Upper Tribunal
(Immigration and Asylum Chamber)

Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London **On 03 November 2015**	**Decision promulgated** ……………………………………

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Bruce

Between

SAJITH MUHANDIRAMGE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S M Khan, of SMK Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Office

Where an application for leave to remain in the United Kingdom is refused under Section S-LTR.1.7 of Appendix FM of the Immigration Rules on the ground of the Applicant's failure without reasonable excuse to comply with a requirement to provide information, the burden of establishing a reasonable excuse rests on the applicant and the standard of proof is the balance of probabilities.

DECISION AND REASONS

Introduction

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 12 September 2014, whereby the

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application of the Appellant, a national of Sri Lanka, aged 26 years, for variation of his leave to remain as the spouse of a person present and settled in the United Kingdom was refused. Simultaneously, a decision was made to remove him by directions under section 47 of the Immigration, Asylum and Nationality Act 2006. The ensuing appeal to the First-tier Tribunal (the "*FtT*") was dismissed. In a considered grant of permission to appeal, a single arguable error of law has been identified, in the following terms:

> "*…. The Judge found that there was no requirement for dishonesty in respect of a refusal under S-LTR.1.7 ….*
>
> *The Judge concluded that, once the Respondent had provided a Memorandum of Conviction and a copy of the completed application form, including the tick box relating to convictions, the burden rested on the Appellant to demonstrate that he had a 'reasonable excuse'. It is arguable that the burden of showing an absence of any reasonable excuse still rests on the Respondent.*"

Permission to appeal was granted accordingly.

Relevant Immigration Rules

2. The subject matter of Appendix FM of the Immigration Rules ("*the Rules*") is "Family Members". This embraces a regime characterised by its detailed prescription. Within this regime it is possible for varying types of family member to secure leave to remain, under differing guises, in the United Kingdom. One dedicated compartment of the Appendix, Section R-LTRP, is devoted to the discrete subject of "Eligibility for Indefinite Leave to Remain as a Partner". This provides, *inter alia*, that all of the requirements in Section E-LTRP must be satisfied. It further provides that the applicant must not fall for refusal under the "Suitability – Leave to Remain" provisions arranged in Section S-LTR, paragraph 1.1 whereof provides that the applicant "*will be refused limited leave to remain on grounds of suitability*" if any of paragraphs 1.2 – 1.7 applies. Within paragraph 1.7 there is a specific requirement, in subparagraph (b), that –

> "*The applicant has failed without reasonable excuse to comply with a requirement to -*
> *…..*
>
> *(b) provide … information*".

3. The words "will be refused" in paragraph S-LTR1.1 attract attention. Their clear import is that of mandatory refusal. This provision is to be contrasted with paragraph S-LTR.2.1, which provides:

> "*The applicant **<u>will normally</u> be refused** on grounds of suitability if any of paragraphs S-LTR.2.2 to 2.4 apply.*"
>
> [Emphasis added.]

Within paragraphs 2.2 – 2.4 a series of defaults is postulated: the provision of false information, representations or documents; non-disclosure of material facts; a failure to pay relevant NHS charges; and the non-provision of a requested maintenance and accommodation undertaking. Strikingly, where any of these situations obtains, the refusal of an application for limited leave to remain as a partner is discretionary. The contrast with paragraph 1.7 is unmistakeable.

Factual matrix

4. The material facts are few and uncontroversial. The Appellant entered the United Kingdom lawfully as a Tier 4 (General) Student in January 2011. His presence in the United Kingdom has been consistently lawful. His sponsor, the British citizen with whom he wishes to settle, is described as a person who is Malaysian by birth, aged 43 years, with two children aged 11 and 15 years respectively. She has been settled in the United Kingdom since July 2008. The relationship between the Appellant and the sponsor dates from September 2013 and they were married on 16 June 2014. Section 10 of the application form, under the rubric of "Personal History", states:

> "*It is mandatory to complete section 10 ….*
>
> *This section asks about any criminal convictions ….*
>
> *If you fail to answer all of these questions as fully and accurately as possible, your application may be refused.*"

This is followed by, *inter alia*, the question:

> "*Have you or any dependants who are applying with you been convicted of any criminal offence in the UK or any other country?*"

In response, the Appellant ticked the "No" box. The application is signed by the Appellant and is dated 30 July 2014.

