

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
WANDERVAL OLIVEIRA DA SILVEIRA FOR JUDICIAL REVIEW
AND IN THE MATTER OF A DECISION BY AN IMMIGRATION
OFFICER

TREACY J

Introduction

[1] In this judicial review the applicant seeks to impugn the respondent's decision of 2 March 2008 that he is an illegal entrant to the UK.

Background

[2] The applicant is a Brazilian national who arrived in the United Kingdom on a local journey from the Republic of Ireland on 2 March 2008 having been granted leave to enter the Republic of Ireland (ROI) as a visitor on 1 March 2008 for a period of 5 days.

[3] The applicant was stopped at Belfast docks in or around 7.20am on 2 March 2008 by Immigration Officer Ian Dower at a control point, with the intention of taking a boat to Liverpool. During an after caution interview the applicant admitted that (1) he had arrived in Belfast the previous day having travelled from the ROI;(2) he advised the Irish Immigration Officer in Cork that he was going to travel around and stay in the ROI for 5 days and was going to see the Irish coastline;(3) that he did not inform the Irish Immigration Officer that he intended to travel to the United Kingdom and (4) that he travelled straight to Belfast from Cork because he wanted to go to the UK.

[4] Immigration Officer Dower then contacted Detective Inspector Philip Ryan of the Garda National Immigration Bureau in the ROI and informed him of the encounter with the applicant. DI Ryan advised Mr.Dower that on

the basis of the information now known the applicant's leave to enter the ROI had been revoked because he had used deception to enter there. DI Ryan requested that Mr Dower send copies of any interview notes and other evidence to him at the first available opportunity and that he would send written confirmation of his decision when he had the opportunity to do so. On 5 March 2008 DI Ryan forwarded a letter in relation to the applicant confirming that the applicant's leave to enter the ROI had been revoked.

[5] Mr Dower then referred the applicant's case to Chief Immigration Officer Peter Bradshaw who was fully briefed about the encounter with the applicant, the content of the interview under caution and the results of checks with the Border and Immigration Agency and the Garda National Immigration Bureau. As appears from para. 4 of his affidavit he then concluded as follows:

"The applicant's entry had been declared unlawful by a competent authority in the Republic of Ireland. Articles 3(1)(b)(ii) and 3(2) of the Immigration (Control of Entry Through the Republic Ireland) Order 1972 state that a person who has entered the Republic unlawfully from a place outside the common travel area is excluded from Section 1(3) of the Immigration Act 1971. Such a person therefore does not benefit from the deemed leave provisions set out in Article 4 of the 1972 Order. Accordingly, I concluded that the subject had entered the UK without leave, in breach of Section 3(1)(a) of the Immigration Act 1971."

[7] The applicant was then served, inter alia, with a notice to the effect that he is an illegal entrant to the UK. Directions were set for the applicant's removal from the UK on 6 March 2008. Though granted leave to apply for judicial review the applicant was refused a stay on removal. This refusal was upheld by the Court of Appeal following an emergency appeal of the leave judgment on 6 March 2008. Accordingly the applicant was removed from the UK on 6 March 2008.

Lack of Sworn Affidavit

[8] The application proceeded at the leave stage on the basis of the applicant's unsworn affidavit. However after leave had been granted the

applicant's solicitor filed an affidavit sworn on 14 March 2008 in which she stated at Paragraph 4 :

“On the basis of the applicant’s instructions, I have prepared a draft affidavit which I believe to reflect the applicant’s instructions accurately. I refer to the unsworn but approved affidavit of the applicant together with exhibits in the bundle of documents exhibited hereto marked ‘HLM1’ and upon which I have signed my name at time of swearing. I undertake to have a sworn affidavit of applicant filed with the court if same has been returned by the applicant to this office.”

[9] When the matter came before myself there was still no sworn affidavit. Counsel for the applicant indicated that his solicitor had sent the applicant an email but that no response had been received. This would appear to indicate that the applicant has lost interest in the proceedings or for some reason did not want to commit his evidence to oath or perhaps a combination of both.

[10] One effect of the applicant’s failure to provide a sworn affidavit or to respond to his solicitor’s email is that she has not been able to discharge the undertaking. Failure (or refusal) to swear an affidavit has been deprecated in the past – see *In Re Copeland* [1990] NI 301.

[11] Whilst the courts have in exceptional circumstances been prepared to proceed at the leave stage on the basis of an unsworn affidavit the same considerations self evidently do not apply at the substantive hearing.

