



**Upper Tribunal
(Immigration and Asylum Chamber)**

Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope) [2020] UKUT 00376 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 20 June 2019 & 4 December 2019

On 7 October 2020

Before

UPPER TRIBUNAL JUDGE BLUM

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SULTAN MAHMOOD

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr M K Mustafa, Counsel, instructed by Kalam Solicitors

For the Respondent: Mr I Jarvis, Senior Presenting Officer

1. Paragraph S-LTR.1.6. of Appendix FM does not cover the use of false representations or a failure to disclose material facts in an application for leave to remain or in a previous application for immigration status.
2. Paragraph S-LTR.4.2. of Appendix FM is disjunctive with two independent clauses. The Home Office is consequently obliged to plead and reason her exercise of discretion to refuse an application for leave to remain based on one or both of those clauses.
3. The natural meaning of the first clause in paragraph S-LTR.4.2 requires that the false representation or the failure to disclose any material fact must have been made in support of a previous application and not be peripheral to that application.
4. The use of the words 'required to support' in the second clause in paragraph S-LTR.4.2 confirms a compulsory element to the use of the document(s) within the application or claim process, and the obtaining of the document(s) must be for the purposes of the immigration application or claim.

DECISION AND REASONS

A.

Introduction

1.

Both members of the panel have contributed to this decision.

2.

This is an appeal against a decision of Judge of the First-tier Tribunal Courtney ('the Judge') sent to the parties on 14 December 2018 by which the appellant's appeal against a decision of the respondent to refuse him leave to remain in this country on human rights (article 8) grounds was refused.

3.

Upper Tribunal Judge McWilliam granted the appellant permission to appeal by means of a decision dated 11 March 2019.

4.

The Judge did not issue an anonymity direction and the parties did not seek one before us.

B.

The appellant

5.

The appellant is a national of Bangladesh who was born in 1979 and is presently aged 41. He asserts that he arrived in this country as a visitor in 1994. He was encountered by immigration officers at his place of work in 1996 and subsequently claimed asylum. The respondent refused the application by way of a decision dated 11 June 1996. The appellant's appeal against the respondent's decision was dismissed and he became appeal rights exhausted in February 1997.

6.

Whilst in this country the appellant contends that he worked in various restaurants having falsely adopted the identity of a British citizen, 'Rezaul Karim', who was born in 1976. In securing employment, he used Mr. Karim's National Insurance number ('NI number').

7.

On 29 July 2009 the appellant applied for indefinite leave to remain ('ILR'). The respondent refused the application by a decision dated 4 February 2010 and the appellant enjoyed no attendant right of appeal.

8.

The appellant applied for leave to remain on human rights (article 8) grounds on 19 June 2014 and the respondent refused the application by means of a decision dated 26 June 2014, detailing the appellant's failure to meet the eligibility requirements of paragraph 276ADE (1) (iii)-(vi) of the Immigration Rules ('the Rules'). The respondent observed that previously submitted tax documents were not in the appellant's name and that the NI number relied upon belonged to another person but expressly accepted at para. 7 of the decision that the appellant met the relevant suitability requirements to be considered under Appendix FM.

9.

The appellant exercised his right of appeal to the First-tier Tribunal and his appeal was dismissed by Judge of the First-tier Tribunal Macdonald . By his decision of 14 January 2016, the Judge noted, at [52]:

‘ 52. It is accepted by the respondent that the requirements of S-LTR in Appendix FM are met ... ‘

10.

JFtT Macdonald found at [49] of his decision that the earliest date the appellant could establish his presence in the United Kingdom was 19 January 1996 and in the same paragraph accepted that it was unlikely that the appellant had left this country since his entry.

11.

By means of further submissions prepared by his current legal representatives , dated 8 September 2016, the appellant sought leave to remain on human rights (article 8) grounds, relying upon his having been present in this country for over 20 years. Under cover of a letter from his legal representatives dated 5 December 2017, the appellant confirmed that he had been residing with his uncle in Wales since 1995 and relied upon documentation in his false identity to establish that he had been employed since 1997 and thereafter secured access to the NHS.

12.

The respondent accepted that the further representations constituted a fresh human rights claim under paragraph 353 of the Rules but refused the application by a decision dated 14 December 2017 . She accepted that the appellant entered the United Kingdom on 18 December 1994 and that he remained in this country until 1997. However, she noted that no satisfactory evidence had been provided confirming that the appellant had resided in this country after the conclusion of his appeal in 1997 and his application for settlement in 2009. She decided that the appellant was unable to provide evidence of continuous residence between those years and concluded that he failed to meet the requirements of paragraph 276ADE(1)(iii) of the Rules.

13.

