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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Ajiboye's Application [2008] NIQB 110

AN APPLICATION FOR JUDICIAL REVIEW BY OLANYINKA OLAYIWOLA AJIBOYE

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McCLOSKEY J

I INTRODUCTION

[1] This is another of the seemingly increasing number of illegal entrant cases which come before the Judicial Review Court in this jurisdiction.

[2] **Olanyinka** Olayiwola Ajiboye, a Nigerian National, the Applicant in these proceedings, has been granted leave to apply for judicial review of an Immigration Officer's decision whereby it was determined that the Applicant was an illegal entrant, on 26th July 2008, and was detained accordingly. The formal Notice of decision expresses the impugned determination in the following terms:

> "*You were silent in your statements to the on-entry Immigration Officer as to material facts and there are reasonable grounds to believe you made misrepresentations on your visa application form in that you have a wife and children all of whom are asylum seekers resident in the Republic of Ireland*".

This Notice is dated 26th July 2008. It was followed by "Removal Directions" dated 27th July 2008. Two days later, on 29th July 2008, the Applicant was granted leave to apply for judicial review and appropriate interim relief. In the event, it would appear that the Applicant subsequently returned to his native country, Nigeria, presumably for business reasons.

[3] In an impressive skeleton argument, Mr. McQuitty, on behalf of the Applicant, realistically refined the grounds of challenge and reduced these still further at the outset of the substantive hearing (on 9th October 2008). The sole enduring ground of challenge resolves to the proposition that, applying the principles in ***Khawaja –v- Secretary of State for the Home Department*** [1984] AC 74, the Respondent has failed to establish, to the requisite standard, that the Applicant was an illegal entrant, with the result that the impugned determination should be quashed. In a skeleton argument of equal quality, Mr. McGleenan, on behalf of the Respondent, replied accordingly. At the substantive hearing, both parties' counsel presented concise submissions which reflected the sole, central issue to be determined.

II THE EVIDENCE – A SUMMARY

[4] The story begins with a document of undeniable importance, the completed Form VAF 1, signed by the Applicant and dated 15th February 2007. By this document the Applicant applied for a visa permitting him to visit the United Kingdom (commonly known as "a visitor's visa"). His completed application form has the following salient features:

(a) He described himself as Nigerian by birth.

(b) He stated that his marital status was that of a married person.

(c) He disclosed the name, nationality and date of birth of his spouse.

(d) He represented that his spouse was then in Nigeria.

(e) He disclosed the existence of a single child of the family (Esther, born on 24th March 2004).

(f) He stated that it was his intention to arrive in the United Kingdom on 26th February 2007, solely for the purpose of a visit of three weeks' duration.

(g) He represented that he had family or close friends in the United Kingdom and provided suitable particulars.

(h) He provided particulars of an address in London and a London telephone number in response to a request to "*… give the full address and telephone number of all the places where you will be staying during your visit, including hotels*".

(i) In answer to certain questions grouped under the heading "Transit", he represented, through the abbreviation "N/A" that he would not be travelling to any country following his visit to the United Kingdom.

[5] On the final two pages of his completed visa application form, the Applicant executed an elaborate and solemn declaration in which he warranted, *inter alia*:

> "*I hereby apply for an entry clearance to the United Kingdom. The information I have given is complete and true to the best of my knowledge …*
>
> *I confirm that if, before this application is decided, there is a material change in my circumstances or new information relevant to this application becomes available, I will inform the United Kingdom Diplomatic Post at which I have applied …*
>
> *I declare that the information given on this form is correct to the best of my knowledge and belief*".

The Applicant further warranted:

> "*I am aware that it is an offence under the Immigration Act 1971 … to make to a person acting in execution of the Act a statement or representation which the maker knows to be false or does not believe to be true and to obtain or seek to obtain leave to enter in the United Kingdom by means which include deception*".

