R v Secretary of State for the Home Department ex parte Dhirubhai Gordhanbhai Patel

Queen's Bench Division

[1986] Imm AR 208

Hearing Date: 26 March 1986

26 March 1986

Index Terms:

Practice and Procedure -- Illegal entrant -- allegations of false statements made to secure entry to the United Kingdom -- when and why the court may be satisfied by affidavit evidence alone that allegations have been established to the required standard of proof. Whether, in the course of a hearing it is equitable to allow the Secretary of State to rely on s 26(1)(c), when the case had begun solely on the basis of an offence under s 26(1)(d) of the Immigration Act 1971

Misrepresentation -- whether silent presentation of a passport containing information known to be false, is a false representation, amounting to deception such as to make the applicant an illegal entrant under the Act. The meaning of "false" in s 26 of the Immigration Act 1971.

Held:

The applicant had at all times claimed he was the son of Gordhanbhai and Maniben Patel. As their son he was admitted to the United Kingdom. Subsequently the Secretary of State concluded he was not their son. The applicant's birth certificate and application for a passport were alleged to contain false information. He was alleged to have made false statements when extending his passport and applying for a special voucher. He was also alleged, when he presented his passport on admission to the United Kingdom, to be making by implication a representation which he knew to be false.
The case fell to be determined on the reliability that the judge felt able to accord to various affidavits, produced by one party or the other and in conflict on material issues. Initially the Secretary of State relied on there having been an offence under s 26(1)(d) of the Immigration Act 1971 (use of a passport or other document known to be false); in the course of the hearing, relying on the same facts, it was pleaded on behalf of the Secretary of State that there had also been an offence under s 26(1)(c) of the Act (making a false representation to an immigration officer). Counsel for the applicant raised objection to an extension of the grounds at that late stage.
Held:
1. On consideration of the affidavit evidence produced and applying the standard of proof laid down in ex parte Khawaja, the Secretary of State had proved his case. The judge doubted whether the Court could have benefitted, in the circumstances from hearing and testing in cross-examination, the witnesses whose affidavits were produced.
2. There was no detriment to the applicant in the Secretary of State extending the grounds in the course of the hearing, he relying essentially on the same facts as before, which facts were well-known to the applicant as being in issue.
3. In s 26 of the Immigration Act 1971, "false" must be held to have the same meaning as in s 9(1) of the Forgery and Counterfeiting Act 1981.
4. Neither the passport itself nor the passport containing the entry clearance was a false document within the meaning of "false" and no offence had been committed under s 26(1)(d) of the 1971 Act.
5. By presenting his passport, which he knew contained false material information to an immigration officer, the applicant committed an offence under s 26(1)(c): ex parte Kwame Addo not followed.

Cases referred to in the Judgment:

R v Dodge [1972] 1 QB 416: [1971] 2 All ER 1523.
R v Secretary of State for the Home Department ex parte Khawaja [1982] Imm AR 139
R v Secretary of State for the Home Department ex parte Kwame Addo (unreported, QBD 17 April 1985).
Ahmad v Secretary of State for the Home Department (unreported, CA, 27 May 1983)

Counsel:

KS Nathan for the applicant;
C Symons for the respondent
PANEL: Webster J

Judgment One:

WEBSTER J: This is an application by Dhirubhai Gordhanbhai Patel for a writ of habeas corpus ad subjiciendum directed to the Secretary of State for the Home Department and for an order quashing a detention order made by the Secretary of State on 10 August 1983. The applicant says that he is the son of Gordhanbhai Somabhai Patel and Maniben Gordhanbhai Somabhai Patel. The Secretary of State's case is that he is not their son but the son of Gordhanbhai Chaturbhai Patel and Madhuben Gordanbhai Chaturbhai Patel. There is no issue, however, as to his date of birth, which was 30 November 1962.
Although both Gordhanbhai Patel and Maniben Patel were born and married in India, they later became citizens of Uganda. They left Uganda 25 or 30 years ago and returned to India. By virtue of her citizenship of Uganda, Maniben Patel and her household were entitled to the benefits of the special voucher scheme introduced by the British Government in 1968 in order to assist citizens of East African states who had been obliged to leave them and who hold British passports.
Maniben Patel was the holder of a British passport and in 1976 a British passport was obtained in the name of the applicant as the son of Gordhanbhai and Maniben Patel. Gordhanbhai Patel died in 1977. In August 1981 the applicant applied for and obtained extension of his passport. Also in 1981 he made an application for a special voucher as a dependant of Maniben Patel. In due course Maniben Patel was issued with an entry clearance certificate entitling her to enter the United Kingdom and in January 1983 the applicant was also issued with an entry clearance certificate.
He entered this country on 24 January 1983 and was given leave to enter for an indefinite period. Maniben had arrived on 26 December 1982.
It is the Secretary of State's case that the applicant is an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971. The Secretary of State initially relied upon the contention that the applicant was an illegal entrant because he had committed a breach of paragraph (d) of section 26(1) of the Act, but he now relied on one or other or both of that paragraph and paragraph (c).
The Secretary of State alleges that the applicant's birth certificate and the application which was made for his original passport contained false information as to his parenthood, not necessarily with the applicant's knowledge or consent. But the Secretary of State also alleges that when the applicant applied to extend his passport and when he applied for a special voucher he made, in each case, a false statement about his parentage; he alleges that when he presented his passport, stamped with the entry clearance certificate, in order to enter this country he was using the document without lawful authority knowing it to be false; and he alleges that when he presented the passport at that time he was making, by implication, a representation which he knew to be false.

The role of this court, since the decision of R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74 has been summarised by May LJ in the unreported case of Ahmad v Secretary of State for the Home Department (DC/203/1980) when, in a judgment with which Waller LJ and Fox LJ agreed, and which was handed down on 27 May 1983, he said at pages 8-9 of the transcript:
"The role of the Court in these cases is to consider all the available material and to decide for itself whether it had been satisfied by the Secretary of State that the applicant for habeas corpus or certiorari is an illegal entrant for the reason to which I have referred. [A reference to section 21(1)(c)]. As I have said, the onus of proof in these cases is now firmly on the Secretary of State. Finally, the standard of proof required before the Court can come to the conclusion that the applicant has practised deceit is that of the balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As these cases involve grave issues of personal liberty, the Court should not be satisfied with anything less than probability of a high degree: the inherent difficulties of discovering and proving the true facts in many immigration cases affords no valid ground for lowering or relaxing the standard of proof required -- per Lord Scarman at page 346 and Lord Bridge of Harwich at page 356 of the report [in Khawaja]."

The evidence before this court consisted, on the applicant's side, of three affidavits: two from the applicant himself and one from Jayanti Suryakant Patel, who supports the applicant's case as to his parentage. The evidence filed on behalf of the Secretary of State consists of the affidavit of Norma Maria Williams, a senior executive officer in the Immigration and Nationality Department of the Home Office. She exhibits to her affidavit four records made by Mr Slade, an immigration officer, of interviews held by him of various persons, including the applicant. She also exhibits witness statements signed by seven of those persons.
When he opened this application on behalf of the applicant, Mr Nathan told me that he was tendering his client, the applicant, for cross-examination either by Mr Symons, who has appeared on behalf of the Secretary of State, or by the Court. He drew my attention to the following paragraph in the speech of Lord Bridge of Harwich in Khawaja at pages 124-125:
"If unlimited leave to enter was granted perhaps years before and the essential facts relied on to establish the fraud alleged can only be proved by documentary and affidavit evidence of past events which occurred in some remote part of the Indian sub-continent, the courts should be less, rather than more, ready to accept anything short of convincing proof. On the other hand, it must be accepted that proof to the appropriate standard can, and in the vast majority of cases will, be provided, in accordance with the established practice of the Divisional Court, by affidavit evidence alone. I understand all your Lordships to be agreed that nothing said in the present case should be construed as a charter to alleged illegal entrants who challenge their detention and proposed removal to demand the attendance of deponents to affidavits for cross-examination. Whether to permit cross-examination will remain a matter for the Court in its discretion to decide. It may be that the express discretion conferred on the Court to permit cross-examination by the new procedure for judicial review under RSC Ord, 53 has been too sparingly exercised when deponents could readily attend court. But however that may be, the discretion to allow cross-examination should only be exercised when justice so demands. The cases will be rare when it will be essential in the interests of justice, to require the attendance for cross-examination of a deponent from overseas. If the alleged illegal entrant applying for habeas corpus, certiorari or both, files an affidavit putting in issue the primary facts alleged against him he will himself be readily available for cross-examination, which should enable the Court in the great majority of cases to decide whether or not he is a witness of truth. If he is believed, he will succeed in his application. If he is disbelieved, there will be nothing to stop the Court relying on affidavit evidence, provided it is inherently credible and convincing, to prove the fraud alleged against him, even though it has not been tested by cross-examination."TMr Symons on behalf of the Secretary of State declined the invitation to cross-examine the applicant, rightly in my view. Mr Nathan did not apply to cross-examine Norma Williams and, even if he had, I could not have been much assisted by her cross-examination, because the Secretary of State relies not directly on her evidence but on Mr Slade's records of his interviews and on the witness statements, all of which are exhibited to her affidavit. Moreover, the applicant, had he been cross-examined, would have had to have given evidence through an interpreter; and even if the makers of those