Further, the respondent observed as to suitability that when the appellant applied for ILR on 29 July 2009, he submitted documents which were verified as not being genuine , namely eleven P60 forms dated from 1998 to 2009. The respondent detailed HM Revenue & Customs ' confirmation that the documents submitted did not match their records and that the NI number used was not issued in the appellant's name. Consequently, the appellant was found to have failed to meet the suitability requirements for leave to remain under paragraphs S-LTR.1. 6 . and S-LTR. 4.2. of Appendix FM applied .

C.

Relevant legislative provisions

14.

The following paragraphs of the Rules are relevant to our consideration:

a.

Paragraph 276ADE

15.

Paragraph 276ADE was inserted into the Rules from 9 July 2014: Statement of Changes in Immigration Rules (HC 194). It incorporates protected article 8 private life rights considerations into

the Rules . Paragraph 276ADE(1) details requirements to be met by an applicant for leave to remain on the grounds of private life :

‘ (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK. ’

b.

Section S -LTR

16.

Section S-LTR of Appendix FM details the suitability requirements to be met in a leave to remain application made by those seeking to remain in the United Kingdom .

17.

Paragraph S-LTR.1.1. details:

‘ S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply . ’

18.

Paragraph S-LTR.1.6.:

‘S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.’

19.

Both provisions apply to applications made on or after 9 July 2012 (HC 194). Paragraph S-LTR.1.6. has not been amended since its introduction to the Rules, whilst paragraph S-LTR.1.1. has been amended to bring into its scope the insertion of paragraph S-LTR.1.8. into the Rules on 24 November 2016. Such amendment is not relevant to the Tribunal’s considerations in this matter.

20.

Paragraph S-LTR.2.1.:

‘S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2 . to 2.5. apply.’

21.

Paragraph S-LTR.2.2.:

‘S-LTR.2.2. Whether or not to the appellant’s knowledge -

a)

false information, representation or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

b)

there has been a failure to disclose material facts in relation to the application.’

22.

Paragraph S-LTR.4.1.:

‘ S-LTR.4.1. The applicant may be refused on grounds of suitability if any of paragraphs S-LTR.4.2 . to S-LTR.4.5 . apply . ’

23.

Paragraph S-LTR.4.2.:

‘ S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful). ’

24.

Paragraph S-LTR.4.2 . was inserted into Section S-LTR from 6 April 2016 (HC 877) and substituted in its present form from 24 November 2016 for applications decided on or after that date (HC 667).

c.

Paragraph S-EC

25.

Section S-EC of Appendix FM details the suitability requirements to be met for entry clearance.

26.

Paragraph S-EC.1.1. details:

‘S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply . ’

27.

Paragraph S-EC.1.5.:

‘S- EC .1.6. Th e exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant’s conduct (including convictions which do not fall within paragraph S-EC. 1.4 .), character, associations, or other reasons, make it undesirable to grant them entry clearance .’

28.

Paragraph S-EC.2.1.:

‘S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC. 2.2 . to 2.5. apply.’

29.

Paragraph S-EC.2.2.:

‘S-EC.2.2. Whether or not to the applicant’s knowledge -

a)

false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

b)

there has been a failure to disclose material facts in relation to the application.’

d.

Paragraph S- ILR

30.

Section S-ILR of Appendix FM details the suitability requirements for indefinite leave to remain.

31.

Paragraph S-ILR.1.1. details:

‘S-ILR.1.1. The applicant will be refused indefinite leave to remain on grounds of suitability if any of paragraphs S-ILR.1.2 . to 1.10 . apply . ’

32.

Paragraph S- ILR .1. 8 .:

‘S- ILR .1. 8 . The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-ILR.1.3 . to 1.6.) character, associations, or other reasons, make it undesirable to allow them to remain in the UK . ’

33.

Paragraph S-ILR.2.1.:

‘S-ILR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-ILR . 2.2 . to 2.4. apply.’

34.

Paragraph S-ILR.2.2.:

‘S-ILR.2.2. Whether or not to the applicant’s knowledge -

c)

false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

d)

there has been a failure to disclose material facts in relation to the application.'

e.

Paragraph A320

35.

Paragraph A320 was inserted into the Rules from 9 July 2012 (HC 194) and amended from 6 September 2012 (HC 565). It includes, inter alia , a specific restriction upon the application of paragraph 322 to private life claims:

'A320 Paragraphs 320 (except subparagraphs (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM, and Part 9 (except for paragraph 322(1)) does not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE-276DH.'

f.

Paragraph 320(7B)

36.

Paragraph 320 (7B) of the Rules:

'Grounds on which entry clearance or leave to enter the United Kingdom is to be refused.

320(7B) where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach) by:

(d) using deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not)

g.

Paragraph 322(1), (1A)

37.

Paragraph 322(1) of the Rules:

'Grounds on which leave to remain and variations of leave to enter or remain in the United Kingdom are to be refused.

