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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE UPPER TRIBUNAL, IMMIGRATION AND ASYLUM CHAMBER

_____

LLD, by her mother and next friend

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

_____

Before: Stephens LJ, Treacy LJ and McCloskey LJ

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McCLOSKEY LJ (delivering the judgment of the court)

Glossary

The Appellant:	LLD
SSHD:	Secretary of State for the Home Department (the Respondent)
FtT:	First-tier Tribunal, Immigration and Asylum Chamber
UT:	Upper Tribunal, Immigration and Asylum Chamber
The Rules:	The Immigration Rules
The 1971 Act:	Immigration Act 1971
The 2007 Act:	Tribunals, Courts and Enforcement Act 2007
The 2008 Rules:	The Tribunal Procedure (Upper Tribunal) Rules 2008

Introduction

[1] This is an application by LLD, whom we shall describe as "*the Appellant*", for leave to appeal to this court against the decision of the Upper Tribunal, Immigration

and Asylum Chamber (the "UT") dated 7 October 2019. The central issue of law raised is the meaning of the word "false" in paragraph 320(7A) of the Immigration Rules.

Relief Sought

[2] In the more detailed terms of the formal motion, the Appellant seeks –

> "*…. leave to appeal, pursuant to the provisions of section 13(4) of the Tribunals, Courts and Enforcement Act 2007, against the decision of the Upper Tribunal (Immigration and Asylum Chamber), Upper Tribunal Judge Dawson, promulgated on 07 October 2017 and which affirmed, in part, the decision of the First-tier Tribunal (Immigration and Asylum Chamber), First-tier Tribunal Judge Farrelly, promulgated on 13 March 2018, to the effect that the Appellant's application for entry clearance had breached paragraph 320(7A) of the Immigration Rules by the submission of a false document.*"

The effect of section 13 of the 2007 Act is that while the Appellant may appeal to this court against the decision of the UT such appeal lies only with the permission of the UT or the leave of this court. In this case the UT has been requested, and has refused, to grant permission to appeal, thus stimulating the present application.

Anonymity

[3] It is appropriate to dwell a little on the issue of anonymity given the *prima facie* incongruity arising out of the differing approaches by the two tribunals in the underlying proceedings. The Appellant, a Filipino national, is aged 16 years. The factual framework is rehearsed in greater detail *infra*. The impetus for every stage of this litigation was the decision of SSHD refusing the Appellant's application for entry clearance to enter and reside in the United Kingdom for family reunification purposes.

[4] In summary:

(a) The first judicial decision in the litigation history, that of the FtT, did not grant the Appellant anonymity and, indeed, specifically recorded "*NO ANONYMITY DIRECTION MADE*".

(b) There is no indication that the Appellant sought anonymity in her application for leave to appeal to the UT.

(c) The Appellant was not anonymised in the decision of the FtT refusing permission to appeal.

(d) *Ditto* in the decision of the UT granting leave to appeal.

(e) In the ensuing decision of the UT the Appellant was anonymised via the acronym of "DL".

(f) The Appellant is not anonymised in the formal documents constituting the application to this court or in subsequently generated documents such as skeleton arguments. Nor was any application for anonymity made initially.

[5] This court drew to the attention of the parties the apparent incongruity between the substantive decision and order of the UT and everything preceding and following same. In response the parties were unable to provide any enlightenment. In addition the Appellant's representatives initially indicated that they had no specific instructions to apply to this court for the grant of anonymity, adding that nonetheless this protection may be appropriate as the Appellant "*… is a minor and the case concerns some sensitive details about her private and family life …* [and anonymity] *… would effectively limit the Appellant's public exposure by these proceedings*". The representatives of SSHD adopted a neutral stance. In response to further specific direction of the court a belated application for anonymity, with accompanying further submissions, materialised.

[6] In summary, the principle of open justice, vouchsafed by both the common law and Art 6(1) ECHR, falls to be applied in conjunction with the Art 8 ECHR private life rights of the Appellant and other family members in the context of the duty owed by the court *qua* public authority under s 6 of the Human rights Act 1998. In Article 8 cases, it is incumbent on the court to conduct a balancing exercise, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases of the present type, the public interest in play is the imperative for justice to be transacted in public in all respects. Every case in which some degree of anonymity is permitted by the court involves an adjustment of this public interest, with the individual's right prevailing.

[7] The issue of anonymity is the subject of Guidance Notes in both the FtT and the UT. The court invited the parties to address, inter alia, these instruments and received further submissions in response. The first of the two relevant instruments is the FtT Presidential Guidance Note No 2 of 2011. This, among other things, provides that where anonymity is granted "*brief reasons*" for this course should be furnished by the judge.

[8] In the UT the equivalent instrument is Guidance Note No 1 of 2013, made by the Chamber President. The context and rationale of this measure are understood by noting firstly rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "*2008 Rules*") which empowers the UT to make an order prohibiting the disclosure or publication of either "*specified documents or information relating to the proceedings*" or "*any matter likely to lead members of the public to identify any person whom the Upper*

Tribunal considers should not be identified". Rule 14(2) elaborates on this. Rule 14 of the 2008 Rules features prominently in the aforementioned UT Guidance Note, which contains a section entitled "*Principles To Be Applied*". In common with its FtT counterpart, the UT Guidance Note also provides (at paragraph 21) that the decision of the tribunal should "*explain the reasons for the order and its scope*".

[9] The direction to the parties noted in [5] above elicited from the Appellant's legal representatives a formal application for anonymity or, alternatively, a "*suitable reporting restriction*". This was founded firstly on Article 170(7) of the Children (NI) Order 1995 (the "*1995 Order*"). It is necessary to consider Article 170(6) and (7) in tandem:

> "*(6) This paragraph applies to any proceedings other than criminal proceedings or proceedings to which paragraph (2) applies.*
>
> *(7) In relation to any proceedings to which paragraph (6) applies, the court may direct that no person shall publish any material which is intended, or likely, to identify –*
>
> *(a) any child as being involved in those proceedings; or*
>
> *(b) an address or school as being that of a child involved in any such proceedings,*
>
> *except insofar (if at all) as may be permitted by the direction of the court.*"

Any contravention of Article 170 is, per paragraph (9), a summary offence. It is clear from the overall architecture of Article 170 that paragraph (7) is of broad scope. In particular, it is <u>not</u> confined to proceedings under the 1995 Order. The scheme of Article 170 is that rules of court are designed to cater for issues of private hearings and the anonymity of children in proceedings under the 1995 Order. But this does not apply to Art 170(7). We consider that this provision does not modify the common law principles or Art 6 or Art 8 ECHR which, in unison, must guide our determination of the anonymity issue.

[10] The Appellant's legal representatives in their further submissions, supported by an affidavit, have highlighted a series of factual matters which they characterised "*highly sensitive in nature*". We shall refrain from detailing these. It suffices to state that they bear upon the Appellant's true identity, the conduct of and fears relating to her biological father and intimate details of her upbringing and family arrangements.