[6] Pursuant to his application, the Applicant was granted a visa which entitled him to make multiple visits to the United Kingdom, subject to a maximum period of 180 days, during the period 19th February 2007 to 19th February 2009. The stamps on this document (though somewhat difficult to decipher) suggest that he subsequently made use of this visa on two occasions, in November 2007 and, more recently, when he entered the United Kingdom on 23rd July 2008, thereby setting in train the chain of events culminating in the impugned determination.

[7] The evidential materials also include a visa authorising the Applicant to visit the Republic of Ireland on terms expressed as "*visits – strictly no extensions*" between 14th July and 13th October 2008. The Applicant (significantly, in the events which occurred) exercised his right to visit the United Kingdom under his UK visitor's visa just nine days after the operative date of his Irish visa. The completed landing card which is habitually

generated in such circumstances does not feature in the evidence before the court.

[8] Continuing the chronology, paragraph 11 of the Applicant's affidavit contains the following salient averment:

> "*On 23rd of July, I entered the United Kingdom via Heathrow Airport to visit my cousin … and also to attend to a church meeting billed to hold* [sic] *on Friday, the 25th of July 2008 at Goresbrook Center, Barking/Dagenham in London …*
>
> [12] *After the meeting in London I boarded an Easyjet flight to Belfast from Stanstead Airport on Saturday the 26th of July 2008 with a view to join with my brother-in-law, Adewunmi Lasisi, who resides in the Republic of Ireland and was visiting Belfast to attend to some personal matters …*
>
> [13] *The idea really was to join with my brother-in-law with initial plans to spend a day or two at Belfast City before we proceed to the Irish Republic in his vehicle*".

It is noteworthy that the Applicant's wife and children feature nowhere in these averments. Nor is there any mention of a firm of solicitors in Dublin.

[9] The Applicant was interviewed at Belfast International Airport between 16.55 and 17.50 hours on 26th July 2008 by Mr. Harrison, Immigration Officer. The questions and answers documented in the interview transcript include the following:

> "Where are you travelling to today?
>
> *Dublin.*
>
> Why are you going to Dublin?
>
> *On business, I'm a lawyer. I'm meeting with Ceemex and Company Solicitors …*
>
> Are there any children of your marriage?
>
> *Three.*
>
> What are your childrens' names, dates of birth and nationalities?

[Supplies three names, with dates of birth 14/03/04, 03/03/06 and 18/06/08].

Where are your wife and children now?

They're in Newbridge in Ireland.

How long has your wife been in Ireland?

She went there when she had the first child in 2004.

What is her immigration status in the Republic of Ireland?

I'm aware that she sought asylum there then went to court for the Irish born citizen.

Are you intending to see your wife and children during your stay in Dublin?

Yes, sure for personal reasons …

On your visa application form what did you declare was the places of residence of your wife?

As far as I can remember its Ireland.

I believe that you would not have been issued a UK visa if you had declared that your wife was living in Ireland?

I wouldn't know why.

On your visa application form what did you declare was the places [***sic***] of birth of your child?

I think I wrote Enniscorthy in Ireland.

Did you see an Immigration Officer when you arrived in the UK?

I came through Heathrow, I did.

What did you tell the Immigration Officer was the purpose for your travel to the UK?

I told her I was visiting. She didn't ask me much.

> Did you tell the Officer that you intended to travel to Dublin to visit your wife and children, asylum seekers resident in the State?
>
> *She didn't ask me.*
>
> Did you tell the Officer that you had items in your baggage intended for contacts in the Republic of Ireland?
>
> *She didn't ask me, she didn't.*"

[10] During the interview, the Applicant was also requested to indicate the purpose which he had specified in his Irish Visa Application Form. He replied "*It's business actually*". As appears from paragraph **[7]** above, this is not easily reconciled with the terms of the visa itself ("*visits*"). Moreover, as appears from the transcript excerpts above, the Applicant was rather non-committal about the immigration status of his spouse in the Republic of Ireland. In paragraph 16 of his affidavit, the Applicant avers, in terms, that the Irish Justice Department has not yet determined an application for residency rights by his wife and children. In contrast, both during interview and in other parts of his affidavit, the Applicant has attempted to assert that his wife and children have acquired rights of this kind in the Republic of Ireland. However, having regard to all the evidence adduced on this issue, I hold that their status in the other jurisdiction remains unresolved.