Decisions of the Secretary of State and the FtT

5. In the Secretary of State's decision, the following is stated:

> "*On 02 January 2013 you were convicted of two counts of fraud at North Staffordshire Magistrates' Court. On section 10.1 of the application form you stated that you had no convictions. Your application falls for refusal by virtue of paragraph S-LTR.1.7 of Appendix FM …..* [and] *is refused under D-LTRP1.3.*"

This is the only reason proffered for refusing the application. The decision maker also considered the Appellant's case under the private life rubric of paragraph 276 ADE of the Immigration Rules, concluding that it was non-compliant with the applicable requirements.

6. There were two grounds of appeal to the First-Tier Tribunal (the "*FtT*"), which were:

   (a) that the Appellant did not intentionally conceal his convictions; and

   (b) that the impugned decision was in breach of Article 8 ECHR

   Both were rejected by the FtT. The main issue for the FtT was whether the Appellant's admitted failure to disclose his conviction in the application form could be forgiven by the "*reasonable excuse*" dispensation in the Rules. The explanation proffered by the Appellant was that he had formed an understanding that the outcome of the criminal proceedings against him was a compromise at the Magistrates' Court, involving the repayment of the sum in question (some £400), together with court costs of £175, whereby, per his statement –

   > "*I was led to believe that so long as the sum in question was settled in full, there was no further liability … I believed that the above did not fall within the definition of a conviction. The omission was therefore an honest mistake on my part as it was never my intention to be deceitful or deceptive* [sic]."

   In a nutshell, the FtT found this explanation wholly unconvincing and rejected it for the reasons given.

7. The issue of law upon which the grant of permission to appeal is focused emerges from the following passages in the decision of the FtT:

   > "*In the present case, it is not for the Respondent to prove that anything was done dishonestly or with an intention to deceive. Insofar as there is any burden upon the Respondent, I find that it has been sufficiently discharged ….* [by producing] *…. a copy of the completed FLR(M) application form ….. and, secondly, a copy of the Appellant's Memorandum of Conviction ….*"

   The FtT considered that there was a burden upon the Appellant, expressed in the following terms:

   > "*…. The Appellant in this appeal must be understood to be contending that he has a reasonable excuse for his undisputed failure to comply with the requirement to provide information. Such being his case, I apprehend that the burden rests upon him to establish the necessary facts upon the balance of probabilities.*"

   At the conclusion of the Judge's consideration of, and reasoned rejection of, the Appellant's explanation for his aberration, the Judge stated:

   > "*… It is my conclusion that the Appellant has failed to discharge the burden of showing on the balance of probabilities that he has a reasonable excuse.*"

The burden of proof issue

8. It has been frequently observed, at all levels, that the world of immigration and asylum law is complex, challenging and populated by a seemingly ever increasing number of legal rules, both domestic and international. I apprehend that few would quibble with this analysis. The complexities and potential for error have been increased by the intermittent emergence of burdens and standards of proof during recent years. This may be linked to another question, which to my mind is not yet finally settled, relating to the essential character of immigration and asylum appeals, resorting to the conventional taxonomy, are these adversarial? Or inquisitorial? Or a combination of both? Or of some other species? Furthermore, in considering all of these questions, what is the influence of the public law overlay in this sphere? I consider that when questions of burden and standard of proof arise in immigration and asylum appeals they cannot be isolated from this broader context.

