. An assessment is required in the light of all of the evidence. Taking into account the appellant's immigration history, the earlier forms completed without error and the extent of the disclosure of the appellant's immigration history in the most recent application, I find that cogent evidence of dishonesty has not been shown in this case. The Secretary of State has not discharged the burden upon her of showing that it is more likely than not that the appellant answered J18 dishonestly, rather than merely answering the question inaccurately and mistakenly.

17. I find that the ground of refusal under paragraph 322(1A) has not been made out. That is the sole issue requiring determination and the appeal is allowed.

## DECISION

18. The decision of the First-tier Tribunal, having been set aside, is re-made as follows: the appeal is allowed.

## ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed: Dated:

Deputy Upper Tribunal Judge R C Campbell

## FEE AWARD

By section 12(4) of the Tribunals, Courts and Enforcement Act 2007, in re-making a decision, the Upper Tribunal may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision. This includes the making of fee awards. As the appeal has been allowed, I make a fee award in respect of any fee which has been paid or is payable in these proceedings.

Signed: Dated:

Deputy Upper Tribunal Judge R C Campbell