[11] It was submitted that the protection of anonymity is required in order to avoid an infringement of the Appellant's right to respect for private and family life protected by Article 8 ECHR and section 6 of the Human Rights Act 1998. The

application for anonymity also prayed in aid the tribunal instruments and procedural rule noted above. Furthermore, this court was invited to infer that the UT Judge, one of the most experienced members of that chamber (we observe), was clearly satisfied that anonymity was necessary to protect the Article 8 rights of the Appellant and other family members concerned and/or to protect the welfare of the Appellant. It was further contended that this approach is reflected in the content and structure of the UT decision. The court permitted the filing of a belated affidavit sworn by the Appellant's mother provided to establish an evidential foundation for the anonymity application. There was, appropriately, no objection on behalf of SSHD. We admit this further evidence.

[12] There is a further consideration to be reckoned. The UT, acting on its own initiative, specifically made an order under rule 14 of the 2008 Rules –

> "*… prohibiting disclosure of any matter that may lead to the identification of the Appellant and other parties to these proceedings …* [adding] *… Any breach may lead to contempt proceedings.*"

In the title of its decision the UT described the Appellant as "*DL (Anonymity direction made*)". The decision itself was deftly crafted by the UT Judge in a manner which prevents the Appellant from being identified. The anonymity order of the UT Judge benefits from the principle of presumptive validity (or regularity) and has not been challenged from any quarter. It is *prima facie* consonant with the relevant UT instrument and procedural rule.

[13] We determine the issue of the Appellant's anonymity in the following way. In so doing we adopt as our point of departure the overarching principle of open justice. We note further the absence of any mandatory statutory provision or binding judicial authority mandating this court to adopt any particular course. We also take into account the general rule promulgated in the two aforementioned tribunal instruments, in relatively strong terms, that neither the identity of a child nor information which could identify a child should be published. While it is not for this court to question the wisdom of this general rule in the forum of specialised tribunals and we understand it to be one of some longevity, we conceive our primary duty to be to apply the common law principles and Arts 6 and 8 ECHR.

In summary, the principle of open justice, vouchsafed by both the common law and Art 6(1) ECHR, falls to be applied in conjunction with the Art 8 ECHR private life rights of the Appellant and other family members in the context of the duty owed by the court *qua* public authority under s 6 of the Human rights Act 1998. In Article 8 cases, it is incumbent on the court to conduct a balancing exercise, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases of the present type, the public interest in play is the imperative for justice to be transacted in public in all respects.

Every case in which some degree of anonymity is permitted by the court involves an adjustment of this public interest, with the individual's right prevailing.

[14] It follows from the foregoing that the Appellant should have been anonymised in like manner in the application to this court and in all documents generated thereby, with an accompanying application for continuing anonymity. This did not occur. The likely explanation would appear to be human error. We need enquire no further. The question for this court, which must form its own independent view and make a fresh assessment and ruling, is whether there are grounds for differing from the UT. Having considered all of the material evidence and submissions, including the recently provided affidavit, we are satisfied that the Appellant should continue to benefit from anonymity. In a nutshell, the intimate and sensitive details and features of her private and family life and that of other family members outweigh the public interest in open justice in this discrete respect. Accordingly, we replicate the anonymity order of the UT. The principle of open justice will prevail otherwise.

[15] The practical out-workings of this discrete order will impose a series of responsibilities on the parties' legal representatives which must be discharged with the minimum of delay. We draw attention to the Sensitive Schedule devised by the court. Its contents will be read and recorded or stored by the parties and their legal representatives only and will not be published in any way. It will also be available to future courts and tribunals.[1]

Relevant Immigration Rules

[16] The Immigration Rules ("*the Rules*") are a hybrid species of quasi legislation which, per section 1(4) of the Immigration Act 1971 (the "*1971 Act*"), specify "*… the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode …*", the latter being the cornerstone of the system of immigration control in the United Kingdom. The Rules, by section 3(2), are laid before Parliament from time to time and may be rejected by negative resolution. Their legal status has been described as that of "*quasi-law*" (*Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, per Sedley LJ).

[17] In the present case there is a single provision of the Rules of stand-out importance. Part 9 constitutes a discrete chapter entitled "General Grounds for the Refusal of Entry Clearance, Leave to Enter, Leave to Remain, Variation of Leave to Enter or Remain and Curtailment of Leave in the United Kingdom". The phrases

[1] Promulgation of this judgment was deferred pending consideration by and response from the parties, with a view to ensuring that its contents do not undermine the anonymity order. The published judgment reflects the parties' responses and will omit the Sensitive Schedule.

"*leave to enter*" and "*entry clearance*" are used interchangeably and are not materially distinct. Within Part 9 is paragraph 320, which provides:

> "*In addition to the grounds for refusal of entry clearance or leave to enter set out in Parts 2 – 8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply ….*"

There follows a series of refusal grounds. One of these is paragraph 320(7A). This provides for mandatory refusal:

> "*… 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.*"

This is the key provision of the Rules in these proceedings. It proclaims a mandatory – not discretionary – ground of refusal.

[18] In compliance with the court's direction to provide a chronology of material dates and events, the parties have jointly compiled the following, which the court adopts with some linguistic and other minor modifications:

Date	**Event**
6 November 2015	Application for entry clearance submitted on behalf of the Appellant
28 March 2016	Appellant's half-brother granted entry clearance
9 April 2016	Appellant's entry clearance application refused
9 May 2016	Notice of appeal submitted to the First-tier Tribunal ("FtT")
4 October 2016	Refusal affirmed on review by SSHD
3 November 2017	Hearing of appeal before FtT Judge Farrelly
13 March 2018	Appeal dismissed. Decision of FtT Judge Farrelly promulgated
10 April 2018	Application to FtT, for permission to appeal to the Upper Tribunal ("UT")

18 July 2018	Decision of FtT Judge Harris, dated 6 July 2018, refusing Appellant permission to appeal to the UT promulgated
16 August 2018	Application to UT for permission to appeal.
14 November 2018	Decision by UT Judge Kekić, dated 5 November 2018, granting the Appellant permission to appeal, promulgated
7 August 2019	Hearing before UT Judge Dawson
7 October 2019	Decision and reasons of UT Judge Dawson promulgated: appeal succeeds in part and is remitted to the FtT
7 November 2019	Application to UT for permission to appeal to Court of Appeal
21 November 2019	Decision by UT Judge Blundell, dated 19 November 2019, refusing permission to appeal to the Court of Appeal, promulgated
5 December 2019	Application seeking leave to appeal to the Court of Appeal
4 February 2020	FtT adjourns the re-hearing of the Appellant's appeal (listed 11 February 2020), pending the outcome of this application

[19] The court also directed the provision of a schedule of agreed material facts. This, with certain judicial modifications, is reproduced in the Sensitive Schedule. In brief compass, therefore, the Appellant's mother, a Filipino national and British citizen, residing and working in Northern Ireland during most of the last 17 years, applied to SSHD for entry clearance permitting the Appellant (then aged 12 and now aged 16) to reside with her mother and half-brother in this jurisdiction. In making such application the Appellant's mother provided a birth certificate in respect of the Appellant which contained false information. The entry clearance application was refused on this ground.

