Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/38690/2014**

THE IMMIGRATION ACTS

Heard at Birmingham **Decision & Reasons Promulgated**
On 23 August 2017 **On 1 September 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHAHBAZ IMAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

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

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, from a decision of the First-tier Tribunal (Judge Pooler hereinafter "the Judge") whereupon he allowed the claimant's appeal against a decision of the Secretary of State which had been made as long ago as 23 September 2014, to remove him from the United Kingdom.

2. By way of brief background the claimant, who is a national of Pakistan, had entered the United Kingdom on 10 January 2011 with leave to enter as a Tier 4 (Student) Migrant. On 17 October 2013 he sought further leave in the same capacity and such was granted until 30 August 2015. On 6 June 2014,

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though, he married and on 14 July 2014 he applied for leave to remain as a spouse under appendix FM of the Immigration Rules.

3. The Secretary of State refused the application and decided that he was to be removed. Underpinning the decision was the Secretary of State's belief that, during the process of applying for his original grant of limited leave as a student, he had used a "proxy" to take an English language test for him and had gone on to submit what, in view of that dishonesty, was a false English language certificate. It is to be noted, though, a different English language certificate which he had submitted with respect to the spouse application was not a falsely obtained one. It is also important to note that in the detailed reasons for refusal letter which was issued on 23 September 2014 the Secretary of State had relied, as the basis of refusal upon what was said to be the claimant's failure to meet the Suitability Requirement under Appendix FM as set out under paragraph S-LTR.2.2 (a). The claimant appealed. There were some earlier hearings and earlier judicial decisions but, eventually, the matter came before Judge Pooler for a complete rehearing. At that hearing both parties were represented. Judge Pooler, as indicated, allowed the claimant's appeal. He did so in a decision which was promulgated on 24 November 2016.

4. Prior to coming to the Judge's reasoning, it is perhaps appropriate to set out some of the potentially relevant legal provisions. S – LTR.2.1 and 2.2 are as follows:

> "S – LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S – LTR.2.2 – 2.5 apply.
>
> S – LTR.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.

5. To complete the picture paragraph S – LTR.1.1 and S – LTR.1.6, when taken together make provision for a refusal to be based on an applicant's conduct, character or other reasons which make it undesirable to allow him/her to remain in the United Kingdom.

6. The Judge allowed the appeal without making a finding as to whether the claimant had ever used a proxy as alleged or not. He took the view that because of the use of the word "the" in S – LTR.2.2 (a), any false information, representations or documents had to have been submitted in relation to the current application for that provision to bite. As indicated, there has never been any suggestion that there has been such conduct in relation to the spouse application. He dealt with and rejected an argument

that S – LTR.2.2 (b) could be relied upon, on the basis that the Secretary of State's representative before him was unable to demonstrate the existence of any obligation in the context of the current application, to disclose matters relating to an earlier application. He also noted the Secretary of State's representative's acceptance that if he (the representative) was not able to successfully rely upon S – LTR.2.2 the appeal should succeed. The Judge explained his reasoning as to all of that in this way;

"9. The relevant chronology, agreed by the representatives is as follows. The ETS English language test, in respect of which the respondent submitted evidence that it was obtained by deception, was obtained by the appellant on 20 August 2013. On 17 October 2013 he applied for leave to remain as a student and submitted the ETS certificate with that application. On 14 July 2014 the appellant applied for leave to remain as a spouse, but did not rely in that application on the ETS certificate. He submitted instead a certificate issued by Trinity College London on 23 June 2014, a copy of which is found in the respondent's bundle.

10. Having taken instructions, Mr Evans [the Secretary of State's representative before the Judge] accepted that the Respondent was unable to prove that a false document was submitted in relation to the application for leave to remain as a spouse. On the basis of that concession I find that the respondent was unable to rely on sub-paragraph (a). Mr Evans, on instructions, wished to rely on sub-paragraph (b) and submitted that there had been a failure to disclose material facts. He was however unable to direct my attention to any obligation, whether arising under the Immigration Rules or otherwise, to disclose material facts in relation to an earlier application for leave to remain. He was also unable to direct my attention to any part of the application form which required similar disclosure. At section 8.4 the appellant was asked if he had passed an acceptable English language test; he answered in the affirmative and produced the certificate issued by Trinity College London in respect of which the Respondent takes no issue. The appellant signed a lengthy declaration at page 50 of the application but this included no declaration which might have founded an assertion that the appellant failed to disclose material facts.

11. Despite the reference in the refusal letter to other grounds of refusal, Mr Evans on behalf of the Respondent relied solely on the issue of deception which was raised under the Suitability requirement. In addition, having taken instructions, he conceded that if I was not satisfied that paragraph S – LTR.2.2 applied then it would be appropriate to allow the appeal on the ground that the decision was not in accordance with the Immigration Rules."