[11] According to Mr. Harrison's affidavit, a search of the Applicant's baggage at Belfast International Airport revealed a woman's clothing, children's DVDs, the original Irish Birth Certificate for one of his children and pages of an Irish Passport Application for the same child. The interview transcript includes a question whereby the Applicant was asked whether these articles were intended for his wife and children. His reply was "*They're for my wife's sister and her children. They too live in Ireland.*" The Applicant confirmed that he had brought the articles from Nigeria. Finally, Mr. Harrison noted, significantly, that the Applicant's plane ticket to Belfast had been purchased on 22nd July 2008 viz. the day prior to his arrival in the United Kingdom from Nigeria.

III STATUTORY FRAMEWORK

[12] By Section 24A(1)(a) of the Immigration Act 1971 ("*the 1971 Act* "), a person who is not a British citizen commits an offence if "*… by means which include deception by him* ", he "*… obtains or seeks to obtain leave to enter or remain in the United Kingdom …* ". By Section 26(1)(c), a person shall be guilty of a

summary offence if, upon examination by an Immigration Officer under Schedule 2, "*… he makes or causes to be made to an Immigration Officer or other person lawfully acting in the execution of* [a relevant enactment] *a return, statement or representation which he knows to be false or does not believe to be true* ". "*Illegal entrant* " is defined in Section 33(1) as "*… a person entering or seeking to enter the United Kingdom,*" being a person "*(a) unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or (b) entering or seeking to enter by means which include deception by another person* ".

[13] Schedule 2 contains an array of provisions, described as "*administrative* ", relating to "*Control on Entry etc.*". As appears from paragraph 1, Immigration Officers are statutory office holders, appointed by the Secretary of State for the Home Department. By paragraph 2, an Immigration Officer is authorised to examine any person who has arrived in the United Kingdom for the purpose of determining, *inter alia*, whether such person is a British citizen and whether a non-British citizen may enter the United Kingdom without leave. By paragraph 2A, questioning is also permitted to establish whether a person holding leave to enter obtained such leave "*… as a result of false information given by him or his failure to disclose material facts …* ". Paragraph 6 authorises the Immigration Officer to refuse leave to enter, within twenty-four hours. By Schedule 2, paragraph 8 and paragraph 9, in conjunction, the Immigration Officer is empowered to make directions for the purpose of removing the individual concerned from the United Kingdom. Paragraph 16(2) confers a corresponding power of detention, pending a decision whether to make removal directions **or** to effect removal pursuant to such directions.

IV GOVERNING PRINCIPLES

[14] A determination by an Immigration Officer that a person is an illegal entrant is vulnerable to challenge by an application for judicial review. Such applications belong to a discrete category, where special legal rules and principles apply. These are found in the decision of the House of Lords in ***Khawaja –v- Secretary of State for the Home Department*** [1984] AC 74. While this particular field of judicial review has generated a substantial quantity of judgments, many of these are simply instances of the application of the ***Khawaja*** principles to a particular factual matrix and are not authorities in themselves. The present case is no exception, in this respect.

[15] In ***Khawaja*****,** there were two Appellants. The first Appellant [Khera], in securing his certificate of entry to the United Kingdom and indefinite leave to enter, failed to disclose his marriage to the immigration authorities. The second Appellant [***Khawaja***], in securing leave to enter the United Kingdom, falsely represented that he had married a lady in the United Kingdom and failed to disclose that he had married her prior to securing entry. The appeal of Khera was allowed, while that of ***Khawaja*** was dismissed.