The Underlying Decision

[20] The impugned decision was made by an Entry Clearance Officer on behalf of SSHD and is dated 9th April 2016. It is directed to the Appellant and states in material part:

> "*You have applied to join your mother […] who is present and settled in the UK. You have provided a copy of your birth certificate which shows your mother's name only. No father is stated however in your application form you have stated that your father is […]. It is claimed on your application form that he did not acknowledge your birth. Checks with the Philippines Statistics Authority have revealed that there is no record of your birth. According to records held your mother gave birth to two children, your brother […] and a daughter […]. […] was born on […] and was the daughter of your mother and […]. It is further noted on her birth certificate that your mother and […] married on […] in […] …..*
>
> *Your birth certificate has been fraudulently obtained and I am therefore refusing your application under paragraph 320(7A).*"

[We have edited the text in order to give effect to the anonymity order of this court.]

[21] The Appellant exercised her right of "*appeal review*" to the Entry Clearance Manager who, by his decision dated 4 October 2016, affirmed the initial decision.

The Anterior Tribunal Decisions and Orders

[22] There are two substantive underlying judicial decisions and three of a procedural nature. The Appellant exercised her right of appeal against the impugned decision. This generated the following series of judicial decisions:

(i) By its decision promulgated on 13 March 2018 the FtT dismissed the appeal.

(ii) On 06 July 2018 the FtT refused permission to appeal to the UT.

(iii) By a decision dated 05 November 2018 a judge of the UT granted permission to appeal.

(iv) By its decision promulgated on 07 October 2019, the UT (a) dismissed the appeal on the paragraph 320(7a) ground and (b) allowed the appeal on the Article 8 ECHR ground, ordering that the decision of the FtT be set aside on this basis (alone) and remitting the case to a different judge of the FtT for fresh decision making. The paragraph 320(7A) ground of appeal was dismissed.

(v) On 19 November 2019 a different judge of the UT refused the Appellant's application for leave to appeal to this court.

[23] It is convenient to preface our identification and application of the governing legal principles with the following passage extracted from [21] of the substantive decision of the UT:

> "*It is accepted in this case that the 'birth certificate' produced by the appellant was a false document* ***and that alone is sufficient for paragraph 320(7A) to be made out.*** *Whilst it may not be understandable why the appellant's mother used or caused to be used a false document that does not take the document out of the category captured by the rule. Accordingly, ground 1 of the challenge cannot succeed.*"
>
> [Our emphasis.]

While there is a degree of textual ambiguity in this passage, it is clear that the Appellant's "acceptance" was confined to the false nature of the document in question and did not extend to a concession that paragraph 320(7A) of the Rules was satisfied in consequence.

Procedure

[24] The court received an extensive skeleton argument from each party, supplementing skeleton arguments deployed at earlier stages of these proceedings. Having considered the papers the court, in the context of the Covid-19 pandemic, identified this appeal as a potentially suitable candidate for paper adjudication. Both parties agreed to this course. Given the volume of the skeleton arguments the court then directed the parties to formulate their core propositions.

[25] In response the following was received on behalf of the Appellant:

1. ***Permission to appeal should be granted****:*

(i) The proposed appeal raises important points of principle or practice related to: (i) the proper interpretation of paragraph 320(7A) of the Immigration Rules as it applies to false documents; (ii) an actual or apparent conflict between two judgments of the English & Welsh Court of Appeal in AA and Hameed; and (iii) the correctness, Convention compatibility and/or general legality of the interpretation set down by the English & Welsh Court of Appeal in Hameed.

(ii) The proposed appeal raises other compelling reasons for the Court to hear this appeal because: (i) the Court's interpretation of paragraph 320(7A) of the Immigration Rules in Hameed, and applied by the UT Judge, was perverse or plainly wrong; (ii) the said interpretation was also inconsistent with the decision of the same court in AA; and (iii) this unlawful interpretation has given rise to delay and drastic consequences for the Appellant and her family.

2. ***Rule 320(7A) of the Immigration Rules is breached, in respect of a false document, only when there is dishonest promotion of that false document for the purpose of obtaining entry clearance***. *This is the correct interpretation of the rule and the one that should be adopted by this Court. This interpretation flows from a proper understanding of the meaning and function of the rule itself; and from a proper reading of what the English & Welsh Court of Appeal said in AA at §67. False means dishonest (AA at §66). Dishonest promotion in this context means to put forward a document with the intention to deceive the authorities and for the specific purpose of securing entry clearance.*

3. ***Hameed was wrongly decided by the English & Welsh Court of Appeal***. *Their interpretation of the rule at hand (and what had been said in AA) at §§25-27 was in error. The court's observations in Hameed reveal a clear contrast and, indeed, conflict with the approach taken in AA in which the court strove to apply the same meaning to the word "false" (requiring dishonesty) in respect of both "representations" and "documents" (see §72; and see also the reference by the court to the guidance which puts false documents and false representations in pari materia at §44). Hameed also creates a perverse or irrational outcome by applying a stricter test in respect of the provision of a document when compared with other types of representation. The interpretation of paragraph 320(7A) advanced in Hameed (§27) creates a significant (and inconsistent) difference in approach between false representations and the submission of false documents, which does not sit easily with the reasoning in AA (at §§67-68) or a fair, correct or Convention-compliant interpretation of the relevant rule.*

4. ***The rule, as applied, was in breach of the Appellant's right to respect for her family life under Article 8 ECHR***. *Notwithstanding that a refusal to permit a child entry-clearance to live with their mother, a British citizen, amounts to an obvious interference with the family life of that child, the Immigration Rules, as now interpreted by Hameed, mandate such a refusal, irrespective of any actual dishonesty on the part of any person being established. This is contrary to the child's welfare and best interests. While such a finding may not be determinative of a subsequent human rights appeal, it may amount to a weighty factor against entry-clearance being granted. This approach flies in the face of the 'sins of the parent' principle which is highly relevant to assessing Convention compatibility, in this context.*

5. ***The Supreme Court's judgment in Ivey v Genting Casinos strongly supports the Appellant's case on dishonesty***. *This important decision was not considered by the court in Hameed and has been mostly ignored by the Respondent. It is submitted that the statement in Hameed at §27 that there is no need to establish actual dishonesty or deception in cases involving the use of false documents is wholly inconsistent with the dicta of the Supreme Court on this very issue, summarising the authoritative test "when dishonesty is in question" at §74 as requiring (a) a fact-finding exercise as to the subjective, "actual state of the [relevant] individual's knowledge or belief"; and (b) a determination, in light of that, of "whether his conduct was honest or dishonest", applying objective standards.*

6. ***The Respondent's core argument (§3) is both unattractive and inherently implausible****; (i) as a matter of common sense; (ii) applying conventional canons of interpretation; and (iii) because the English & Welsh Court of Appeal in AA sought (consistently with common sense and an ordinary approach to construction) to mandate a uniform, single, interpretation of what the word "dishonest" means. The Respondent's case would result in two distinct, substantively different meanings of the word "dishonest", depending on whether one is dealing with a representation or a document. That cannot be correct (nor, indeed, compliant with the Appellant's Convention rights). The Respondent's argument as to alleged futility does not provide a substantive defence.*

[26] The core propositions formulated on behalf of SSHD are in the following terms:

SUBSTANTIVE ISSUE

1. *The Appellant contends that the England and Wales Court of Appeal's (EWCA) decision in Adedoyin[2] has been wrongly interpreted by the Upper Tribunal (IAC). In Adedoyin the EWCA was concerned with determining the correct meaning of the word "false" used in Immigration Rule 320(7A), because false can be interpreted to mean two quite different things. Rix LJ's omnibus conclusion was that false in this context meant dishonest, so that dishonesty would result in refusal.*

2. *Immigration Rule 320(7A) refers to dishonesty in two ways: (1) the submission of a dishonest document along with an application; and (2) the making of a dishonest submission in an application. The Appellant contends that Adedoyin, properly interpreted, means that a **false document** case requires **two** separate elements of dishonesty before the application can be refused: (1) submission of a dishonest document; and (2) a dishonest intent (promotion) when submitting that document.*

3. *The Appellant's interpretation is wrong. Only one episode of dishonesty is required. If a dishonest document is submitted, that is sufficient for refusal. There is dishonesty within the document itself and the grounds for refusal are therefore met. There is no need for additional dishonest intent when it is submitted.*

4. *The EWCA acknowledged the strong public policy reasons for discouraging all forms of dishonesty in applications for permission to enter the UK.*

5. *The Appellant has failed to recognise that the dishonesty prohibited by Immigration Rule 320(7A) can manifest in different ways depending on whether it is in a **false document** case or a **false representation** case, but whichever form it takes all that is required is dishonesty (not double dishonesty).*

[2] [2010] EWCA Civ 773, [2011] 1 WLR 145.

6. *There is a single test of dishonesty. The Appellant's reliance on Ivey[3] and the suggestion that the Respondent's view results in two tests for dishonesty is misguided. The form the dishonesty takes changes, not the test for dishonesty.*

7. *The Appellant's interpretation also conflicts with the EWCA later decision in Hameed (2019)[4], which again held that submission of a dishonest document was of itself sufficient for refusal under Immigration Rule 320(7A). The Appellant argues Hameed conflicts with Adedoyin, but that is incorrect – the decisions are the same. The Immigration Rules apply equally throughout the UK and there is no good reason for a different interpretation in Northern Ireland.*

ACADEMIC CASE

8. *The Appellant's mother obtained two birth certificates: a legitimate one and an illegitimate one. She submitted the illegitimate one along with the application to the Entry Clearance Officer. Knowing that she had a legitimate certificate and an illegitimate certificate, it is difficult to see how there is any prospect of a tribunal deciding that she was not acting dishonestly when submitting the false one.*

9. *The Appellant's mother has had several opportunities to explain her actions during the various stages of the review and appeal processes. She has contributed evidence throughout. Despite the false birth certificate being the central feature of the proceedings, as it was the reason for refusal, she has been unable to provide any explanation capable of grounding a finding that she was not acting dishonestly. Therefore, even if the Appellant secured a favourable outcome to these proceedings, it would be of no benefit to her. Her case is academic.*

SECOND APPEAL CRITERIA

10. *This case has been the subject of multiple considerations during its journey through the specialist immigration appeal tribunal system. For that reason, the Second Appeal Criteria set a high threshold before this Court will consider the case. The Appellant does not satisfy either of the Second Appeal Criteria.*

DELAY

11. *This case involves a child, aged 16 years. The original application was submitted in November 2015 when she was aged 12 years. The impugned decision was reached in April 2016. Since that refusal over 4 years ago, there has been one Home Office review and five separate tribunal decisions touching upon her. The UT has given her a further appeal hearing based on her Article 8 claim, regardless of the outcome of this appeal. The adverse effects of the further delay on the best interests of the child caused by this application for appeal speak loudly against a grant of leave.*

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[3] *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67

[4] [2019] EWCA Civ 1324

The Substantive Issues of Law

[27] We begin by elaborating briefly on paragraph 320(7A) of the Rules. The mandatory refusal of entry clearance on the ground of false representations or false documents was first introduced in 2008 (by HC321, HC607 and HC1113). Paragraph 320(7A) is replicated in three other provisions of this chapter of the Rules. The materiality of the dishonesty or deception is irrelevant. The onus of proof rests on SSHD. While we are mindful of decisions such as *Khawaja v SSHD* (1984) AC 74 and *MH Pakistan* (2010) UKUT00168 (IAC) it is not necessary for our decision to dilate on the question of standard of proof, which featured in neither party's arguments, and we decline to do so.

[28] We now turn to the relevant jurisprudence. In *Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773 (aka *AA(Nigeria v SSHD*) the English Court of Appeal considered the meaning of the word "*false*" in paragraph 322(1A) of the Rules. This decision is central to these proceedings. Paragraph 322(1A) provides that leave to remain in the UK is to be refused -

> *"… 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."*

The language replicates precisely that of paragraph 320(7A): see [15] above.

[29] It is necessary to reproduce the critical passages, [65]–[77], of *Adedoyin* in their entirety:

> "65. The essential question is whether "false" in either paragraph 320(7A) or paragraph 322(1A) is used in the meaning of 'incorrect' or in the meaning of 'dishonest'. Whatever Staughton LJ may have said in *Akhtar* it is quite clear to me that in ordinary English usage 'false' may have either meaning. While 'incorrect' is given as its first meaning in the *Concise English Dictionary*, I am unable to regard its second meaning, which I gloss as 'dishonest', as other than entirely normal: and that is so whether regard is had to the man or woman in the street or to the barrister in the Temple.
>
> 66. It seems to me therefore that there is an open choice as to the meaning to be given to 'false' in the relevant rules. In that situation, I would prefer the meaning of 'dishonest', for the following reasons.

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 purpose 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 that 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'.

68. Secondly, however, a false representation stated in all innocence may be simply a matter of mistake, or an error short of dishonesty. It does not necessarily tell a lie about itself. In such a case there is little reason for a requirement of mandatory refusal, although a power, even a presumption, of discretionary refusal would be understandable. It is noticeable that paragraphs 320 and 322 also contain grounds on which entry clearance, leave to enter, or leave to remain, as the case may be, 'should normally be refused'. If on the other hand a dishonest representation has been promoted by another party, as happened with the sponsor husband in *Akhtar*, then it is entirely understandable that the rule should require mandatory refusal, irrespective of the personal innocence of the applicant herself. Therefore, the reason of the thing, as well as the natural inference that 'false' in relation to 'representations' should have the same connotation as 'false' in relation to 'documents', together argue for a conclusion that 'false' requires dishonesty – although not necessarily that of the applicant himself.

69. Thirdly, the non-disclosure of material facts is also a mandatory ground of refusal. Such non-disclosure can be entirely honest, or it can be dishonest. If dishonest, the dishonesty may again happen without the knowledge of the applicant, or the applicant may be personally dishonest. The facts of *Akhtar* again come to mind. In this context, however, the rule says nothing about the knowledge of the applicant, which might suggest that the importance of this aspect of the rule lies in the word "material". There has been some uneasy jurisprudence about the effect of that word: see *Akhtar* itself (where the point did not have to be decided) and *Macdonald* at para 3.77. In any event, the rule at this point does not speak in terms of what is 'false'. I say nothing therefore about this part of the rule. In my judgment, it cannot be decisive as to the meaning of 'false'.