7. So the appeal was, indeed, allowed. However that was not the end of the matter because the Secretary of State applied for permission to appeal to the Upper Tribunal. In so doing he argued that the Judge had erred in failing to apply the principle of "ex turpi causa" and had wrongly permitted the claimant "to hide behind the literal wording of paragraph S – LTR.2.2 to defeat an

important public interest principle that he should not benefit from his own wrongdoing".

8. Permission to appeal was initially refused by a Judge of the First-tier Tribunal but was subsequently granted by a Judge of the Upper Tribunal who said this;

> "There is an arguable issue as to whether para. S – LTR.2.1 and 2.2 (a) applies <u>only</u> to "false information, representations or documents" submitted in relation to the application which is the subject of the decision appealed, as Judge of the First-tier Tribunal Pooler considered was the case in reaching his decision to allow the appeal.
>
> It is also arguable that the Judge ought to have considered the applicability of para. S – LTR.1.1 and S – LTR.1.6, pursuant to which a person does not satisfy the suitability requirement if his or her presence is not conducive to the public good "because their conduct ..., character..., or other reasons make it undesirable to allow them to remain in the UK". Arguably, the Respondent would have been entitled to conclude that, given the appellant had submitted a false TOPEIC certificate in a previous application, his presence in the UK was not conducive to the public good because his conduct or character made it undesirable to allow him to remain in the UK."

9. Pausing there, I would simply observe that no argument based on S – LTR.1.6 had been raised before the Judge (or indeed by the Secretary of State in the relevant reasons for refusal letter) and that it does not appear that there has ever been any finding to the effect that the claimant had or had not submitted a false certificate. As indicated, the Judge dealing with matters by way of a complete rehearing did not find it necessary to resolve that contested issue of fact.

10. Permission having been granted the matter was listed for an oral hearing before the Upper Tribunal (before me). Representation was as stated above and I am grateful to each representative. In the end it was not necessary for me to hear from Mr Coleman. Mrs Aboni, who I think had a difficult case to argue, quite appropriately in my view did not rely upon the doctrine of "ex turpi causa".

11. I have concluded, as I told the parties at the hearing, that the Judge did not err in law. I set out my reasons for reaching that conclusion below.

12. First of all, paragraph 2.2 does refer to "the" application as opposed to "an" or "any" application. On the face of it that would seem to suggest that the behaviour identified in the rule must have been detected in the context of the current application under consideration as opposed to a previous application. I appreciate it is not appropriate to interpret immigration rules in the way that one would interpret a statute but, nevertheless, the simple and straightforward wording does seem to afford significant support for the interpretation adopted by the Judge. Further, it would have been very easy to have used an alternative

word such as one of the two suggested above if there had been any different intention on the part of the Secretary of State when drafting these rules. Further still, the fact that there are other provisions as indeed identified in the grant of permission to appeal in this case, which might permit the sort of dishonesty said to have occurred here to be taken into account, supports the Judge's interpretation because that interpretation would not, in consequence, negate the possibility of misconduct or dishonesty being punished.

13. As to "ex turpi causa", I have never come across an attempt to use the doctrine in an immigration context before. As I understand it that doctrine, sometimes referred to as "the illegality defence" is a creature of private law and is capable of founding a defence to actions in contract, tort or trust law. It does not seem to me to have any application in a public law forum or in any "State v individual" type of case. In any event Mrs Aboni, as I say, chose not to argue it.

14. I have concluded then, on the basis of the material and arguments before me, that the Judge's interpretation was correct and that for the provision to bite the misconduct has to relate to the current application.

15. No challenge has been made with respect to the way in which the Judge dealt with the possible application of paragraph 2.2 (b) so I shall now turn to paragraph 1.6 which was only raised in the grant of permission to appeal.

16. It does seem to me that, in principle, paragraph 1.6 might have application to cases such as this if the misconduct alleged is proven to the necessary standard. However, paragraph 1.6 was not raised in the reasons for refusal letter and, much more importantly in my view, was not raised before the Judge. Indeed, as paragraph 11 demonstrates, the Secretary of State's representative not only did not rely on 1.6 but accepted that if he could not succeed under 2.2 the appeal should be allowed. So, quite simply, the matter was not before the Judge for him to decide. The fact that there was a possible argument which might have been pursued but wasn't does not establish error of law.

17. In the circumstances, therefore, the Judge did not make an error of law. His decision shall, therefore, stand.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision shall stand.

I make no anonymity direction since none was made by the First-tier Tribunal and none was sought before me.

Signed

M R Hemingway

Judge of the Upper Tribunal

Dated 31 August 2017

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated 31 August 2017