witness statements had sworn affidavits and had been cross-examined on them, it is common ground that most, if not all, of them would also have had to have given evidence through an interpreter. I think that I would probably have gained very little assistance, possibly none, from hearing such evidence. I would have derived still less assistance from hearing only the evidence of the applicant.
I note, however, that in Khawaja at page 105 Lord Wilberforce said:
"An allegation . . . being of a serious character and involving issues of personal liberty, requires a corresponding degree of satisfaction as to the evidence. If the Court is not satisfied with any part of the evidence it may remit the matter for reconsideration or itself receive further evidence. It should quash the detention order where the evidence was not such that the authorities should have relied on or where the evidence received does not justify the decision reached or, of course, for any serious procedural irregularity."

During the hearing before me, I pointed that passage out to Mr Symons, inviting him to consider whether to apply for leave to put the evidence of the persons who made witness statements on affidavit, so that each party to the application could apply for leave to cross-examine the witnesses who had sworn affidavits on behalf of the other side. Mr Symons expressed the concern which the Department would feel if issues of this kind were to turn into a full scale trial, a concern which I may say I understand, although it is not perhaps for me to say whether or not I share it. Mr Symons, therefore, elected to stand firmly on the evidence in its present form. He submitted that on that evidence the Secretary of State's allegations are proved not merely to a high degree of probability, but overwhelmingly.
Before I embark on the exercise of putting all the evidence into the balance, it seems to be necessary, in view of what I have already said about the case, to explain the way in which, rightly or wrongly, I approach the evidence as a whole. On the fact of it, since none of it has been given on oath and tested before me, none of it should have very much weight, if the ordinary rules of evidence are applied to it. But, as I have already said, I doubt if I would get much more assistance in attempting to weigh the evidence if I had the witnesses before me. If the applicant is telling lies, it is obvious that he has been rehearsing the details of them for many years. The same applies, if they are telling lies, to those interviewed by Mr Slade from whom he took statements, because their evidence as a whole shows a remarkable consistency.
Moreover, it is not always easy to assess the credibility of a witness of one's own nationality who speaks one's own language; and what is not always easy to assess when the witness speaks one's own language becomes increasingly more difficult as more obstacles are introduced into the communication between Court and witness. With considerable diffidence, I think it is appropriate to quote and adopt in this particular context (I emphasise those four words) a passage from Lord Devlins's The Judge where he adopts part of a paper read by MacKenna J at University College, Dublin. Lord Devlin, at page 63, writes:
"The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness. On that I would adopt in their entirety (this being the highest form of judicial concurrence) the words of MacKenna J: 'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity?
For my part I rely on these considerations as little as I can help.
"'This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a

witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the Plaintiff's or the Defendant's.'"

