Neutral Citation no. [2008] NIQB 60 | *Ref:* **WEA7166**

Judgment: approved by the Court for handing down | *Delivered:* **05/06/2008**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY MUKUNDA PRASAD DAHAL

WEATHERUP J

[1] This is an application for judicial review of a decision of the immigration authorities made on 2 February 2008 that the applicant was an illegal entrant to the United Kingdom and a person liable to detention and removal from the United Kingdom. Mr Stockman appeared for the applicant and Dr McGleenon appeared for the respondent.

[2] The applicant is a Nepalese national born on 21 September 1976. He is married with a wife and daughter in Nepal where he was employed as a teacher. In July 2007 he applied to enter the United Kingdom under the Highly Skilled Migrants Programme (HSMP). This involved a two stage process. An application was made to Work Permits (UK) on behalf of the Home Office and on 17 August 2007 the applicant was issued with a letter of approval. The applicant then sought leave to enter the United Kingdom under the HSMP and on 19 September 2007 was granted leave to enter, valid for two years. The applicant entered the United Kingdom on 5 October 2007 on an HSMP visa.

[3] On arrival in the United Kingdom the applicant lived in London and worked as a helper with Superior Services Limited in Plumstead. He then travelled to Carrickfergus on 26 November 2007 where he worked as a waiter in a restaurant until the beginning of January 2008. The applicant then returned to London where he obtained employment as a sales assistant in Sainsbury's Supermarket commencing at the end of January 2008. The applicant also undertook training with the Security Industry Authority to be a security officer.

[4] On 2 February 2008 the applicant returned to Northern Ireland to collect possessions that he had left in Carrickfergus. He arrived at Belfast International Airport on a return ticket to London for the same day. While in Belfast he was interviewed by immigration officers. Later that day he was issued with a "Notice to a Person Liable to Removal" on the basis that he was an illegal entrant as defined in Section 33(1) of the Immigration Act 1971. The specific statement of reasons stated –

"You were silent in your statements to the on entry immigration officer as to material facts in that you intended to utilise your UK entry clearance as a highly skilled migrant in order to take up the offer of employment as a waiter at a restaurant."

The applicant was also served with "Reasons for Detention and Bail Rights" and on 4 February 2008 removal directions were issued for the applicant's removal to Bahrain/Nepal at 2230/1205 hours on 08/09 February 2008. On the application for judicial review the applicant's removal was stayed and he remains in the UK on bail.

[5] The applicant's grounds for judicial review resolved to three matters. First, that it had not been established that the applicant was an illegal entrant. Second, that the immigration authorities were not entitled to rely on information obtained as a result of investigations made after the decision to remove the applicant. Third, that the applicant's period of detention was unlawful.

The Highly Skilled Migrants Programme.

[6] The Government introduced the HSMP in January 2002. The 2002 White Paper "Secure Borders, Safe Haven" stated that the overall aim of the programme was to attract "…. high human capital individuals, who have the qualifications and skills required by UK business to compete in the global marketplace". From 1 April 2003 the HSMP has been a category of admission under the Immigration Rules. Paragraph 135A of the Immigration Rules states the requirements to be met by a person seeking leave to enter as a highly skilled migrant as being that an applicant -

> (i) must produce a valid document issued by the Home Office confirming that he meets, at the time of issue of that document, criteria specified by the Secretary of State for entry to the United Kingdom under the Highly Skilled Migrants Programme; and
>
> (ii) intends to make the United Kingdom his main home; and

(iii) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and

(iv) holds a valid United Kingdom entry clearance in this capacity.

[7] The valid document under the first requirement is satisfied when the applicant obtains an "Immigration Employment Document" from Work Permits (UK). Qualification is based on a points system, with points awarded based on age, qualifications and earnings.

[8] The applicant was interviewed by immigration officers between 1815 and 1910 on 2 February 2008 at Belfast International Airport. The interview was conducted under administrative caution and the applicant agreed to be interviewed without legal advice or a solicitor being present. The recorded questions and answers included the following -

> "Q. How did you find out about the position (as a waiter in the restaurant in Carrickfergus)?
>
> A. Through a friend who used to be my neighbour in Nepal. He told me about the job whilst I was in Nepal.
>
> Q. Are you telling me that you intended to travel to take employment at the Indian restaurant in the UK as a waiter?
>
> A. Yes my friend offered me the position.
>
> Q. You started working at the restaurant within four weeks/one month of your arrival?
>
> A. Yes I told you my friend had offered me the job.
>
> ……
>
> Q. Did you see an immigration officer when you arrived in the UK?
>
> A. Yes.
>
> Q. What did you tell the officer was the purpose of your travel to the UK?

A. To make UK my home and continue with my teaching career.

Q. Did you tell the officer that you intended to utilise your UK visa to take up an offer of employment at a restaurant in Northern Ireland?

A. No.

Q. Was it ever your intention to seek employment in a professional capacity allied to your profession as a teacher?

A. No."

[9] The applicant initialled all answers recorded to the questions. In his affidavit the applicant disputed most of what was recorded above as his answers to the questions and stated:

> "I have been shown a copy of my interview record. I don't agree with the answer to the question 'how did you find out about the position'. I did not say to the interviewing officer that my friend told me about the job while I was in Nepal. In fact I have not been in contact with him for three years and he only came in touch with me after I came to the UK. I had not come to the United Kingdom to accept the job offer at the restaurant. I do not agree with the answer recorded to the last question. I answered 'yes' but my answer is recorded as 'no'."

[10] In his affidavit the applicant stated further that in applying under HSMP he wanted to obtain a career orientated job if possible in the academic sector and if that proved impossible he wanted a job in any professional sector that would best utilise his skill. He stated that he wanted to be a teacher but he realised that he had to undergo different training to qualify for that type of employment in the UK.