322(1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.'

38.

Paragraph 322(1A) was inserted into the Rules from 27 November 2008 (HC 1113), with amendment from 6 April 2012 (HC 1888) :

322(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.'

h.

Paragraph 322 (2) and (5)

39.

Paragraph 322 of the Rules:

‘Grounds on which leave to remain and variations of leave to enter or remain in the United Kingdom should normally be refused.

(2) the making of false representations or the failure to disclose any material facts for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave.

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security.’

D.

The decision of the First-tier Tribunal

40.

The appellant’s appeal was heard by the Judge sitting at Hatton Cross on 26 November 2018. The appellant attended and gave oral evidence. By her decision dated 14 December 2018 the Judge noted, at [14] of her decision, the appellant’s acknowledgment that he had used Mr. Karim’s identity in order to obtain employment and medical services and that during the course of an earlier application for settlement he had produced P60s in Mr. Karim’s name.

41.

As to the deception, the Judge found that the respondent had discharged the evidential burden of proving that the appellant practised dishonesty or deception in his application for ILR in July 2009 and so the burden shifted to the appellant to provide a plausible innocent explanation. The Judge proceeded to conclude, at [16], that the use of Mr. Karim’s NI number, said by the appellant to be solely to secure ‘work to survive, pay the tax and insurance only’ did not constitute an innocent explanation and so, on balance, the appellant had not dispelled the prima facie case of deception established against him.

42.

Upon considering the appellant’s explanation that the appellant had not attempted to deceive the respondent in his settlement application, having openly declared that he had been using Mr. Karim’s name and NI number in order to work, the Judge found, at [17]

17. ... The fact that the appellant made his 2009 application in the name of Sultan Mahmood and openly admitted that the P60s were in a false identity, relying upon them not as evidence of identity but as proof of residence, does not in my judgment deprive them of their innate character as documents containing false representations (even assuming that they are genuine P60s, which is unclear). Falsity carries the meaning of deliberately dishonest: see A v SSHD [2010] EWCA Civ 773. The P60s contain a statement made to HMRC which Mr. Mahmood knew to be untrue, namely that he was a man named Rezaul Karim who was entitled to work in the UK.’

43.

The Judge 's reasoning as to the application of the suitability requirements is addressed at [20]-[22] of her decision. She concluded that the appellant had not simply used the alias of Rezaul Karim in order to obtain work but also to access NHS services , visiting his GP on a regular basis since 2001 and having been referred on several occasions for hospital investigations. She therefore found that the appellant had engaged in sustained deceit over the course of more than a decade. The Judge concluded that the documents relied upon arising from employment, such as the P60s, possessed an innate character as documents containing false representations. She determined that the appellant's personal history including character, conduct and employment history made it undesirable to allow him to remain in this country and so his application fell for refusal under both the mandatory suitability ground established paragraph S-LTR.1.6 . and the discretionary ground of paragraph S-LTR.4.2.

44.

Consequently, the Judge found that the appellant did not meet the suitability requirements of the Rules and so could not meet the requirements for leave to remain on the grounds of private life in the UK set out in paragraph 276ADE .

E.

Grounds of appeal

45.

The appellant raised six grounds of complaint by way of his grounds of appeal to this Tribunal. The grounds were drafted by counsel, but the Tribunal acknowledges that they were not drafted by Mr. Mustafa nor by the appellant's representative at the hearing before the Judge , Mr. Hasan . In granting permission to appeal, the focus of UTJ McWilliam's reasoning was directed at grounds 1 and 3.

46.

At the hearing before us on 20 June 2019 Mr. Mustafa accepted that ground 2 was not arguable and, on instruction, he withdrew grounds 4 to 6 . The Tribunal is therefore only required to consider grounds 1 and 3.

47.

Ground 1 is rooted in the principle that when approaching the findings of fact made by a Tribunal in earlier proceedings, the earlier determination stands as an assessment of the claim the appellant made at the time of the first decision and so is a 'starting point' for the purposes of the later fact-finding exercise : Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 ; [2003] Imm AR 1 . The appellant relies upon the respondent having accepted that he met the relevant suitability requirements in 2014, and before JFT Macdonald in 2016, submitting ' [t]hat previous stance and concession/acceptance ... should have been a strong factor in the instant appeal.'

48.

Ground 3 contains two separate challenges. The first contends that both paragraph S-LTR.1.6 . and paragraph S-LTR. 4.2 . are discretionary in nature and so require a balancing assessment, which was not undertaken by the Judge. The second contention is the Judge failed to lawfully engage with there being no deception in respect of the present application. Paragraph 6 of the grounds of appeal details:

6. The FTJ does not engage with what the apparent false representation is made [sic] in the previous application (i.e. the present or previous application) . Indeed, reliance on documents in someone else's name to obtain employment is not a false representation made to the respondent in an application, especially given that the appellant accepted he had done this (see [32] of Judge Macdonald's determination) and had been forthcoming about it. The FTJ has not assessed whether the representations were false within the meaning of AA (Nigeria) v. Secretary of State for the Home Department [2010] EWCA Civ 773.