9. Burdens and standard of proof have progressively, and almost with stealth, become an established feature of decision making in the field of immigration and asylum law. Their emergence may properly be described as organic. They have featured particularly in cases where it is alleged by the Secretary of State that the applicant has engaged in deception or dishonesty with the result that the application in question should be refused. This discrete line of authority is not recent, being traceable to the decision of the Immigration Appeal Tribunal in Olufosoye [1992] IMM AR 141. In tribunal jurisprudence, the origins of this particular lineage can be traced to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, which concerned the inter-related issues of procuring entry to the United Kingdom by deception and precedent fact in the Secretary of State's ensuing decision making process. It is well established that in such cases the burden of proof rests on the Secretary of State and the standard of proof belongs to the higher end of the balance of probabilities spectrum.

10. One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 00236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:

    (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.

    (b) The spotlight thereby switches to the applicant. If he discharges the burden – again, an evidential one – of raising an innocent explanation, namely an account

which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.

A veritable burden of proof boomerang!

11. Shen is preceded by a lengthy line of Tribunal jurisprudence to this effect: see JC (Part 9 HC 395 – Burden of Proof) China [2007] UKAIT 00027, at [10]; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919, at [25]; Mumu (Paragraph 320; Article 8; Scope) [2012] UKUT 00143 (IAC); and Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC). In short, in cases of alleged deceit, the legal rules are well settled.

12. The phenomenon of burden and standard of proof features in other spheres of the general field of immigration and asylum decision making. For example, in Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC) which concerned an application for leave to remain refused on the basis that the Secretary of State claimed to have been unable to obtain the requisite fee from the Appellant's bank, resulting in the application being returned as invalid, the Upper Tribunal held that where this gives rise to a contention that there is no ensuing right of appeal, the burden is on the Secretary of State to demonstrate that the bank authorisation specified in the completed application was not sufficient to secure payment of the requisite fee. This decision was considered recently in Mitchell (Basnet Revisited) [2015] UKUT 00562 (IAC), where the Vice-President stated:

> "*The Appellant had submitted an apparently good application form and the Secretary of State's response to the appeal was to assert that the fee could not be collected on the basis of the authority given.* ***This was a matter solely within the knowledge of the Secretary of State****, because the crucial events had happened after the submission of the form and it was therefore for the Secretary of State to show that the difficulty arose from a default by the appellant.*"
>
> [Our emphasis.]

13. For many immigration Judges and practitioners one of the best known illustrations of the operation of burden and standard of proof is that of asylum claims. Every asylum claimant bears the burden of establishing a well founded fear, in the terms of the Refugee Convention. As regards the standard of proof, the House of Lords held in R v Secretary of State for the Home Department, ex parte Sivakumaran [1988] AC 958 that what must be demonstrated is a "*real and substantial risk*" or a "*reasonable degree of likelihood*" of persecution for a Refugee Convention reason. It is clear that this denotes a standard somewhat lower than that of the balance of probabilities, given in particular their Lordships' approval of the linguistic formulae devised by Lord Diplock in Fernandez v Government of Singapore [1988] AC 958, at 994, namely

"*a reasonable chance*" and "*a serious possibility*". Thus, per Lord Keith in Sivakumaran, at page :

> "*…. If the examination shows that persecution might indeed take place then the fear is well founded.*"

14. One of the striking features of the many decisions belonging to this general field is the absence of any detailed consideration of the questions mooted in [8] above. It is beyond question that immigration appeals do not partake of the conventional traits of *inter-partes* litigation. There is, rather, a clearly discernible public law framework, given that the powers and discretions being exercised are statutory, belong to the realm of public law and give rise to disputes between the individual and the state. This is further reflected in the broad spectrum of errors of law which feature in the decisions of the FtT and the jurisprudence of the Upper Tribunal. These include the quintessentially public law misdemeanours of irrationality, bias, failing to take into account all material facts and considerations, permitting the intrusion of immaterial facts and considerations and the failure to provide a procedurally fair decision making process.