70. Fourthly, it seems to me that, in a situation where a word, such as here 'false', has two distinct, and distinctively important, meanings, there is a genuine ambiguity which makes it legitimate, in construing Rules which are expressions of the executive's policy, to consider what the executive has said, publicly, about its rules. Clearly, what a minister says in Parliament, expressed as an assurance, and especially on the occasion of a debate arising out of the tabling of amended rules, is of particular, and may be of decisive, importance (just as the DP 5/96 policy was effectively changed by an announcement in Parliament, see *NF (Ghana)* above). In such a situation of genuine ambiguity, moreover, it seems to me that, perhaps exceptionally, it is even possible to get some assistance from the executive's formally published guidance, such as RFL04 or the relevant IDI. In saying that I do not think I am departing from the observations of Lord Brown in *Mahad*, cited above, about the function and status or probable general unhelpfulness of IDIs.

71. Fifthly, therefore, I consider it necessary in the present case to consider what assurances were given in, and arising out, of the Lords debate of 17 March 2008 when the rule in question was before Parliament. Lord Bassam then made a clear statement, in answer

to Baroness Warwick who had noted the ambiguity of the word 'false', that by 'false documents' –

> 'We mean a document that is forged or has been altered to give false information. If people submit such documents, our belief is that they should be refused…'

ILPA then asked for clarity as to whether that answer extended to statements, on the basis that the reference to falsity in the rule "implies an element of falsehood and not a mere mistake". Mr Byrne's letter replied to that request for clarification first by saying that the answer was to be found in Entry Clearance Guidelines 'which I believe deals with this point', and secondly by stating in his own words what the new rules were intended to cover, viz 'people who tell lies – either on their own behalf or that of someone else – in an application to the UK Borders Agency. They are not intended to catch those who make innocent mistakes in their applications.'

72. For the reasons given above, I consider that that assurance, essentially as to the meaning of the word 'false' in the new rules, was a correct exposition of the true interpretation of those rules. If, however, there were to remain any uncertainty in a situation of genuine ambiguity, then I consider that what the minister said, in answer to ILPA's specific request, was intended to be definitive of that ambiguity. It will be seen that the minister's answer also confirms my personal understanding of the proper ratio of *Akhtar*.

73. Sixthly, in the light of the minister's answer in his letter, it must be legitimate to look at the relevant Entry Clearance Guidelines to which he referred. The current version is RFL04 which I have cited above. It is abundantly clear from that, in my judgment, that 'false' in relation to both 'representations' and 'documents' is being used in the same way and as requiring dishonesty, although not necessarily in the applicant himself: see para 42/43 above. It will be recalled that the whole of the relevant passage in RFL04 is beneath the rubric: 'Deception in an application – paragraph 320(7A)'.

74. Seventhly, especially in the light of the minister's answer, it seems to me legitimate to look at the IDI guidance given as to the rule in paragraph 322(1A) itself. That has been set out above and I refer to my observations upon that guidance (at paras 32/33 above). Although there are to my mind discrepancies here and there, what is striking is that the whole discussion is under the heading of "Paragraph 322(1A) – Deception used in a current application" and the primary emphasis is on lying.

75. Eighthly, (and this point, although convenient to state last, is rather one of primary importance), it is plain to my mind that paragraph 320(7B) with its reference to 'Deception' is intended to be read together with the rule in paragraphs 320(7A) and 322(1A). Paragraph 320(7B)(d) makes it clear that it applies not only to cases of entry clearance and leave to enter (the subject-matter of paragraph 320) but also to the case of leave to remain (the subject-matter of paragraph 322). "Deception" picks up the language not itself found in paragraphs 320(7A) and 322(1A) but rather in RFL04 and the IDI on paragraph 322(1A). I accept the submission of Mr Collins which as I understood it was that paragraph 320(7B)(d) was a gloss on paragraphs 320(7A) and paragraph 322(1A) – for otherwise a case within those latter paragraphs would not be dealt with within paragraph 320(7B) at all (see para 28 above), which cannot have been intended – but I reject his submission that "Deception" does not entail dishonesty. Therefore, once the connection of the rule in paragraph 322(1A) (and in paragraph 320(7A)) with paragraph 320(7B)(d) is made, it is impossible in my judgment to conclude that 'false' in the expression 'false representations' in the rule in question has the morally neutral meaning of 'incorrect'.

76. For these reasons, I conclude that Mr Malik's basic submission is correct. Whether as a matter of the interpretation solely of the relevant rules in paragraphs 320(7A), 320(7B) and 322(1A), but in any event when consideration is also given to the assurances given in the Lords debate as supplemented by the minister's letter to ILPA dated 4 April 2008, and to the public guidance issued on

> behalf of the executive, the answer becomes plain, and in essence is all of a piece. Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a 'false representation' a ground for mandatory refusal.
>
> 77. If it were otherwise, then an applicant whose false representation was in no way dishonest would not only suffer mandatory refusal but would also be barred from re-entry for ten years if he was removed or deported. That might not in itself be so very severe a rule, if only because the applicant always has the option of voluntary departure. If, however, he has to be assisted at the expense of the Secretary of State, then the ban is for five years. Most seriously of all, however, is the possibility, on the Secretary of State's interpretation, that an applicant for entry clearance (not this case) who had made an entirely innocent misrepresentation, innocent not only so far as his personal honesty is concerned but also in its origins, would be barred from re-entry under paragraph 320(7B)(ii) for ten years, even if he left the UK voluntarily."

[30] The Court of Appeal decided, unanimously, that "*false*" denotes "*dishonest*". It entails the making of deliberate lies, to be contrasted with statements which do not accord with the true facts. Thus a representation is to be characterised false within the compass of paragraph 322(1A) – and, by extension, paragraph 320(7A) – only if there has been dishonesty or deception on the part of a relevant person. The tribunal had decided that the claimant's state of mind was irrelevant to the question of whether the representation under consideration, which related to previous convictions, was immaterial in determining whether it was "*false*". The Court of Appeal determined that this was erroneous in law and remitted the case to the tribunal for the main purpose of determining whether the offending representation had been dishonest.

[31] The kernel of what the Court of Appeal decided is encapsulated in pithy terms at [76]:

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

The starting point and cornerstone of the detailed analysis and reasoning of Rix LJ at [65] is that "*false*" does not denote "*incorrect*". Rather its true meaning is "*dishonest*". A false document, he observed, is one which "*tells a lie about itself*": see [67]. This,

however, does not justify a mandatory refusal decision under the provisions of the Rules unless the falsity can be linked to the dishonest state of mind of a relevant person. The court's emphasis was on the state of mind of the applicant or other person (for example the sponsor or an agent), to be contrasted with the falsity in the representation or document under scrutiny. In short, while a representation or document may contain a falsity, the question is whether this is attributable to a relevant person's dishonesty and a mandatory refusal under paragraph 320(7A) of the Rules is lawful only where this question attracts an affirmative answer.