[12] Judicial review is a discretionary remedy. In my view the failure or refusal of this applicant to swear an affidavit verifying the facts relied upon by him require this application to be dismissed. His conduct has meant that the requirements of Order 53 have been flagrantly breached; it may betoken as I said earlier a lack of interest in the proceedings or refusal to depose on oath or both; and it has led to the solicitor being unable to fulfil the undertaking she gave in her own (sworn) affidavit.

Substantive Issues

[14] I did however hear full argument from both sides on short, but important, legal issues raised by the application and I consider that it might be of some assistance if I rule upon these.

Statutory Framework

[15] Section 1(3) of the Immigration Act 1971 provides:

“Arrival in and departure from the United Kingdom on a local journey from or to the Islands (... Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall any person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this sub section under the powers conferred by this Act; and in this Act the United Kingdom and those places or such of them as are not so excluded, are collectively referred to as the ‘common travel area’.”

[16] Article 3 of the Immigration (Control of Entry Through Republic of Ireland) Order 1972 provides that the Republic of Ireland shall be excluded from Section 1(3) of the Immigration Act 1971 in relation to any person who arrives in the United Kingdom on a local journey from the Republic of Ireland if, according to Article 3(b)(ii);

“He entered that Republic unlawfully from a place outside the common travel area.”

[17] The combined effect of these provisions is that arrival in the United Kingdom on a local journey from the Republic of Ireland shall be subject to control under the 1971 Act if the individual entered the Republic of Ireland unlawfully from a place outside the common travel area.

[18] Section 33(1) of the Immigration Act 1971 defines “illegal entrant” as 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 and includes a person who has entered as mentioned in paragraph (a) or (b) above.”

Submissions

[19] It was not disputed that the applicant entered the United Kingdom without leave. Counsel for the applicant submitted the principal issue in the case was whether or not the applicant required leave as a matter of law in the circumstances of his arrival. He submitted that the issue of whether there was a statutory requirement on the applicant to have leave to enter the UK had to be determined at the time of entry. He submitted that as a matter of fact the

applicant had sought and obtained leave to enter the Republic of Ireland at the time of his entry to the United Kingdom. Therefore, it was asserted, upon that entry to the United Kingdom he did not require leave. It was submitted that the decision by the authorities in the Republic of Ireland revoking the applicant's leave after he had arrived in the UK could not retrospectively render the applicant's lawful entry to the UK unlawful. Alternatively it was disputed by the applicant that the Republic of Ireland had revoked the applicant's leave to enter prior to the respondent's determination that the applicant was an illegal immigrant.

[20] As counsel for the respondent has pointed out the effect of Article 3 of the Order is that arrival in the United Kingdom on a local journey from the Republic of Ireland shall be subject to control under the 1971 Act if the individual entered the Republic of Ireland unlawfully from a place outside the common travel area.

[21] I should record at this point that I am quite satisfied that the competent authorities in the Republic of Ireland had revoked the applicant's leave to enter the Republic of Ireland before the respondent took its decision in this case. This is plain from the unchallenged averment of Mr Dower at paragraph 10 of his affidavit. It, of course, follows from this that I reject the applicant's alternative argument.

Conclusions

[22] If the applicant's principal argument were correct it would mean that the UK's borders would be surprisingly porous. Those who had gained leave to enter the ROI by, (as yet undetected), deception would nonetheless have thereby acquired an indefeasible right to the benefit of the deemed leave provisions (see para 4 of the 1972 order). In this case the alertness of the immigration authorities coupled with the close cooperation of their counterparts in the ROI led to the deception being detected and the leave to enter the ROI being revoked on 2nd March 2008. On the applicants argument these circumstances still did not defeat his right to enter the UK without leave. Thus he would enjoy the fruits of his deception in the ROI and use the leave thereby granted as the springboard to enter the UK without being subject to the control of the Immigration Act 1971 – even if that was the very purpose of the initial deception!

[23] Those who wish to subvert the immigration law of the UK can prove resourceful. Even they might blush at the idea that their deceitful conduct might yield such a pleasing result. Such an outcome would be plainly contrary to public policy and common sense. It is therefore hardly surprising that such a consequence is not mandated by a construction of the relevant legislation. On the contrary the legal equation is plain. Once it has been

determined that a person entered the Republic unlawfully from a place outside the common travel area they are subject to control under the 1971 Act.

[24] For all the above reasons the application must be dismissed.