15. This public law overlay also arises from time to time in appeals to the Upper Tribunal raising questions about the fairness of the decision making process adopted by the FtT. This discrete issue features in R (on the application of Maheshwaran) v Secretary of State for the Home Department [2002] EWCA Civ 173. In order to do justice to the passage in question it is necessary to reproduce it in full, per Schiemann LJ, at [3] – [5]:

> "*3. Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators cannot be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given.*
>
> *4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post - hearing decision of the higher courts – requires it. However, such cases will be rare.*

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

It is the very essence of litigation having a public law character that there is no *lis inter-partes*. Notably, there is no express recognition of this in the passage quoted above, in which the emphasis is, rather, on classic adversarial *inter-partes* litigation.

16. Furthermore, the judgment of Schiemann LJ must be considered in the light of Lord Carnwath's more recent formulation of the general character of Tribunal proceedings (*infra*). In addition, Judges should be cognisant that this passage, properly, does not purport to enunciate a fair hearing code in either rigid or exhaustive terms. The *locus classicus* remains, I believe, the decision of the House of Lords in Doody v Secretary of State for the Home Department [1993] 3 All ER 92, at 106 D/H. In the celebrated passage in the speech of Lord Mustill in which six governing principles are configured, we would suggest that, for Tribunal Judges, the sixth is the most apposite:

> "*Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.*"

Particular attention must be paid to this principle in the world of immigration and asylum proceedings which feature, with some frequency, the phenomena of unrepresented litigants, through the medium of interpreters, and litigants who may be classified vulnerable for one reason or another. As ever, the specific litigious context will be all important.

17. In this reflection on the interplay between burdens of proof and the right to a fair hearing, the decision of the Court of Session in Koca v Secretary of State for the Home Department [2005] CSIH 41 also repays careful reading. In that case the claimant was represented by a solicitor, while there was no representative of the Secretary of State. The adjudicator dismissed the appeal. One of the two central grounds of the ensuing judicial review challenge was a complaint that the claimant had been deprived of his right to a fair hearing on account of the adjudicator's failure to canvass with him discrepancies in his case which, in her subsequent decision, were held against him. Lord Clarke observed, in [19]:

"…. This case falls to be decided in accordance with the overriding requirement that the reclaimer should have been given a fair hearing. That requirement, of course, ***is not confined to the actual conduct of the hearing itself before the Adjudicator but applies also to the process whereby the Adjudicator reaches his decision.****"*

[My emphasis.]

Lord Clarke then highlighted the absence of any cross examination or judicial questioning:

"… whereby any such inconsistencies, contradictions or discrepancies might well have been highlighted."

The Court's conclusion on this issue was the following, at [20]:

"…. If ….. any perceived contradiction or inconsistency in the reclaimer's position was going to form a significant reason for rejecting his appeal then, in the particular circumstances of this case, it appears to use that fairness required that, prior to the issue of her decision, she gave the reclaimer or his representative an opportunity to comment upon, or seek to explain, it."

And, in the same, passage, Lord Clarke formulated what he termed *"the narrower proposition"* in these terms:

"…. If the Adjudicator himself considers that he has identified certain inconsistencies in the applicant's evidence which could have a very significant effect on the decision, he should provide the applicant with an opportunity to explain these."

The concept which shines brightly in these passages, though not explicitly mentioned, is that of <u>context</u>. Finally, having regard to the next issue to which I shall turn, the statement in [21] of the judgment is worthy of note:

"….. We accept entirely …… that an adjudicator has no obligation to search for material of that kind [a Turkish asylum seeker's report requested by the appellant's expert witness] *which is not placed before him even when it is referred to. It is for the applicant and those representing him to ensure that any material which they wish the Tribunal to have regard to is placed before the Tribunal."*

This statement must, of course, be considered in the light of Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which requires the Secretary of State to provide specified documents in every case. Furthermore, the Tribunal is empowered, by Rule 4, to make further specific directions regarding documents.