[32] The primary submission of SSHD, based on *Adedoyin*, is that the requirement to establish dishonesty is confined to false representation cases and does not extend to cases of false documents. We consider that this submission finds no support in either the relevant provisions of the Rules or the judgment in *Adedoyin* and reject it.

[33] It is necessary to consider the more recent decision of the English Court of Appeal in *Hameed v Secretary of State for the Home Department* [2019] EWCA Civ 1324. There the Appellant's application for leave to remain in the United Kingdom was refused under paragraph 322(1A) of the Rules – materially indistinguishable from paragraph 320(7A) as noted above – on the basis that there had been reliance upon a false certificate of sponsorship ("CoS") submitted with his application. The falsity of the document was conceded. The Appellant's case was that the refusal decision was unlawful as he had not been guilty of dishonesty. The court observed at [24] that the *"fundamental problem"* with the appellant's case was that the Secretary of State had not refused his application on the basis that he had made a false representation but on the ground that he had submitted a false document. The court noted at [23] that while the appellant had made a representation, in completing his application for the relevant student status, he had not acted falsely or dishonestly. The court further observed that the person who had supplied the appellant with the ensuing bogus certificate *"may have been acting dishonestly but was not making a representation"*.

[34] The court stated at [25] – [27]:

> *"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.'*
>
> *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]).

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'."*

The sentence in bold is, properly analysed, the key part of the judgment. The Court of Appeal upheld the refusal decision of SSHD and its subsequent affirmation by the UT in judicial review proceedings.

[35] At this juncture we draw further attention to the following statement of Rix LJ in *Adedoyin*, at [65]:

> *"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."*

We consider that, properly construed and considered in its full context, this passage was not intended to suggest that a document is capable of being dishonest, whether in the Part 9 regime of the Rules or otherwise. Human beings are capable of being dishonest. Documents, in contrast, are (inexhaustively) either false or genuine, accurate or inaccurate, correct or incorrect – and so forth. The assessment of a document entails a purely forensic exercise. The assessment of whether a human being has engaged in dishonesty is to be contrasted. The latter assessment involves exploring the state of mind of the person concerned and the making of findings which will normally be based on appropriate inferences and sometimes, less typically in practice, on direct evidence such as a written or oral statement evincing an intention to deceive

[36] We would caution that [65] of *Adedoyin* is not be construed narrowly or literally, at the expense of the remainder of the paragraph in question and the ensuing passages. In *Hameed* a different division of the Court of Appeal purported to apply its earlier decision in *Adedoyin*. In our consideration of *Adedoyin* above we have drawn attention to the detailed analysis of Rix LJ at [65]–[77] and the importance of considering this as a whole. It is striking that in *Hameed* the later division of the Court of Appeal focused only on [67]. Furthermore, we consider with respect that the court misunderstood this discrete passage. In *Hameed* there is no suggestion of any disagreement with *Adedoyin*. Rather the Court of Appeal purported to apply *Adedoyin*. We consider, with deference, that the Court fell into error. In our judgement the decision in *Hameed* is irreconcilable with that in *Adedoyin*. We shall examine the implications of this *infra*.

[37] There is one further element of the juridical equation which falls to be considered. In the clear and focussed skeleton argument of Mr David Scoffield QC and Mr Steven McQuitty (of counsel) on behalf of the Appellant there is a further, free standing submission that *Hameed* is also in conflict with other authority relevant to the question of dishonesty. In *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 the Supreme Court considered an appeal brought by a professional gambler who had been denied £7.7 million in winnings by the respondent casino on the basis that he had cheated during a particular card game (Punto Banco Baccarat). At trial the judge had dismissed his claim against the casino for his winnings on the grounds that, while neither dishonesty nor deception was involved, the appellant's play had amounted to "cheating" in breach of an implied term of his contract with the casino. The Court of Appeal upheld that decision and the appellant appealed to the Supreme Court.

[38] The Supreme Court dismissed his appeal on the basis that the trial judge had been correct to hold that the appellant's conduct amounted, objectively, to cheating and this was sufficient to breach the implied contractual term. The court added some guidance on the issue of dishonesty, at [74], *per* Lord Hughes:

> *"74. These several considerations provide convincing grounds for holding that the second leg of the test propounded in R v Ghosh [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 and by Lord Hoffmann in Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476, para 10: see para 62 above.* ***When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts.*** *The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held.* ***When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.*** *There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*
>
> [Emphasis added]

[39] While the passage in question was *obiter*, a specially constituted five member panel of the English Court of Appeal has endorsed it unequivocally, concluding that *Ghosh* is no longer to be followed in criminal cases, in *R v Barton and Booth* [2020] EWCA Crim 575. Burnett LCJ expressed the conclusion of the court at [1]:

> *"For 35 years the approach to dishonesty in the criminal courts was governed by the decision of the Court of Appeal Criminal Division in R v Ghosh [1982] QB 1053. In Ivey v Genting Casinos (UK) (trading as Cockfords Club) [2017] UKSC 67; [2018] AC 391 the Supreme Court, in a carefully considered lengthy obiter dictum delivered by Lord Hughes of Ombersley, explained why the law had taken a wrong turn in Ghosh and indicated, for the future, that the approach articulated in Ivey should be followed. These appeals provide the opportunity for the uncertainty*

> *which has followed the decision in Ivey to come to an end. We are satisfied that the decision in Ivey is correct, is to be preferred, and that there is no obstacle in the doctrine of stare decisis to its being applied as the law of England and Wales."*

He added at [104]:

> *"We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly obiter. To that limited extent the ordinary rules of precedent (or stare decisis) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision. Such was a necessary condition before adjusting the rules of precedent accepted by this court in James in relation to the Privy Council. Had the minority of the Privy Council in Holley not agreed that the effect of the judgment was to state definitively the law in England, it would not have been accepted as such by this court. The same approach is necessary here because it forms the foundation for the conclusion that the result is considered by the Supreme Court to be definitive, with the consequence that a further appeal would be a foregone conclusion, and binding on lower courts."*

The precedent status of this decision is considered at [45] – [48] below.

[40] *Ivey* had previously been the subject of strong endorsement from Sir Brian Leveson P in *Patterson v DPP*, the Court of Appeal's approving reference in *R v Pabon* [2018] EWCA Crim 420 and the explicit advice to judges in the *Crown Court Compendium* that it should be followed.

[41] *Ivey* was not considered by the Court of Appeal in *Hameed.* We consider that Lord Hughes' formulation regarding dishonesty, provided as it was in the context of a civil case, should be accorded broad application. We are unable to identify any reason in principle or otherwise why it should not apply to the relevant provisions of the Immigration Rules. Coherence and predictability in the legal system are long recognised and essential attributes. The DNA of dishonesty is the same, in whatever legal context it features. Thus, while the context of the decision in *Hameed* was a specific provision of the Rules it is plainly incompatible with *Ivey*. This reinforces our conclusion that *Hameed* was erroneously decided.