49.

At the conclusion of the hearing on 20 June 2019 , following a request by the parties, the Tribunal permitted the filing of further written submissions, which were subsequently received from Mr. Jarvis, dated 25 June 2019, and from Mr. Mustafa, dated 26 June 2019. Upon considering the written submissions, the Tribunal concluded that it would be aided by further oral argument and a further hearing took place on 4 December 2019. At the conclusion of the hearing the parties were directed to file and serve further written submissions and we received them from Mr. Jarvis, dated 17 January 2020, and Mr. Mustafa, dated 5 February 2020.

F.

Decision

a.

Paragraph S-LTR.1.6

i. Mandatory requirement

50.

At the outset and observing that it was not pursued by Mr. Mustafa with vigour before us , the Tribunal rejects the contention advanced by the grounds of appeal that paragraph S-LTR.1.6. is discretionary in nature . The appellant's submission places misconceived reliance upon the requirement as to the establishment of conduct making presence in this country 'undesirable' as being capable, by itself, of introducing a balancing exercise into the assessment . However, we are satisfied that this submission fails to engage with the clear stricture of paragraph S-LTR.1.1. that a mandatory refusal will result if one or more of seven discrete factual circumstances are established and paragraph S-LTR.1.6. identifies one such circumstance.

ii. Scope

51.

The wording of the provision is general in its terms, confirming that an applicant's presence in this country is 'not conducive to the public good' because their 'conduct', 'character', 'associations' or 'other reasons' make it 'undesirable' to allow them to remain in this country.

52.

We have reminded ourselves that the Rules should be read sensibly and are mindful of the function which they serve in the administration of immigration policy. We observe Lord Brown's confirmation in Mahad v. Entry Clearance Officer [2009] UKSC 16, [2010] 1 W.L.R. 48, at [10], in a judgment approved by the other members of the Court, that '[t]he 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.'

53.

It is appropriate at this juncture to identify the approach adopted by the respondent over time as to the employment and tax documents secured through the appellant's adoption of Mr. Karim's identity . By means of the decision of 4 February 2010 the respondent detailed, inter alia :

'HM Revenue & Customs have confirmed that the eleven P60 forms dated 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2008 and 2009 submitted with your application do not match their records and that the National Insurance number used was not issued to anyone by your name, the Secretary of State is satisfied that 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.'

54.

We note that the decision of February 2010 was a consideration of the requirements under paragraph 276B(i)(b) of the Rules as they then stood , to which the mandatory ground of refusal under paragraph 322 (1A) was applicable where false representations have been made or false documents have been submitted, whether or not material to the application, and whether or not to the applicant's knowledge , in relation to the application.

55.

In respect of the appellant's employment and tax documents the respondent's decision of 26 June 2014 details :

'14. ... The earliest record of your client in the United Kingdom is when he was encountered working without authority and claimed asylum on 19 January 1996, however, satisfactory evidence has not yet been provided to show that he has lived continuously in the United Kingdom since that date. Tax documents have previously been provided, however, as stated in previous refusal letters, the P60s are not in your client's name and HMRC confirmed that the National Insurance number is that of a British citizen born in 1976.'

56.

By her decision of 14 December 2017, the respondent considered suitability under Appendix FM and as to paragraph S-LTR.1.6. reasoned:

'For the reasons given below, your application falls for refusal on the grounds of suitability in Section S-LTR under paragraphs 276ADE(1)(I) of the Immigration Rules because:

When you applied for indefinite leave to remain on 29 July 2009 you submitted a number of documents which were verified as not being genuine. HM Revenue & Customs confirmed that the eleven P60 forms dated 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2008 and 2009 submitted with that application did not match their records and that the National Insurance number used was not issued to anyone by your name.

Given the above your presence in the UK is not conducive to the public good as your conduct and character make it undesirable to grant leave to remain. You therefore fail to meet the requirements for leave to remain because paragraph S-LTR.1.6 . of Appendix FM of the Immigration Rules applies.'

57.

Initially before us the respondent's position was that she was permitted to rely upon paragraph S-LTR. 1.6. and the hearing in June 2019 therefore focused, in part, upon whether the respondent had made a concession as to suitability by her June 2014 decision. The respondent contended that as the decision

in 2014 did not expressly establish that there had been a material investigation as to the use of the P60 documents in a different name it was not possible to justify a conclusion that she had, in substance, conceded her position as to deception.

58.