Although those opinions in my respectful view overstate the difficulty of assessing the demeanour of a witness in an ordinary case, when the witness is English speaking, they do not, I feel, overstate the difficulty and may even understate it in a case such as the present one when most, if not all, of the witnesses would have to give evidence through an interpreter. Even if inconsistencies of detail, either as between one witness and another or within the evidence of any one witness, were to be revealed I would be unable to place any great reliance upn them unless I were able to decide whether they were to be attributable to lack of credibility or to the inability, which most if not all people share, first to observe accurately events that have happened and then to recall what they have observed with precision months or even years after the event. To assess the credibility of the witness, I would be dependent upon their demeanour and on their manner of giving evidence. In such a case as this I think that that would be very difficult. In this context I cite, also for the purpose of adopting it as an expression of my own view, a passage from "The Judge as Juror: The Judicial Determination of Factual Issues", a lecture delivered by Bingham J at University College, London, on 7 February 1985 and published in Current Legal problems, 1985, page 1. The passage, beginning at page 10 reads:
"However little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when (as happens in almost every commercial action and many other actions also) the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so. Scrutton LJ once observed: 'I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not'. If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."

I have set out my approach to the evidence in this case in some detail in order to explain why I feel able to give any weight at all to the evidence adduced on behalf of the Secretary of State and why I have not simply taken the view that, on the issue raised in this case, the Secretary of State cannot even begin to establish his allegation to the high degree of probability necessary, without filing affidavits to prove those allegations directly rather than by hearsay, and without making the deponents to those affidavits available for cross-examination. This approach is not, perhaps, as startling as it might first appear, because Lord Templeman in Khawaja at page 128 said:
"I agree with my noble and learned friend, Lord Scarman, that the burden of proving that leave to enter was obtained by fraud and that consequently the entrant is an illegal entrant liable to arrest and expulsion can only be discharged by the immigration authorities manifesting to the satisfaction of the court a high degree of probability. It does not follow that the court must disregard written statements by witnesses who are not available for cross-examination or documents which are not supported by direct written or oral evidence as to the circumstances in which they came into existence."

I have not, however, overlooked the following paragraph in that same speech; and I recognise that, when I attempt to evaluate the evidence, no single piece of it except that directly deposed to in affidavits sworn on either side can be, prima facie, of much weight.

It is necessary to introduce a consideration of the evidence by setting out the family tree of Gordanbhai and Maniben Patel. It is common ground that (leaving the applicant out of account for a moment) they had three sons and one daughter. The daughter is Indiraben Patel. One of the sons is Kamlesh Kumar Patel, another is Rameshbhai ("Ramesh") and the third is Bipinchandra ("Bipin"). Bipin married Bhartiben ("Barti").

I have already mentioned Jayanti Patel, whose affidavit is relied upon by the applicant. He is the son of Suryakant Patel and Suryakant Patel is the brother of Ratilal Patel. It is common ground that neither of those two brothers were brothers of Gordhanbhai Somabhai Patel. The Secretary of State's case is that the applicant is the nephew of Ratilal and Suryakant Patel, but the applicant denies it.

The applicant's case can, I hope fairly, be summarised as follows. Almost all the documents establish that he is the son of Gordhanbhai Somabhai Patel and Maniben. I say "almost all; because, as will be seen, he cannot make that contention in relation to the declaration of sponsorship made by Suryakant Patel on 23 December 1982. The applicant swears on oath that he is the son of Maniben and the Department's evidence shows that he has persisted in that assertion, even when challenged and shown evidence inconsistent with it, on every occasion on which he has been asked about it. Jayanti Patel has sworn an affidavit to the same effect. Finally, three of the witnesses upon whom the Department relies have at one time said that the applicant is Maniben's son although they later retracted those statements. The witnesses in question are Maniben herself, Kamlesh and Indaraben.