[42] The combined researches of the court and the parties have (perhaps surprisingly) failed to identify any post-*Hameed* reported case in which the decisions in *Hameed* or *Adedoyin* were considered. We have noted that in *R (Balajigari and Others) v Secretary of State for the Home Department* [2019] 1 WLR 4647, decided some weeks before *Hameed*, the Court of Appeal, at [36], cited without demur [76] – [79] of *Adedoyin*. The conjoined appeals in that case were almost exclusively concerned with a different provision of the Rules, namely paragraph 322(5) which provides that SSHD may refuse leave to remain in the United Kingdom or variation of leave to enter or remain in the United Kingdom, on a discretionary basis, on the ground of the applicant's conduct, character or associations. This ground of refusal was invoked in all four cases. In one of the cases only (*Kawos*) the refusal was also based on paragraph 322(2), which contains as a discretionary ground of refusal "*the making of false representations or the failure to disclose any material fact …*"

[43] In all of the cases under appeal the claimants were required by the Rules to demonstrate a minimum level of earnings in the UK in the previous year and, to this end, made representations and provided evidence which SSHD refused to accept. It was common case that dishonesty on the part of the applicant is, in the context of applications of this kind, required: see [35]. This prompted the court's references to *Adedoyin* and *Ivey*. Underhill LJ, delivering the unanimous judgment of the court, stated at [35]:

> "*The provision of inaccurate earnings figures either to HMRC or to the Home Office in support of an application for leave under Part 6A as a result of mere carelessness or ignorance or poor advice cannot constitute conduct rendering it undesirable for the applicant to remain in the UK. Errors so caused are, however regrettable, 'genuine' or 'innocent' in the sense that they are honest and do not meet the necessary threshold.*"

It was in this context that reference was made to *Adedoyin*, which the court quoted as providing support for its assessment.

[44] In *Balijigari* the *Ivey* approach to dishonesty was exported, without qualification, to provisions of the Immigration Rules closely comparable to paragraph 320(7A). We consider it immaterial that the other provisions empower discretionary, rather than mandatory, refusal of applications and reject the argument of SSHD to the contrary. This court agrees fully with the foregoing passage in *Balajigari and Others*. The actual outcome of the conjoined appeals – all succeeded on the main ground that SSHD's assessment of dishonesty was the product of a procedurally unfair decision making process – is not directly relevant to the application which we are deciding. However, we shall comment further, and briefly, on this *infra*.

The Doctrine of Precedent

[45] The foregoing analysis and conclusion are not determinative of the construction of paragraph 320(7A) of the Rules. The reason for this is that this court is bound by neither of the decisions in *Adedoyin* and *Hameed*. By well-established principle decisions of the English Court of Appeal are of persuasive and not binding authority in this jurisdiction: see the summary of the relevant authorities in *Baranowski v Rice* [2014] NIQB 122 at 19. See also, more recently, *Re Steponaviciene's Application* [2018] NIQB 90 at [20]–[24]. The relevant principle was stated by Campbell LJ in *Re Starritt and Cartwright's Applications* [2005] NICA 48 at []:

> "*It has been long established that while this court is not technically bound by decisions of courts of corresponding jurisdiction in the rest of the United Kingdom, it is customary for it to follow them to make for uniformity where the same statutory provision or rule of common law is to be applied. That is not to say that the court will follow blindly a decision that it considers to be erroneous.*"

[46] As appears from our analysis above, we consider that the two decisions of the English Court of Appeal under scrutiny, namely *Adedoyin* and *Hameed*, are in conflict with each other. As a matter of principle this court is not strictly bound by either. Given our conclusion that *Adedoyin* was misunderstood and misapplied in *Hameed* the first step for this court is to choose between the two decisions. We have not identified any other option and neither party urged any other course upon us. We consider the analysis and reasoning in *Adedoyin,* as we have expounded them, cogent. We further consider that the more recent decision of the Court of Appeal in *Balajigari and Others*, which we have endorsed, is harmonious with *Adedoyin* and irreconcilable with *Hameed*. The final ingredient in the jurisprudential equation is the decision of the Supreme Court in *Ivey*, noted above, which in our view is supportive of *Adedoyin* and further undermines *Hameed*. Giving effect to this analysis we propose to follow the decision in *Adedoyin*.

[47] In *R v Barton and Booth (supra)* the English Court of Appeal devoted much attention to the binding effect of the *obiter* aspect of *Ivey*. Doctrinally, this court's relationship with the UK Supreme Court is the same as that of its English counterpart. As noted above, by well-established principle the Northern Ireland Court of Appeal is not bound by decisions of the English Court of Appeal, which have persuasive, not binding, status. In *Barton and Booth* it was decided that in *Ivey* the Supreme Court had developed and modified the doctrine of *stare decisis*. We are satisfied that *Barton and Booth* was correctly decided (the contrary not having been contended) and propose to follow it accordingly.

[48] From the foregoing follows inexorably the conclusion that the successive decisions of the FtT and the UT dismissing the Appellant's appeal against the refusal of SSHD to grant her entry clearance on the basis that her application had relied

upon *inter alia* a birth certificate which had been "*fraudulently obtained*", purporting to apply paragraph 320(7A) of the Rules, were erroneous in law.

The Second Appeal Test

[49] As noted in [1] above, this is not an appeal against the decision of the UT. It is, rather, an application for leave (permission) to appeal to this court under section 13(4) of the 2007 Act. Section 13(5) provides that an application of this nature must first be made to, and refused by, the UT. By section 13(6):

> "*The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers –*
>
> *(a) That the proposed appeal would raise some important point of principle or practice; or*
>
> *(b) That there is some other compelling reason for the relevant appellate court to hear the appeal.*"

The present application falls within the scope of section 13(7) as "…. *the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11".*

[50] The Lord Chancellor has exercised the power conferred on him by section 13(6) in the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834). Accordingly, the grant of leave to appeal to this court will be appropriate only if we consider that the proposed appeal would raise some important point of principle or practice or that there is some other compelling reason to hear the appeal.

[51] In applying these tests we acknowledge firstly that while the inevitable effect of our primary conclusion above is that if leave to appeal is granted the appeal will succeed this of itself does not satisfy either of the statutory tests. Furthermore, success for the Appellant in this court will not achieve finality as this is clearly a case for the exercise of this court's power of remittal to the FtT for the purpose of conducting a fresh appeal hearing which will *in particular* examine whether there was dishonesty on the part of the Appellant or her mother or any other person in the provision and reliance upon the false birth certificate in making the entry clearance application and make appropriate findings.

[52] It is convenient to consider whether either of the statutory tests is satisfied by reference to the submissions advanced in the clear and comprehensive skeleton argument of Mr Philip Henry (of counsel) on behalf of SSHD.

(i) Mr Henry's first submission has the merit of clarifying beyond per adventure that the only person alleged to have acted with "*dishonest intent*" is the Appellant's mother. Investigation and determination of this purely factual issue would, therefore, be the main task to be performed by the FtT in the event of this appeal succeeding and a remittal order following. Given the erroneous assessment of the FtT (endorsed by the UT) of the decision in *AA (Nigeria)* this court cannot be satisfied that this factual issue has been adequately considered. Furthermore, as the decision of the UT makes particularly clear, the appeal to the FtT was based on Art 8 ECHR and the UT set aside the first instance decision on the ground that the Art 8 analysis was inadequate. The "dishonesty" ground of appeal failed. This *per se* operates to defeat the first of Mr Henry's submissions.