At the resumed hearing in December 2019 the focus of discussion before the Tribunal concerned paragraph S-LTR.4.2. We observe that as this matter progressed over the two hearings Mr. Jarvis placed greater reliance upon paragraph S-LTR.4.2. and after the second hearing he very helpfully clarified by means of his further written submissions the respondent's position as being that it was not open to her to rely upon paragraph S-LTR.1.6 either when making her decision in 2014 or in the present matter. This is so, according to the respondent, because the provision was not intended to cover the use of deception/dishonesty in a previous application for immigration status. He relied upon several strands in seeking to establish that such interpretation was consistent with the Rule.

59.

Firstly, he relied upon the respondent's guidance detailed in 'General grounds for refusal - section 1 of 5: about this guidance, general grounds for refusal and checks ' (version 16.0) 30 April 2014, and in particular drew our attention to the section entitled 'What the rules require'.

'The Immigration rules define fraud and forgery as a form of deception.

If a person submits a document or information with an application which is independently verified as being forged or not genuine, you may consider refusing entry or leave to remain. When you have evidence that a person has done this, either as part of their current or previous application, the Immigration Rules state that you should refuse the application unless the particular paragraph of the rules allows you to use discretion.

A false document includes:

- genuine document which has been altered or tampered with
- counterfeit document (one that is completely false)
- genuine document that is being used by an imposter
- genuine document which had been fraudulently obtained or issued, and/or
- genuine document which contains a falsified or counterfeit visa or endorsement.'

For entry clearance

- When you refuse because fraud and forgery has been used in a current application, paragraph 320(7A) of the rules apply. Where there is evidence they have contrived in a significant way to frustrate the intentions of the rules, paragraph 320(11) applies.

- When you refuse on fraud and forgery grounds in a previous application, paragraph 320(7B) applies.

-

When you refuse because forged counterfeit passport has been used, paragraphs 320(3) and 320(19) apply.

-

When you refuse for false employment documentation, paragraph 320(15) and 320(19) apply

-

When you refuse for other deceptive documents, paragraph 320(19) applies.

For leave to remain

-

When you refuse because of fraud and forgery in the current application, paragraph 322(1A) of the rules applies.

-

When you refuse because of fraud and forgery in a previous application, paragraph 322(2) of the rules applies.

-

If an applicant has used fraud and forgery in a current or previous application to get a document from the Secretary of State to show that they have a right to reside in the UK, you must refuse the application under paragraph 322(2A) of the Immigration Rules.'

60.

As to this document Mr. Jarvis relied upon there being no reference to false representations also being considered under paragraph S-LTR.1.6. We observe the Court of Appeal's confirmation in ZH (Bangladesh) v. Secretary of State for the Home Department [2009] EWCA Civ 8, [2009] Imm. A.R. 450, at [32], that the respondent's instructions, and by analogy her guidance, are not an aid to the construction of the Rules notwithstanding that their author is in law the author of the Rules. They do not have, and cannot be treated as if possessing, the force of law. This is consistent with Lord Brown's observation in Mahad, at [11], that instructions issued by the respondent have on occasion been issued inconsistently with the Rules as interpreted by the courts. Further, we agree that having considered the document we are not aided by it because it expressly confirms on page 2 that it 'explains each part of paragraph 322 and identifies which are mandatory refusals and which are discretionary'. Its limited scope precludes consideration of the suitability requirements under Appendix FM.

61.

Mr. Jarvis next submitted that paragraph A320, which was inserted into the Rules on 9 July 2012, was relevant as to the decision of June 2014 because it establishes that paragraph 322, save for paragraph 322(1), does not apply to applications for leave to remain under paragraph 276ADE and Appendix FM. Paragraph 322(1A), which is concerned with, inter alia, utilising false representations and false documents in an application and paragraph 322(2) which addresses their use in a previous application for leave to remain are thereby excluded from consideration and application.

62.

We are satisfied that whilst the introduction of paragraph A320 expressly precludes the respondent from utilising paragraphs 322(1A) and 322(2) in identified circumstances, it does not by itself aid us in establishing the scope of paragraph S-LTR.1.6. We note that the latter was introduced as part of

the structured approach to article 8 established by Appendix FM in July 2012, such approach setting out in detail the requirements to be met in securing leave to enter or remain on article 8 grounds under the Rules and the requirement to meet this suitability requirement was incorporated from the outset within paragraph 276ADE(1)(i).

63.

Mr. Jarvis further relied upon the Explanatory Memorandum to Statement of Changes to the Immigration Rules (HC 877) which introduced paragraph S-LTR.4.2. into the Rules from 6 April 2016. He submitted before us that such introduction was predicated upon an express policy decision to allow for the previous use of false representation grounds to be deployed in decision-making on Appendix FM and paragraph 276ADE applications or claims where previously there had been no available ground of refusal. He drew our attention to paragraph 7.41 of the Explanatory Memorandum:

‘7.41. The following changes and clarifications are being made to the Immigration Rules relating to family and private life:

- To enable an application to be refused on grounds of suitability if false representations have been submitted, or there has been a failure to disclose material facts, in a previous immigration application; or where the applicant has failed to pay litigation costs awarded to the Home Office ...’

