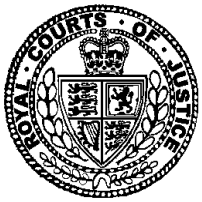

Neutral Citation Number: [2019] EWCA Civ 1324

Case No: C6/2018/0171

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL JUDGE PITT
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER
JR60192017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before:

LORD JUSTICE PATTEN
THE SENIOR PRESIDENT OF TRIBUNALS
and
LADY JUSTICE ASPLIN

- -

Between:

Saqib Hameed	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Ms. Amanda Jones (instructed by **Sky Solicitors**) for the **Appellant**
Mr. Colin Thomann (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 12 June 2019

- -

Approved Judgment

Sir Ernest Ryder, Senior President:

Introduction:

1. This is an appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber) [UT] which refused permission to apply for judicial review of the Secretary of State's decision made on 6 April 2017. That decision refused the appellant's application for leave to remain in the United Kingdom as a Tier 2 (General) Migrant. Permission to appeal to this court was granted by Newey LJ on 23 October 2018.

Background:

2. The appellant is a citizen of Pakistan. On 9 October 2010 he entered the United Kingdom on an Entry Clearance Tier 4 (General Student) Visa. Following two applications to have his student leave extended he was granted further leave to remain as a Tier 4 (General Student) Migrant valid until 31 May 2012 and then 30 April 2015.

3. On 28 April 2014 the appellant applied for leave to remain as a Tier 2 (General) Migrant. On 27 January 2015 he withdrew his Tier 2 application. On 29 March 2015 he submitted a new Tier 2 application. This application was refused by the Secretary of State on 6 April 2017 under paragraph 322(1A) of the Immigration Rules on the basis that the Certificate of Sponsorship [CoS] submitted with the application was a false document.

4. On 18 April 2017 the appellant asked for an administrative review of the Secretary of State's decision. The administrative review decision accepted that the appellant did not knowingly use deception in his application but maintained the original refusal decision.

5. On 14 July 2017 the appellant applied to the UT for permission to judicially review the Secretary of State's decision to refuse his application for leave to remain as a Tier 2 (General) Migrant. On 23 October 2017, Judge Macleman refused permission on the papers. On 18 January 2018, following an oral hearing, Judge Pitt refused

permission to apply for judicial review. It is this decision which is the subject of this appeal.

Immigration Rules:

6. Part 9 of the Immigration Rules sets out, among other things, general grounds for the refusal of leave to remain. The relevant parts of paragraph 322 read as follows:

> "322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave: Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused
> [. . .]
> (1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application."

7. At the end of the hearing before this court it became clear that there was in existence at the time of the decision made by the Secretary of State relevant guidance directed to those who wish to sponsor migrants (who I shall refer to as applicants): *Version 11/14 Tier 2 and 5 of the Points Based System Guidance for Sponsors*. We caused that to be disclosed and asked for additional submissions about its content. There are relevant parts of the guidance as follows:

> "23.1 A CoS is not a paper certificate or document, but a virtual document, like a database record. When you have followed all of the rules set out in this guidance and you are ready to sponsor a migrant under Tier 2 or Tier 5 you must assign a CoS to them using your SMS [sponsorship management system] account. This involves working through a short online form where you give us information about the migrant you want to sponsor and the work they will do […]"

"23.2 When you assign a CoS, a reference number is generated and you must give this number to the migrant you want to sponsor. They must then quote it in their application for entry clearance […]"

"23.3 The migrant may ask for other information that was part of the process of generating the reference number. You can give the migrant a copy of their CoS and there is a function within your SMS account to print any CoS you have assigned […]"

8. What is clear from the guidance is that there is an online form for sponsors which generates a CoS. That can be provided to the applicant by the sponsor as a printed document or in the form of a reference number that the applicant uses to put into their own application form. As appears from the argument raised before us in this case, the consequence is that the Secretary of State's decision about an applicant may have to contain different content dependent upon which method of presentation of the 'data' is used by a sponsor. Given the fact that an applicant's circumstances will be the same regardless of the manner in which a sponsor communicates a CoS reference number, that might be thought to be confusing.