18. That one of the features of Tribunal proceedings is a certain <u>inquisitorial</u> dimension was acknowledged recently by Lord Carnwath SC in <u>Secretary of State for the Home Department v MN and KY</u> [2014] UKSC 30, at [25]. Having referred to the relevant

procedural rules of the First-tier Tribunal and the Upper Tribunal, Lord Carnwath stated:

> *"Secondly, there is no presumption that the procedure will necessarily follow the adversarial model which (for the time being at least) is the hallmark of civil court procedures.* ***In a specialist tribunal, particularly where parties are not represented, there is more scope, and often more need, for the judges to adopt an inquisitorial approach****."*
>
> [Our emphasis.]

This may be allied with the long standing recognition that proceedings before tribunals do not operate within what is perceived to be the rather stricter and more rigid framework of proceedings before conventional courts. We consider that the decision in Maheshwaran must be considered in the light of the above. What Lord Carnwath added is no throwaway line:

> *"However, there is no single approach suitable for all tribunals. For example, in a major case in the tax or lands tribunals, the sum may be great and the issues as complex, as in any case in the High Court and the procedure will be modelled accordingly."*

In [23], his Lordship, drawing on the report of Sir Andrew Leggatt (*infra*), having highlighted the specialised nature of Tribunals, continued:

> *"These special qualities, including emphasis on the development of 'innovative methods of resolving disputes that are of a type that may be brought before Tribunals', are given statutory force in the duties of the Senior President under section 2 of the 2007Act. They are also embodied in the overriding objective in the Rules ….."*

19. By long established convention proceedings before tribunals have been considered to operate with a greater degree of procedural flexibility and informality. This is reflected in, for example, rule 4(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014:

> *"Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure."*

This replicates the terms of the predecessor rule. Furthermore, an identical provision is found in rule 5(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It is also well established that a statutory tribunal is not normally bound by the rules of evidence. Thus hearsay evidence may be received, provided that the party affected has a fair opportunity to consider and respond to same: see R v Hull Prison Visitors, ex parte St Germain (No 2) [1979] 1 WLR 1401. A further feature of tribunal proceedings is that they are conducted, or capable of being conducted, informally. This, historically, may explain why most tribunal proceedings are conducted without

requiring witnesses to be sworn, as was noted in the Franks Report (Cmnd. 218, 1957), at [91].

20. What is clear beyond peradventure is that in the field of immigration and asylum law tribunals do not exercise investigatory or pure inquisitorial powers. They do not generally conduct "own motion" enquiries. Evidence is adduced by the parties and not the Tribunal. These considerations serve to explain why Sir Andrew Leggatt noted in his report (Cmnd. Tribunals for Users – One System, One Service: Report of the Review of Tribunals (2001) at 7.3 – 7.5) that, in contrast with other jurisdictions such as Australia, tribunal proceedings in the United Kingdom are generally not inquisitorial in nature. We consider that this is not undermined by the assessment of Baroness Hale, in a rather different context, that the process of statutory benefits adjudication is "*inquisitorial rather than adversarial*": see Kerr v Department for Social Development (NI) [2004] UKHL 23, at [61]. That process is rather different from the *inter – partes* framework of appeals to both the FtT and this Chamber. Lord Carnwath did not dilate on the meaning to be attributed to "*inquisitorial*" in the context in which he was writing. On balance, we consider that he did not intend to signal any radical departure from the assessment of Sir Andrew Leggatt.

21. In Wade and Forsyth, Administrative Law (10th Edition), one finds a useful analysis of this topic, at page 784:

> "….. *Once it is recognised that a dispute has arisen* [between the State and the individual] *then, in the common law tradition, a relatively adversarial procedure is implied. This is consistent with the integration of tribunals into the judicial system as ordained by the 2007 Act. A tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an enquiry of its own motion, enter into the controversy and call evidence for or against either party*".