64.

From June 2004 onwards explanatory memoranda must be provided by the relevant government department with all instruments subject to Parliamentary procedure. Their purpose is to provide the public with an easy-to-understand explanation of the delegated, or secondary, legislation’s intent and purpose in a manner akin to explanatory notes which are documents which explain the purpose of all Government Bills and some Private Members’ Bills. They provide a clear explanation of what part of the law the delegated legislation is changing and why. However, they do not form part of the delegated legislation, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone and their aim is to explain the effect of the text, not to justify it. We observe that the Explanatory Memorandum was presented to Parliament with Statement of Changes (HC 877) on 11 March 2016.

65.

Lord Steyn confirmed in R (Westminster City Council) v. National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, at [5], that explanatory notes may be a useful aid to construction in so far as they ‘cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are therefore always admissible aids to construction.’

66.

Brook LJ held in Flora v. Wakom (Heathrow) Ltd [2006] EWCA Civ 1103; [2007] 1 WLR 482, at [16], that ‘the text of an Act does not have to be ambiguous before a court may be permitted to take into account an explanatory note in order to understand the contextual scene in which the Act is set.’ This is subject to the caveat that if the statutory language is unambiguous a court or tribunal is not free to rewrite it by reference to the explanatory notes: R (R D) v. Secretary of State for Justice [2010] EWCA Civ 18, [2010] 1 WLR 1782, per Carnwath LJ, at [45].

67.

We observe Brook LJ’s confirmation in Flora, at [16], that ‘the value of ... explanatory notes as an aid to construction ... is that [they identify] the contextual scene ... That is all.’ A court or tribunal

must therefore resist attempts to elevate explanatory notes to a status where they supplant the language of the legislation itself: *A spinalls Club Ltd v. Revenue and Customs* [2013] EWCA Civ 1464 , [2015] Ch. 79, per Moses LJ, at [22].

68.

We agree that the strong similarity between explanatory notes and explanatory memoranda as to their provenance and their purpose is such that the same interpretative principles apply to explanatory memoranda .

69.

In this matter, we are satisfied that the use of the word ‘enable’ at paragraph 7.41 of the explanatory memorandum identifies the mischief that paragraph S-LTR .4.2 . was intended to address. Giving the word its usual and ordinary meaning, to give the authority or means to do something, we are satisfied that the context of the introduction of paragraph S-LTR.4.2 . was to give authority to the respondent to refuse an application on grounds of suitability if false representations have been submitted, or there has been a failure to disclose material facts, in a previous immigration application. We are satisfied that this authority was given because such power did not previously exist within the suitability requirements established by Section S-LTR , including paragraph S-LTR.1.6. , in respect of an application for leave to remain.

70.

Our decision is reinforced upon considering the Rules, and in particular Appendix FM, in the round. Under Part 9 of the Rules there is a mandatory requirement under paragraph 322(1A) to refuse where false representations or false documents or information have been submitted in relation to the application. The respondent enjoys a discretionary power under paragraph 322(2) to refuse leave to remain consequent to the making of false representations , or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave. From 6 April 2012 the power to refuse was extended to the making of false representations in order to obtain documents from the respondent or a third party required in support of the application for leave to enter or a previous variation of leave: (HC 1888). Thus, by means of paragraph 322(2) the respondent enjoys power to refuse an application where there has been fraud or forgery in a previous application.

71.

We note that in entry clearance and leave to enter matters refusal is mandatory , not discretionary, where an applicant has previously breached the United Kingdom’s immigration laws, when aged 18 or over at the time of their most recent breach , by using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the respondent or a third party required in support of the application, whether successful or not , unless they meet an identified exception : paragraph 320(7B) (d) .

72.

As observed above, paragraph A320 of the Rules was inserted into the Rules on 9 July 2012 and prohibits the application of both paragraphs 322(1A) and 322 (2) to considerations of applications for leave to remain made under Appendix FM. The suitability requirements in Appendix FM mirror, to a certain extent, the general grounds for refusal which are set out in the Rules. However, it was Parliament’s intention that the suitability requirements in Appendix FM did not adopt all of the requirements established by Part 9 of the Rules .

73.

Instead, paragraphs S-EC.1.5, S-LTR.1.6 and S-ILR.1.8. adopt a similar approach in entry clearance, leave to remain and indefinite leave to remain applications as to conduct, character and association. Separate discretionary power to refuse applications where false information, representations or documents have been submitted in relation to the present application, whether or not the applicant had knowledge of their submission is established by paragraphs S-EC.2.2, S-LTR.2.2. and S-ILR.2.2.