The Department's case, in summary, is that eight people, seven of whom have signed witness statements, had stated on eleven different occasions that the applicant was not the son of Maniben. Those witnesses included Maniben herself, Bipin, Bharti, Ramesh, Kamlesh and Indiraben Balubhai Patel and Urmilaben Kanji Patel, the wife of the owner of the address where Maniben Patel lives. The evidence of those witnesses (although not each of them speaks to a threat) is that Maniben and Kamlesh falsely obtained a passport for the applicant as Maniben's son as a result of threats made by Madhuben Patel. The fact that three of those witnesses each at one time in 1983 said that the applicant was Maniben's son is attributed to threats from the same source. The Department also relies upon Suryakant Patel's sponsorship declaration, in which he describes the applicant as his nephew and on the fact that a letter was found in the applicant's room addressed to Ratilal Patel, signed "Dhiru" and opening with the words "My dear big uncle". They rely also on the evidence of Mr Slade's report of 6 September 1983 that when he interviewed Ratilal Patel on 31 August 1983 and asked him about the applicant's parentage Ratilal, who was either his sponsor or the brother of his sponsor, said that "It was not his family and he did not know".

Finally, Mr Symons comments on the evidence that there was every motive, on the part of the applicant's family, for procuring a deception to enable the applicant to get into this country; that it was inherently unlikely that a mother would repudiate her child; and that Maniben's and Ramesh's evidence that they had been threatened by Madhuben Patel was wholly plausible.

If there were only one or two "witnesses" on either side I would, obviously, be quite unable to decide that the Secretary of State had proved his allegations to the high degree of probability necessary without hearing at least some of those witnesses. But there are so many witnesses who support the Secretary of State's case that I have no hesitation in concluding, despite the fact that the evidence of each of those witnesses taken separately is of little weight, that weighing the evidence as a whole the Secretary of State has established, to that high degree of probability, that the applicant is not the son of Maniben Patel. I might have had more difficulty in arriving at that conclusion if anyone had been able to suggest a motive for so many witnesses (albeit most if not all of them of the same family) telling the same untrue story. But the only suggestion made, by the applicant in his affidavit, is that he did not get on well with Maniben.

I return, therefore, to section 26 of the Immigration Act 1971. Section 26(1)(d) upon which the Secretary of State initially relied, provides that a person should be guilty of an offence: 'If, without lawful authority, he . . . uses for the purposes of this Act . . . any passport . . . entry clearance . . . or other document which he knows or has reasonable cause to believe to be false." Mr Symons submits that on the facts of this case the applicant was using a passport and entry clearance which he knew to be false because in his application to extend his passport he

had falsely stated that his parents were Gordhanbhai and Maniben Patel and because in applying for his voucher (as a result of which application it seems that his entry clearance was ultimately given) he had made the same false statement. In these circumstances he submits that the applicant was using documents which he knew to be false. Mr Nathan, I think, would argue that, however the passport and entry clearance may have been obtained, they were not "false". If the word "false" in this context has the same meaning as it has for the purposes of the Forgery Act 1913 or the Forgery and Counterfeiting Act 1981, neither the passport of itself, nor the passport containing the entry clearance, was a false document. It was not false within the meaning of that word in section 9(1) of the 1981 Act, nor does the document "tell a lie about itself": see R v Dodge [1972] 1 QB 416 at page 419 per Phillimore LJ giving the judgment of the Court of Appeal. No authority was cited to me which enables me to put any less restricted meaning on the word and accordingly I conclude that neither the passport of itself nor the passport containing the entry clearance was a false document and that therefore no offence was committed under section 26(1)(d).

Mr Symons, however, submits that if there was not an offence under section 26(1)(d), there was one under section 26(1)(c). That subsection provides: "If on any such examination [ie an examination under Schedule 2 of the Act] or otherwise he makes . . . to an immigration officer or other person lawfully acting in the execution of this Act a . . . representation which he knows to be false or does not believe to be true."

Mr Nathan submits that it was too late for the Secretary of State at a late stage of the hearing of the application to "change his ground" and attempt to rely upon section 26(1)(c) instead of, or as well as, section 26(1)(d). In my view in the circumstances of this case there is no force in that submission. The facts relied upon by the Secretary of State in support of this contention are, substantially, the same as the facts upon which he relied in contending that there was an offence under section 26(1)(d), being the facts referred to in the Minister of State's letter of 12 March 1984 included in the bundle and the facts which the Secretary of State sought to prove in the evidence adduced on his behalf. It has not been necessary at any stage to place formal reliance on any one particular paragraph of the subsection and it cannot be said that the applicant is taken by surprise by this change of approach. In my judgment, therefore, it is open to Mr Symons to rely upon paragraph (c).