This summary seems uncontroversial. The authors continue:

> "*Naturally this does not mean that the Tribunal should not tactfully assist an applicant to develop his case, particularly when he has no representative to speak for him, just as a Judge will do with an unrepresented litigant. And this may require a more inquisitorial role.*"

Judicial conduct of this kind would, of course, be subject at all times to the overarching duty of impartial adjudication. The final comment of these respected commentators on this issue is:

> "…. *The 2007 Act reforms also imply a less passive Tribunal to ensure that all cases are dealt with justly and fairly; and a shift towards a less adversarial procedure may be anticipated.*"

Thus there is scope for further development of the law on this front.

22. Returning to the issue to be determined in this appeal, it seems to us that the resolution of any question relating to burden and standard of proof cannot be divorced from the nature of the proceedings in which the issue arises. Hence the *excursus* in the foregoing paragraphs. Equally important, in our view, is an appreciation of the underlying legal theory. Writing at the end of the 19th century, the American scholar Thayer (Preliminary Treatise on Evidence at the Common Law) opined that the phrase "*burden of proof*" had two basic meanings. He formulated the first of these thus:

> "*The peculiar duty of him who has the risk of any given proposition on which parties are at issue – who will lose the case if he does not make this proposition out, when all has been said and done*".

This is immediately recognisable as the persuasive (or legal) burden, the standard whereof varies from the civil to the criminal context viz a preponderance of the evidence (or on the balance of probabilities) and beyond reasonable doubt. Thayer coined the second meaning of "burden of proof" as:

> "*The duty of going forward in argument or introducing evidence, whether at the beginning of a case, or at any later moment throughout the trial or discussion.*"

[At page 355.]

This corresponds approximately to what is known as the evidential burden viz the burden on a party in certain contexts to establish sufficient evidence to raise an issue before the tribunal of fact. At its simplest, the function of burdens of proof is to facilitate judicial decision making within a coherent, regulated, orderly, consistent, predictable and bilaterally fair framework. Such decision making is generally undertaken in a context involving a dispute between the parties which is resolved by the adversarial process so typical of the common law. The imposition of a burden of proof equips the court or tribunal concerned with a vital tool to be applied in its adjudication of the dispute.

23. The general rule is that it is incumbent on the claimant to prove what he alleges or contends. Indeed, this has been described as the "*golden rule*": see Chapman v Oakleigh Animal Products [1970] 8 KIR 1063, at 1072. This general rule has been helpfully framed in the following terms: the legal burden of proof normally rests upon the party desiring the court to take action, with the result that a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied: see Dickinson v Minister of Pensions [1953] 1 QB 228, at 232. In very pithy terms, he who asserts must prove.

Conclusion and decision

24. Having regard to the terms of the grant of permission to appeal, three conclusions are, in principle, open to this Tribunal. The first is that the burden of proving that the Appellant had a reasonable excuse for non-disclosure of his criminal conviction

rested on him. The second possible conclusion is that the Secretary of State had the burden of proving that the Appellant did not have a reasonable excuse for the non-disclosure. The third partakes of the "boomerang" discussed in [10]above.

25. If the second of these conclusions is to prevail, it would operate as an exception to the general rule of evidence discussed immediately above. We are unable to identify any basis in principle, logic or otherwise favouring this conclusion. It finds no support in any authority brought to our attention. Furthermore, it would be in conflict with the principle that where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the latter bears the burden of disproving it. This principle has been applied in both criminal and civil cases: see in particular R v Edwards [1975] QB 27, General Accident Fire and Life Assurance v Robertson [1909] AC 404 at 413, Magowan v Carville [1960] IR 330 at 336, 337 and Abrath v North Eastern Railway Company [1883] 11 QBD 440. In the latter case, Bowen LJ stated, at 457 – 458:

> *"If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about onus of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof, because the only answer which they have to give is Yes or No, or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof. Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative " and " affirmative" are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds come back to the question of the present trial, it is possible that the language of Cave, J., has been misunderstood; and must look and see out of the ways in which the question might possibly be tried, which way he has selected, because as soon as it is seen which mode of trial he has selected a great advance is made towards seeing that the criticisms which have been made on his direction are unsound. A judge may leave the jury to find a general verdict, explaining to the jury what the disputed facts are, telling them that if they find the disputed facts in favour of one side or the other, his opinion as to reasonable and probable cause will differ accordingly, telling them what, in each*

alternative, his view will be, and enabling them to apply that statement with reference to the issue as to malice; that is a way which in a very simple kind of case may be adopted. But I think it necessary only to state as much as I have stated about it, to see that a very clear head and a very clear .tongue will be required to conduct a complicated case to a general verdict in that way. Accordingly, judges have, been in the habit of adopting a different course whenever there are circumstances of complication. A judge may accordingly, do this; he may tell the jury what the issues or questions are, and at the same time inform them what will be the effect upon the verdict, which they will ultimately be asked to find, of the answers they give to the specific questions, leaving the jury both to answer the questions and then to find a verdict, after he has explained to them what result the answers to the questions will involve. That is the way in which Cave, J. really did try this case. There is a third way in which a judge may conduct the trial, by asking the jury specific questions, and not leaving it to them to find the verdict, but entering the: judgment upon their findings himself. That is a third way, and that was not adopted in form by the learned judge, although it will be observed it differs only slightly in form from the second mode of procedure, which he, in fact, did adopt. Now, if the judge adopts the second method of procedure, it is obvious that he is putting specific questions to the jury with the intention, as soon as they have answered the specific questions, to request them to go still further, and to find a general verdict one way or the other on such answers."

[Subsequently affirmed by the House of Lords in [1886] 11 App Cas 247.]

26. In contrast, adoption of the first of the two possible conclusions mooted above is indicated by the general rule, duly bolstered by considerations of fairness, logic and common sense, all long standing traits of the common law. This conclusion would require the Appellant to bear the burden of proving a reasonable excuse for the omission in question and to do so to the civil standard, viz on the balance of probabilities. We readily espouse this conclusion.

27. Furthermore, there is no principled reason favouring the third possible conclusion, namely that the Appellant had a (mere) evidential burden which, if discharged, subjected the Secretary of State to the legal burden of disproving the reasonable excuse canvassed. Given that the Appellant is the party in possession of the material information, belonging solely to his knowledge there is no basis in principle or otherwise for this third conclusion.

28. Accordingly, we conclude that the burden rested on the Appellant of proving that he had a reasonable excuse for non-disclosure of his criminal conviction in the completed application for variation of his leave to remain. This burden was to be discharged to the standard of the balance of probabilities. It follows that the approach espoused by the FtT to this issue was correct in law. Thus we dismiss the appeal and affirm the decision of the FtT.

29. Finally, we consider it appropriate to draw attention to the dichotomy of mandatory/discretionary refusal of applications made under the Appendix FM regime. In the abstract, it seems unsatisfactory that a case categorised as a "*failure to provide information*" should attract mandatory refusal, in circumstances where the closely comparable ground of "*failure to disclose material facts*", which entails discretionary refusal, may be apposite. While it may be that the former ground is

designed to operate in cases where there has been some procedural or mechanical failure, we received no argument on this issue. There appears to be scope for the contention that an inappropriate invocation of the former ground could, in certain contexts, constitute an error of law. In particular, it must not be capricious. Furthermore, if a Tribunal were to conclude that, in the real world of decision making, there is slavish adherence to the former ground, to the exclusion of the latter, this would be unsustainable in law on the basis of a series of interlocking and overlapping legal errors: fetter of discretion, inflexible policy, improper motive, misconstruction of the applicable legal rules *et alia*. In the present case, while not germane to our decision, we consider that the more appropriate provision of the Rules to have been invoked by the Secretary of State was that of failing to disclose material facts. We apprehend that there will be scope for more definitive adjudication of this issue in some appropriate future case.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 07 November 2015