[16] The primary issue for their Lordships was the true meaning of the expression "*illegal entrant* " in the 1971 Act. On this issue, Lord Bridge concluded [p. 117]:

> "*My Lords, in my opinion, the question whether a person who has obtained leave to enter by fraud '**has entered in breach of the Act**' is purely one of construction. If the fraud was a contravention of Section 26(1)(c) … and if that fraud was the effective means of obtaining leave to enter - in other words if, but for the fraud, leave to enter would not have been granted - then the contravention of the Act and the obtaining of leave to enter were the two inseparable elements of the single process of entry and it must inevitably follow that the entry itself was '**in breach of the Act**.' It is on this simple ground and subject to the limitations that it implies that I would rest my conclusion that those who obtain leave to enter fraudulently have rightly been treated as illegal entrants.*"

The Appellate Committee was unanimous in this conclusion: see, for example, per Lord Fraser [p. 95] and per Lord Scarman [p. 106].

[17] The second issue of general importance arising is described and determined by Lord Fraser in the following passage [p. 96]:

> "*The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort … On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an **ex facie** valid permission if the person is an illegal entrant. That is a **precedent fact** which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond enquiring only whether he had reasonable grounds for his belief.*"

On the issue of standard of proof, Lord Fraser continued:

> "*With regard to the standard of proof, I agree with … Lord Scarman that for the reasons explained by him, the appropriate standard is that which applies generally in civil proceedings namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and*

> *gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be high.*"

[18] Lord Scarman, addressing the first of these questions, stated that "… *where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied* " [p. 109]. Regarding burden and standard of proof, he stated [p. 113]:

> "*Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices: but the degree of probability must be such that the court is satisfied.*"

On this issue, Lord Wilberforce expressed himself thus [p. 123]:

> "… *the civil standard of proof by a preponderance of probability will suffice, always provided that, in view of the gravity of the charge of fraud which has to be made out and of the consequences which will follow if it is, the court should not be satisfied with anything less than probability of a high degree.*"

[19] As regards the primary issue viz., entry by deception, it is clear from **Khawaja** and subsequent decided cases that the essential test is one of **materiality**. The alleged deception must be material in the sense that it is a factor which precipitated the decision granting leave to enter. This is made particularly clear in the decision of the English Court of Appeal in ***Kaur -v- Secretary of State for the Home Department*** [1998] Imm.Ar.1, where it was held that the test of materiality is whether the deception "… *was likely to influence the decision* " [per Ward LJ, p. 9]. The court also applied MacDonald's textbook formulation of the test [**Immigration Law and Practice**, paragraph 3.18]:

> "*Has there been a failure to disclose facts which the Applicant knew or ought to have known would be relevant in considering whether to grant the visa* "?

Applying these tests, the Court of Appeal concluded:

> "*If the test is in those terms, then it is beyond question that it was relevant for the entry clearance officer to know that the Appellant's husband was languishing in prison and was at that time quite unable to offer to accommodate her or to support her.*"

[20] A clear example of deception by conduct (effectively by silence or concealment) is provided in ***Regina -v- Secretary of State for the Home Department, ex parte Awan*** [1996] Imm.Ar.354, where the Applicant, in securing her visitor's visa, failed to disclose the true reasons for and circumstances in which she was leaving Pakistan for the United Kingdom (a forced, indefinite departure rather than a finite social visit). There, Buxton J stated (at p. …):

> "*The presentation of a passport or the presentation of an entry clearance visa that has been formulated on a basis that no longer persists or no longer represents the totality of a person's intentions or possibilities is and it is clearly held by the authorities to be an act of deception under the guidance given in* ***Khawaja***."

In ***Re Udu and Nyenty's Application*** [2007] NICA 48, Campbell LJ stated, at paragraph [21]:

> "*We agree that a representation may be implied from the silent presentation of a passport that the holder is seeking entry for the purpose for which the visa which has been obtained and no other*".

[21] Similarly, in ***Regina –v- Secretary of State for the Home Department, ex parte Al-Zahrany*** [1995] Imm. AR 510, the English Court of Appeal held:

> "*In my judgment in proffering a passport which contains a visa valid for the purpose of a visit to this country and to enable her to become a visitor to this country (and that being the leave to enter which she obtained) she* [the Applicant] *is plainly making, albeit silently, a representation that that is the purpose of her visit*".

[Per Stuart-Smith LJ].