74.

We agree that the absence of a suitability requirement addressing the previous use of false representations or a failure to disclose any material fact, as provided for by paragraph 322(2) of the Rules, when Appendix FM was inserted into the Rules was consistent with Parliament's then intention. We therefore agree that the insertion of paragraph S-LTR.4.2. which mirrors, in part, paragraph 322(2) was to address a failure of the suitability requirements previously established under Section S-LTR in not permitting the respondent to adversely rely upon the previous use of false representations and related concerns. In such circumstances, we are satisfied that the scope of paragraph S-LTR.1.6. is not sufficiently wide to capture the use of false representations in an application for leave to remain before the respondent or in a previous application for leave to enter or remain.

75.

We conclude the paragraph S-LTR.1.6., a mandatory ground of refusal, does not cover the use of false representations or a failure to disclose material facts in an application for leave to remain or in a previous application for immigration status.

76.

Consequently, the Judge materially erred in law in finding that the respondent could refuse the appellant's application on suitability grounds under paragraph S-LTR.1.6. of Appendix FM.

b.

Paragraph S-LTR.4.2

i) Disjunctive nature

77.

The exercise of refusal on suitability grounds under this paragraph is discretionary in nature by application of paragraph S-LTR.4.1.

78.

Paragraph S-LTR.4.2. is specific as to its scope of application and the combination of a semicolon with 'or' establishes an exclusive sense to the rule by which two independent clauses are joined, so establishing the paragraph's disjunctive nature. Mr. Jarvis accepted on behalf of the respondent that consequent to such disjunctive nature, the respondent is obliged to explain why the applicable discretion has or has not been exercised in respect to this Rule.

79.

The two separate basis upon which the respondent may exercise discretion to refuse an application for leave to remain can be summarised as i) the use of false representations or a failure to disclose any material fact in a previous application and ii) the use of false representations in order to obtain a document required to support such an application. Consequent to their independent nature, the Tribunal is satisfied that reliance upon one or both of the elements must be specifically pleaded and reasoned by the respondent in her decision letter, or if upon becoming aware of further information

the respondent seeks to exercise her discretion during the course of the subsequent appeal process it should be by means of an addendum decision providing reasons with an appellant being given sufficient time to counter the serious nature of the underlying allegation as to conduct.

i i) 'The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim'

80.

By her decision of 14 December 2017, the respondent relied upon the first independent clause of paragraph S-LTR.4.2. concerned with the applicant having made false representations in a previous application for leave to remain or a variation of leave, or in a previous human rights claim.

81.

Mr. Jarvis did not seek to persuade us that a broad reading should properly be applied to this clause so as to permit any false representation arising in an earlier application, regardless of whether it was made in support of the application and regardless of whether the falsity was drawn to the respondent's attention, as being sufficient to enable the refusal of an application. We agree that Mr. Jarvis was correct not to because such approach would clearly go beyond the natural meaning of the words used in this clause of the paragraph. The use of the first 'or' in the sentence is inclusive, bringing together two separate elements namely the making of false representations and the failure to disclose any material fact, which relate to a 'previous application'. If the intention had been to adopt the broader approach, the word 'any' would have been used in the first element, concerned with false representations, as well as in the second, concerned with failure to disclose material. Further, the plain meaning of 'has made false representations ... in a previous application ...' is that the false representation is made in relation to a previous application. There is no counter-indication that any false representation not made in support of the application, should be read into this clause.

82.

In this matter the appellant has consistently informed the respondent that whilst he dishonestly assumed an identity and a NI number to secure employment, and used the identity as a British citizen to secure access to the NHS, he was open and honest to the respondent as to the employment and tax documents accompanying the application having been secured through the use of the false identity. We consider it important that the P60 forms, genuinely issued but the product of dishonesty as to identity, were peripheral to the application for leave to remain on long residence grounds. Their purpose was to demonstrate long residence, but it was not a requirement of the relevant rule that the appellant provide P60s. They were relied upon by the appellant to establish his long residence, a task they were capable of satisfying, and not to establish that the appellant was the person named upon them. Nor did the documents establish that the appellant enjoyed a right to work lawfully in this country or to meet any financial requirement established by any relevant paragraph of the Rules. The false representation in this matter was in providing various employers with a dishonesty assumed identity and NI number to secure employment. The employment and tax documents were produced consequent to the appellant having secured employment in his false identity. Having openly informed the respondent from the outset as to his actions, there were no false representations made on the appellant's behalf in his application that he was a British citizen called Rezaul Karim who was born in 1976, possessed a particular NI number, was lawfully entitled to work and through the course of lawful employment had earned the sums detailed by the eleven P60 forms.

83.