9. It was initially unclear from the submissions made on behalf of the parties what had happened in this case. For example, did the sponsoring employer provide a CoS as a virtual or hard copy document and/or did the appellant complete an application form using the reference number provided by the sponsor? One matter was clear: although the parties agree that the reference number given to the appellant by the sponsor was not a genuine number, the appellant did not know that. He was as much a victim as the system from the actions of a third party.

10. After a number of unsatisfactory attempts to get the parties to be clear about the facts it finally transpired that the parties agree that the sponsoring employer had provided a hard copy CoS to the appellant which he submitted as a supporting document with his application form under cover of a letter from his solicitor dated 31 March 2015. He was also provided with the same reference number that appeared on the face of the CoS so that he then used the reference number in his own documentation.

Decision appealed:

11. The UT refused the appellant's application for permission to bring judicial review proceedings against the Secretary of State on the basis that the Secretary of State's decision was made in accordance with paragraph 322(1A) of the Immigration Rules i.e. the Secretary of State did not err in refusing the appellant's application for leave to remain. Judge Pitt noted that it was not disputed that the CoS submitted with the application was false within the meaning of paragraph 322(1A). She held that it was immaterial whether or not the appellant knew that the CoS was false because paragraph 322(1A) applied irrespective of the applicant's knowledge.

12. Judge Pitt rejected the appellant's submission that a CoS was not a document. She also held, however, that if it was not a document, the reference number was information with the consequence that paragraph 322(1A) still applied.

13. The appellant has one ground of appeal for which permission has been given. It should be noted that the ground is premised on a version of the facts which was led before us but which is not agreed to be determinative:

    i. It was wrong to find the appellant had made a false representation under paragraph 322(1A) of the Immigration Rules when he had not acted dishonestly.

14. In his skeleton argument the appellant put forward a second submission which for completeness I will deal with although no permission has been granted to consider it as a ground of appeal:

    ii. The Upper Tribunal erred in law in failing to appreciate the dilemma applicants face when a finding of dishonesty is made against them without a proper evidential basis, now that the statutory right of appeal to the First-tier Tribunal has been withdrawn.

15. The appellant's case during the hearing before us was not directed towards the circumstance that is now agreed to be the case, namely that he submitted a document with his application form. Rather, the case that the appellant sought to meet is that the reference number that he was given and which he used is not a document but either a representation or information.

16. He submits that he made a representation as it was he who filled in the application form and signed it. However, he was not acting falsely or dishonestly. The person who was acting falsely or dishonestly was the person who provided a reference number that was not genuine. It is submitted that in the absence of knowledge, the actions of two independent people cannot without more be elided so that the appellant becomes responsible for the actions of the sponsor and the making of a 'false representation'. It was submitted that the same argument would apply to the construction of the Rule relating to the provision of information.

17. The appellant further submitted to us that this is not a 'false document' case because the CoS is not a document. It is a number. Although the appellant has used the opportunity given by the court to clarify the facts and make further submissions about them, he maintains this submission, in effect contending that the print out of the CoS is an artefact of a virtual i.e. online system which creates nothing other than a reference number for an applicant to use.

18. It is finally submitted that the intention of the Immigration Rules is to prevent applicants benefiting from dishonesty, whether committed by the applicant himself or by another on his behalf. In this case, the appellant did not and never intended to benefit from the dishonesty about which he was unaware. He was the victim of a fraud. The mischief the Rules are aimed at does not exist in this case.

19. The Secretary of State submits that the refusal of the appellant's application was not premised upon a 'false representation' having been made. It was premised on a 'false document' having been submitted by the appellant. It is therefore not relevant whether the party making the representation was dishonest because a false document is itself dishonest.

20. Furthermore, a virtual or electronic deposit of information, such as the CoS is a 'document'. This would be consistent with dictionary and commonly understood definitions of the word document, the Civil Procedure Rules and the policy guidance.

21. In any event, the argument about the falsity of the document or representation is irrelevant to the outcome of the decision and academic in the sense that without a

genuine CoS an applicant cannot obtain the points needed to succeed in an application.