(ii) Mr Henry's second submission, linked to his first, is that as matters stand the FtT will have to conduct a "*full analysis*" of the Appellant's Article 8 case consequent upon the remittal order of the UT. This could result in the Appellant succeeding. While all of this is correct it does not sound on the question of whether either of the statutory tests is satisfied and, further, does not engage with our analysis in (i) above.

(iii) Mr Henry's third submission is predicated entirely on an interpretation of the decision in *Adedoyin* which we have rejected above. At the beginning of his analysis, in [67], Rix LJ states unequivocally that the mandatory refusal enshrined in paragraph 320(7A) of the Rules is appropriate where there has been dishonest promotion of the use of the false document by any person, whether it be the applicant, a parent, a sponsor, an agent or someone else. At the conclusion of his analysis, in [76], Rix LJ states equally unambiguously that dishonesty or deception on the part of some person is an essential pre-requisite to mandatory refusal. The central submission on behalf of SSHD entails a distortion and misconception of the key passages in *Adedoyin*.

(iv) This court has also rejected Mr Henry's fourth submission which is that there is no conflict between the decisions in *Adedoyin* and *Hameed*.

[53] In determining whether either of the statutory tests is satisfied what is required of this court is an evaluative judgement. Focusing on the terms of section 14(6), we consider the specific question in this case to be whether the appeal raises an important point of principle. The correct interpretation of the Immigration Rules is a matter of principle. Thus the question becomes whether the specific point of interpretation raised by this appeal is <u>important</u>. It is implicit in the submissions of

both parties, and we accept, that *Adedoyin* is the leading decision in the discrete sphere to which it belongs. Being a decision of the Court of Appeal it is binding on all lower courts and tribunals and, subject to the *Young v Bristol Aeroplanes* principles, binding on the Court of Appeal itself. A later division of that court has made a decision, in *Hameed*, which in our judgement misunderstands and misapplies *Adedoyin*. It is inevitable that uncertainty and debate will have been generated in consequence and will continue to arise. In short, there are two conflicting decisions of the English Court of Appeal on the interpretation of paragraph 320(7A) of the Rules. This is the first factor to be weighed.

[54] The second relevant factor is that SSHD, the public authority concerned, has been making – and doubtless continues to make – decisions based on an erroneous interpretation of both *Adedoyin* and *Hameed*. SSHD's misinterpretation and misapplication of the decision in *Adedoyin* is likely to have affected all decisions based on paragraph 320(7A) of the Rules since 2010 and, given the submissions made to this court, will clearly continue to do so indefinitely unless corrected judicially. Allied to this is the consideration that the language of paragraph 320(7A) is mirrored in three further provisions within Part 9 of the Rules.

[55] The three factors identified above all have a bearing on the first of the two statutory tests. To these we would add the following. It is a notorious fact that the admission of non-British nationals to the United Kingdom is a matter of significant public interest, one which generates acute controversy and polarised debate among members of society. One discrete facet of this topic is the trustworthiness, honesty and motives of persons seeking such admission and those belonging to their circle, such as family members, sponsors and agents. This consideration sounds on the second of the statutory tests.

[56] We have considered the inexhaustive guidance formulated by the English Court of Appeal in *Uphill v BRB (Residuary) Limited* [2005] 1 WLR 2070 in the kindred context of the second appeal test enshrined in CPR 52.13(2). We have also been assisted by the erudite analysis of Carnwath LJ in *PR (Sri Lanka) v SSHD* [2011] EWCA Civ 988. In addition we have been mindful of the statement of Lord Hope in *Eba v Advocate General for Scotland* [2012] 1 AC 710, at [48], that in order to satisfy the first of the statutory tests the issue "*… would require to be one of general importance, not one confined to the petitioner's own fact and circumstances*".

[57] Drawing these several threads together we conclude that the first of the statutory tests is satisfied. This conclusion requires no added weight. However, insofar as necessary such is found in our consideration of the second statutory tests above. For the reasons given we consider that the appeal which the Appellant seeks to bring to this court raises an important point of principle. It follows that the grant of leave to appeal is appropriate. Given our resolution of the substantive issues raised, it further follows that the appeal must succeed substantively.

Conclusion and Order

[58] Giving effect to the foregoing the court concludes and orders:

(i) Leave to appeal is granted.

(ii) The appeal is allowed.

(iii) The case is remitted to the FtT for *de novo* consideration and determination, guided by the judgment of this court.

Post-Remittal

[59] It is instructive to recall that the ultimate issue to be determined by the FtT upon remittal will be whether the refusal decision of SSHD infringes the right to respect for family life conferred on the Appellant and the other family members concerned by Article 8 ECHR under section 6 of the Human Rights Act 1998. As explained in decisions such as *LD Zimbabwe* [2010] UKUT 278 (IAC) and *Mostafa (Article 8 In Entry Clearance*) [2015] UKUT 112 (IAC) any demonstrated breach of a material provision of the Rules is not *per se* determinative of the Article 8 issue. Rather, it ranks as something which is "*… capable of being a weighty, though not determinative, factor in deciding whether* [a refusal of entry clearance] *is proportionate to the legitimate aim of enforcing immigration control*" (drawn from the headnote in *Mostafa*). Of course, if following further enquiry the FtT is not satisfied that SSHD has established dishonesty on the part of some person or persons, as explained in this judgment, the sole ground of the refusal decision will be extinguished and, taking into account *inter alia* the positive decision in the entry clearance application of the Appellant's older brother, the breach of Article 8 ECHR may not be contentious.

[60] In its fresh consideration and determination of the Article 8 appeal it will be for the FtT to explore in particular how and why the contentious birth certificate was generated and provided in support of the Appellant's entry clearance application. If the FtT were to conclude that SSHD's invocation of paragraph 320 (7A) was lawful this would not be determinative of the appeal. Rather, questions such as whose dishonesty, the gravity of the dishonesty, its materiality and the apparent motive will all have a bearing on the Article 8 ECHR proportionality balancing exercise. Foolishness or naivety, for example, are not on a par with a deliberate intention to deceive entailing elaborate cunning and mischievous plotting and scheming. Furthermore, there is no sustainable extant finding of any tribunal adverse to the Appellant, who will be entitled to a fresh judicial determination based on an entirely clean sheet.

[61] We would add one final observation. The central conclusion of the Court of Appeal in *Balijigari* was that the refusal decisions of SSHD, all based on the asserted dishonesty of the applicants, were vitiated by procedural unfairness. This has not

featured as a ground of appeal in the present case thus far. It appears to this court that the *ratio* of *Balijigari* is *prima facie* indistinguishable from refusal decisions under paragraph 320 (7A) of the Rules (viz the present case). This issue will predictably arise for future judicial determination.

Postscript [1]: Costs

[62] Having considered the parties' submissions, the court orders that SSHD will pay the Appellant's costs, to be taxed in default of agreement. There will also be a legal aid taxation order in the usual terms.

Postscript [2]: Appeal to the Supreme Court

[63] Following distribution of this judgment in draft, the possibility of an application by SSHD for leave to appeal to the Supreme Court was raised. The court was subsequently notified that no such application would be pursued.