Upon considering [17] of the decision we are satisfied that the Judge materially erred in adopting the broader interpretation of the first independent clause of paragraph S-LTR.4.2. Whilst observing that the appellant had openly declared that he assumed the identity of Mr. Karim to secure employment, the Judge considered the innate characteristic of the documents are containing 'false representations' through the deliberate dishonesty employed to secure them. Such an approach uncoupled the requirement that the false representation be made 'in a previous application' and instead broadened the use of a false representation to the securing of any document used in the previous application, even if there were clear and adequate admissions to the respondent from the outset as to the circumstances in which the documents were obtained.

84.

We conclude that paragraph S-LTR.4.2. is disjunctive with two independent clauses. The respondent is consequently obliged to plead and reason her exercise of discretion to refuse an application for leave to remain based on one or both of those clauses. By her decision of 14 December 2017, the respondent only relied upon the first clause. The natural meaning of the first clause requires that the false representation or the failure to disclose any material fact must have been made in support of a previous application and not be peripheral to that application. The reliance upon employment and tax documents, openly confirmed to have been secured through the long-time use of a false identity, was peripheral to the previous application for leave to remain on private life grounds under paragraph 276ADE(1)(iii) and also peripheral to the earlier application for ILR on long residence grounds. The Judge therefore materially erred in finding that the suitability requirement established by the first clause of paragraph S-LTR.4.2. was applicable to the appellant.

G.

Remaking the decision

85.

Mr. Jarvis informed us at the hearing that though the respondent did not rely upon the second clause of paragraph S-LTR.4.2., namely the use of false representations in order to obtain a document required to support such an application, either in her 2017 decision or before the Judge in 2018, and so it could not be considered at the error of law hearing, she would now wish to rely upon it at the remaking stage. He accepted that the reasons for the exercise of discretion would have to be conveyed to the appellant in writing.

86.

When considering whether to permit the respondent time to issue an addendum decision we have considered her case under the second clause of paragraph S-LTR.4.2 at its highest and we conclude that she could not, on any view, meet the requirements of the second clause on the facts of this case.

87.

The use of false representations is clearly linked to the obtaining 'from the Secretary of State or a third party a document required to support such an application or claim'. Mr. Jarvis accepted before us that, in principle, the deception should relate to the act of obtaining the document for the purposes of supporting an application or claim to remain in the United Kingdom. This is consistent with the use of the words 'required to support' which confirms a compulsory element to the use of the document(s) within the application or claim process. Such compulsion is identified by the relevant Rules or guidance.

88.

We therefore conclude that the use of the words 'required to support' in the second clause of paragraph S-LTR.4.2. confirms a compulsory element to the use of document(s) within the application or claim process, and the obtaining of the document(s) must be for the purposes of the immigration application or claim.

89.

We observe that the appellant has relied upon documents arising from his employment, such as the P60 s, in long residence and article 8 (private life) applications alone and not, for example, in an application where he was required to establish his earnings. He always confirmed by means of his applications that the documents were secured with the adoption of an other person's identity . The false representation was to his employer(s), namely that he was a British citizen called Rezaul Karim who was born in 1976, possessed a certain N I n umber and was lawfully permitted to work . Such false representations were not made to obtain a document for the purpose of supporting an application for leave to remain in the United Kingdom. The documents were solely generated consequent to the app ellant having secured employment . We are satisfied that upon a natural reading of the second clause the securing of the employment documents relied upon by the appellant in this matter were not secured through false representations to support an application for leave to remain . In any event we observe that suc h employ ment and tax documents are not required for an application for leave to remain under paragraph 276ADE(1)(iii). Consequently, even taking the responden t's case at her highest under the second clause of paragraph S-LTR.4.2. she could not succeed.

90.

W e find that the appellant does not f all to be refused under the suitability requirements detailed at paragraph 276ADE(1)(i) . Noting the unchallenged finding of JFtT Macdonald that the appellant has been present in this country since 19 January 1996 and upon considering the evidence before us we are satisfied that the appellant has been continuously present in this country since that date, a period of over 20 years. We therefore find that the appellant meets the requirements of paragraph 276ADE(1)(iii) and allow his appeal on article 8 private life grounds .

H.

Notice of decision

91.

The decision of the First-tier Tribunal involved the making of an error on a point of law and we set aside the Judge's decision promulgated on 14 December 2018 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

92.

Upon remaking the decision, the appeal is allowed on human rights (article 8) grounds .

Signed : D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 7 October 2020

TO THE RESPONDENT

FEE AWARD

93. The respondent accepts that her reliance upon paragraph S-LTR.1.4. and the first clause of paragraph S-LTR.4.2. in her decision of 14 December 2017 was erroneous. No other ground was identified for refusing the appellant's application under paragraph 276ADE of the Rules.

94. We make a fee award in favour of the appellant in the sum of £140.



Signed : D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 7 October 2020