In the light of my conclusions (*infra*), it might be said that this passage is tailor made for the present case.

[22] In summary, in this particular *genre* of judicial review challenge, the question for the court is whether the Applicant was an illegal entrant. The Respondent must establish, to a high degree of probability, that this was the Applicant's status. In principle, this can be established if the Applicant was guilty of deception in obtaining his visa or securing entry to the United

Kingdom. The Applicant must not mislead the immigration authorities in respect of any material fact. A fact can be material even though it is not necessarily decisive in securing the visa or effecting entry.

V CONCLUSIONS

[23] I am satisfied, to a high standard of probability, that the Applicant was an illegal entrant, having sought to obtain and having obtained leave to enter the United Kingdom by means including deception, within the compass of Section 24A(1) of the 1971 Act. I hold firstly that the Applicant practised deception through a series of positive misrepresentations and material non-disclosures in the completion and submission of his Visa Application Form. Specifically, and in particular, he positively represented that he was the father of one child only; he positively represented that his wife was in Nigeria; he further represented that the sole purpose of his contemplated journey to the United Kingdom was to visit for a period of three weeks at a specified address in London; and he positively represented that he had no intention of visiting any other country. I hold that all of these were deceitful misrepresentations. Simultaneously, there were material non-disclosures in the completed Visa Application Form. Predominantly, the Applicant failed to disclose the existence of his second child (who, according to what he informed Mr. Harrison subsequently, had been born on 3rd March 2006); he failed to disclose his wife's true whereabouts viz. the Republic of Ireland; and he failed to reveal the true and main purpose of his proposed journey to the United Kingdom which, I hold, was to travel onwards to the Republic of Ireland to visit his wife and children. I find that each of these non-disclosures was deceitful. Further, there can be no doubt that the Applicant's deception was material, in the sense that his misrepresentations and non-disclosures are clearly likely to have influenced –

(a) the decision to grant him a visa; and

(b) the decision at Heathrow Airport to allow his entry.

[24] Fundamentally, I hold that the Applicant, when applying for his visa, intended to secure it for the purpose of a transitory visit to the United Kingdom, his main objective being to visit his wife and children in the Republic of Ireland. Thus there was a highly material non-disclosure in the completed Form. Furthermore, the true purpose of the visit is also betrayed, in my view, by the date when the London to Belfast plane ticket was purchased. Equally damning of the Applicant is the evidence about the contents of his baggage, as revealed by the search at Belfast International Airport on 26th July 2008. Significantly, the Applicant's affidavit does not address either of these matters.

[25] There is no evidence that the Applicant made any positive misrepresentation when interviewed by an entry Immigration Officer upon his arrival at Heathrow. However, I hold that he was guilty of the same deceitful non-disclosures as those detailed in paragraph [23 and 24] above. I further hold that the presentation of his passport and visa upon arrival constituted, as in ***Al-Zahrany***, ***Awan*** and ***Udu*** and ***Nyenty***, a positive silent misrepresentation that the sole purpose of the journey was to visit the United Kingdom. Notably, the Applicant's affidavit is silent with regard to the events which occurred upon his arrival at Heathrow Airport.

[26] I reject the argument advanced on behalf of the Applicant that, in determining whether he was an illegal entrant, the court should confine itself to the (meagre) evidence about what transpired during the Applicant's interaction with the Immigration Officer at Heathrow Airport. The correct approach, in my view, is to consider all evidence having a bearing on the question of whether the Applicant obtained or sought to obtain leave to enter the United Kingdom by means including deception. Adopting this approach, and having regard to those aspects of the evidence highlighted particularly above, I conclude, applying the high preponderance of probabilities standard, that this is a clear case of entry by deception, thereby constituting the Applicant an illegal entrant. It follows that his application for judicial review must be dismissed.

[27] While I am provisionally minded to apply the general rule that costs follow the event, I shall hear further argument on this matter, if required. I note that the Applicant is a legally assisted person.

[28] Finally, I record my gratitude to the parties' counsel for their cogent and focussed submissions.