Discussion:

22. There was a false document in this case which was a CoS supplied in hard copy by the appellant's sponsor. The reference number on the certificate, when checked, was found not to be a genuine reference number. It was apparently accepted by both parties before the UT that the consequence was that the CoS submitted by the appellant was not genuine.

23. The appellant also made a representation as it was he who filled in the application form and signed it. He was not acting falsely or dishonestly. The person who supplied him with the CoS may have been acting dishonestly but was not making a representation. As I describe below, although the Secretary of State asserted in the original decision letter that the appellant had used deception in his application, that assertion was subsequently withdrawn with the consequence that there is no reasoning about any dishonesty or deceit relied upon.

24. The fundamental problem with the appellant's case is that the Secretary of State did not refuse his application under paragraph 322(1A) on the basis that the appellant had made a false representation. The Secretary of State refused the application under paragraph 322(1A) on the basis that he had submitted a false document.

25. The underlying question in the appeal, namely whether the appellant or another person was responsible for any dishonesty or deception which is implicit in the need for 'falsity', was considered in *Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773, [2011] 1 WLR 564. At [76] Rix LJ held that:

> "Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a "false representation" a ground for mandatory refusal."

26. That has the effect that where, as in this case, an applicant is not responsible for or aware of the falsity and hence the dishonesty or deception being perpetrated, it is

necessary for the Secretary of State to establish dishonesty or deception on the part of another as part of the reasoning for a refusal under paragraph 322(1A) (see, for example *Adedoyin* at [68]).

27. What *Adedoyin* also established, however, is that a false document is itself dishonest and that fact avoids the need to establish dishonesty or deception on the part of an applicant or another. That was made clear at [67]:

> "First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purposes of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of the document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge"

28. The appellant's alternative submission is that the CoS is not a document, it is a number. On the facts of this case that is wrong but, in any event, a document can be a virtual or online document as a matter of the natural and ordinary meaning of the words, and for the purposes of the Rules (see, for example: CPR 31.4 and PD 31B para 1) and in accordance with the Secretary of State's guidance on the materials in question (see paragraph 247 of version 11/14 of the Guidance for Sponsors, ante). A document provides information and acts as an official record. A CoS, even if it were to be only available online or in virtual form, provides information and acts as the official record. A sensible reading of 'document' in paragraph 322(1A) includes online documents like a CoS.

29. In my judgment that is a sufficient basis to conclude that a CoS is a document for the purpose of the Immigration Rules having regard to how those Rules are to be construed: see *Mahad (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16 per Lord Brown at [10]**:**

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

30. The Secretary of State was therefore entitled to refuse the appellant's application under paragraph 322(1A). Judge Pitt did not err in reaching this conclusion.

31. It is unnecessary to comment on the appellant's alternative version of the facts save to say that the Secretary of State's decision letter would no doubt be different if there is no document provided to the applicant by the sponsor but only a number. In that circumstance, the appellant would have been entitled to say that the Secretary of State's decision letter must deal with the falsity of the representation and if the falsity is not alleged to be that of the applicant, it must be that of someone else.

32. The appellant raised before this court a question of public law fairness. He submits that the Secretary of State cannot make unjustified accusations that he is dishonest, with no right of statutory appeal to the First-tier Tribunal on a question of fact, and then withdraw the allegation in the administrative review decision, leaving the substantive decision unchanged. In so far as he needs to, he relies upon *Balajigari v The Secretary of State for the Home Department* [2019] EWCA Civ 673.

33. The 6 April 2017 decision stated explicitly that the Secretary of State was "satisfied that you have used deception in this application". That conclusion was not withdrawn until the subsequent administrative review on 15 May 2017 when it was confirmed in clear terms that the decision maker was satisfied that the appellant did not knowingly use deception.

34. The appellant submits that a finding of dishonesty has been made against him and that there is no procedure available to challenge this finding. He submits he has been

denied his right to a remedy. The submission is hard to reconcile with what happened. The Secretary of State withdrew the allegation. The surviving reasons for refusal of the application relate to the submission of a false document and the failure to evidence matters that are necessary to obtain points. There is no longer a wrong to be remedied.

35. For the reasons I have given, I would dismiss the appeal.

Lady Justice Asplin:

36. I agree.

Lord Justice Patten:

37. I also agree.