Relying upon that paragraph he makes two distinct submissions. The first, relying upon the words "or otherwise" and "or other person lawfully acting in the execution of this Act", is that the applicant made a false representation (or statement) when applying for an extension of his passport and when applying for a special voucher. Although I have found (because until a late stage of the hearing there was no dispute about it) that the applicant applied for and obtained an extension on his passport and that he applied for the special voucher, Mr Nathan, rather belatedly, protests that those facts were never admitted. Moreover, there is undoubtedly a certain amount of doubt about whether the entry clearance was issued consequent upon the application for a special voucher or some other application. Although I would, if necessary, conclude that the applicant had committed a breach of section 26(1)(c) by making those applications, it does not seem to be necessary finally to decide that matter because of the second way in which Mr Symons relies upon this paragraph, namely by contending that when the applicant presented his passport to the immigration officer on entering this country he thereby was, by his conduct, making a representation which he knew to be false.

In this connection, Mr Symons drew to my attention an unreported decision of Hodgson J in R v Secretary of State for the Home Department, Ex parte Kwame Addo of 17 April 1985 in which Hodgson J decided that a person who presents his passport to an immigration officer on entering this country, if he says nothing, is making no representation about it at all, either expressly or by implication. In that case the applicant, after a chequered immigration history spread over seven years which he had spent in this country, in September 1982 went to Holland for six days. On his return on 8 September 1982, as a result of a false misrepresentation made by him to the immigration officer, his passport was endorsed with indefinite leave to enter. In February 1983 he went to Ghana and returned to the United Kingdom on 22 February, presenting his passport to the immigration officer. It contained the indefinite leave obtained on 8 September which had been obtained by misrepresentation. There was no doubt but that he had

been an illegal entrant when he was given leave to enter as a result of the misrepresentation on 8 September 1982, but on his return to this country, after leaving it again, in February 1983 he was asked only one question, which was how long he had been in England which he answered truthfully "seven years".
The question therefore before Hodgson J was whether he unlawfully entered the United Kingdom in February 1983 in breach of the immigration laws and that question, in turn, depended upon whether he had made a false statement or representation on that occasion in breach of section 26(1)(c). At page 8 of his judgment Hodgson J said this:
"Applying section 26 to the facts of this case, the short question therefore is whether by merely handing his passport to the immigration officer the applicant made a false representation. It is difficult to see how it can be said that he did. The leave to enter was not a nullity, and the immigration authorities had taken no steps to 'seek to secure his summary removal under Schedule 2'. By providing elaborately for the punishment of the use of false documents in section 21(1)(d), Parliament seems to have accepted the difficulties involved in categorising mere conduct as a representation. Of course, conduct accompanied by silence can amount to a representation. But even if the presentation of the passport and nothing more can be a representation, it is difficult to see how in this case, it was a false one. It said nothing about the passport itself which was not accurate."

With the greatest respect to the learned judge, I do not agree with his conclusion. I, of course, acknowledge that the case of Khawaja decided that there is no positive duty of candour approximating to a requirement of utmost good faith on an immigrant to disclose all material facts in relation to an application to enter, but that case also decided that silence as to material facts is capable of amounting to deception so as to render a person who had gained leave to enter by such deception an illegal entrant. I acknowledge also that for a representation to be false within the meaning of the subsection it has to be a representation of present, not of a previous, fact. But in my view the applicant when he entered the United Kingdom in the present case, by presenting his passport, with its entry clearance, to the immigration officer impliedly stated, by that conduct, that, "I believe that I am entitled to present to you this passport which I believe has not been fraudulently obtained and which contains an entry clearance which I believe has not been fraudulently obtained". Expressed more colloquially, the representation is "This is my passport on which I rely in seeking to gain entry: there's nothing wrong with it, so far as I know". Such a statement or representation, if to be implied, was false to the applicant's knowledge and in my judgment on entering the United Kingdom in those circumstances he was guilty of an offence under section 26(1)(c) of the Act.
For all these reasons I dismiss this application.

DISPOSITION:

Application dismissed

SOLICITORS:

Munir & Co, London; Treasury Solicitor