[11] The interviewing immigration officer was John Harrison. Mr Harrison confirmed the contents of the interview and referred to documents recovered from the applicant, being a copy CV, documents relating to "jobcentreplus" and an employment contract with Sainsbury's supermarket indicating that the applicant worked as a bakery assistant for £6.08 per hour. Mr Harrison reported to the Chief Immigration Officer Peter Bradshaw and it was decided that the applicant had been rendered an illegal entrant by virtue of deception.

Visa entrants who become illegal entrants.

[12] The approach to the issue of illegal entrants was considered by the House of Lords in Khawaja v Secretary of State for the Home Department [1984] 1 AC 74. The immigration authorities must establish to a high degree of probability that the applicant is an illegal entrant. It is not sufficient to establish that the immigration authorities had reasonable grounds to believe that the applicant was an illegal entrant but rather the Court must be satisfied of the precedent fact that the applicant was an illegal entrant. The Court will be satisfied that the applicant was an illegal entrant if he was guilty of deception in obtaining his visa or in obtaining entry to the United Kingdom. While there is no duty of candour on the part of an applicant he or she must not mislead the authorities on a material fact. A material fact is an effective but not necessarily decisive fact in obtaining the visa or obtaining entry. The Court of Appeal in Northern Ireland reviewed the position in Udu and Nyenty's Applications [2007] NICA 48 and established further that the presentation of a visa granted for a particular purpose amounts to a representation that the applicant is seeking entry for that purpose and if the applicant has or may have a different or additional purpose it is an act of deception not to disclose that different or additional purpose.

[13] At the interview with the immigration officer the applicant admitted that he had obtained his employment as a waiter while he was still in Nepal and that he had not intended to seek employment related to his profession as a teacher. The applicant was a teacher of English in Nepal and does not have difficulty with the English language, nor is it suggested by the applicant that he had difficulty understanding the interviewer. He initialled all the answers that he gave at interview. It is his stated belief on affidavit that his visa entitles him to work in any capacity and at interview he had no reason to believe that his statements about his employment had any effect on his status as an HSMP visa entrant. I have no reason to doubt the record of the interview of the applicant. Accordingly I am satisfied that the applicant obtained an offer of employment as a waiter in Carrickfergus prior to his arrival in the United Kingdom and that it was not his intention to obtain work allied to the teaching profession.

[14] The purpose of the HSMP was outlined in the White Paper referred to above as being to attract highly skilled persons to contribute to the UK economy. The Statement of Changes in Immigration Rules ordered by the House of Commons on 7 November 2006 contains an Explanatory Memorandum which states that the HSMP was designed to allow highly skilled individuals with exceptional skills to come to the United Kingdom to seek work or opportunities for self-employment. The changes to the programme in 2006 were stated to have been made to help to ensure that the scheme selected people who would be the most successful in the labour market and who will make a strong economic contribution to the UK.

[15] The applicant contends that it is not necessary that those who have obtained HSMP visas should intend to obtain higher skilled employment. The applicant contends further that the sanction for those who fail to obtain high skilled employment will be a refusal of an extension of the HSMP visa. The applicant relies on the 2006 changes to the Immigration Rules relating to the extension of an HSMP visa. It is provided that a points system applies to such extensions based on matters that include the nature of employment and income while in the UK under the initial HSMP visa. An HSMP visa holder who engages in low skilled employment will fail to secure sufficient points to obtain an extension of the HSMP visa. This is said to be the sanction for those in the applicant's position, rather than a finding that they are acting contrary to the purpose of the visa in not seeking higher skilled employment.

[16] Further the applicant contends that had it been intended that those granted an HSMP visa were to seek highly skilled employment then the Immigration Rules or the programme would have stated expressly that such was the case. By way of example the applicant refers to paragraph 128 of the Immigration Rules which includes a requirement that entrants with a work permit are capable of undertaking employment in accordance with the work permit and do not intend to take employment except as specified in the work permit. On the other hand paragraph 135A does not actually require an HSMP entrant to take up employment but only requires that he should be able to maintain and accommodate himself and any dependants adequately without recourse to public funds.

[17] The HSMP does not state in terms that an applicant should seek to obtain highly skilled employment. However it is clearly implicit in the HSMP that arrangements were being made for highly skilled migrants to contribute their skills to the UK economy and that the programme is not a vehicle for entry to undertake low skilled employment. Accordingly those who obtain an HSMP visa must be expected to seek higher skilled employment. That is not to conclude that an entrant under the programme must only engage in highly skilled employment because there may be reasons why an applicant cannot obtain such employment in the short term or the longer term and in order to fulfil the condition that they should not be a burden on the State they may be required to engage temporarily in lower skilled employment. However I am satisfied that the programme does not enable an applicant to obtain entry without ever having had the intention to seek high skilled employment, whether because their declared skills are not sufficient to secure such employment or for whatever reason.

[18] Accordingly I am satisfied that the applicant practiced deception in obtaining a visa under the HSMP when it was not his intention to seek highly skilled employment for which he declared he was qualified and that such non disclosure was material to his application for an HSMP visa.

Immigration investigations after the decision to remove the applicant.

[19] After the decision that the applicant was an illegal entrant the immigration authorities investigated the applicant's HSMP application. To obtain the necessary approval from Work Permits (UK) the applicant had to verify his age and academic qualifications and employment and his previous level of income in Nepal. At age 30 he earned 5 points. With a Masters degree gained in 2005 he earned 35 points. An income in Nepal in excess £3,500 earned 45 points and an income in excess of £2,000 earned 20 points. The applicant earned 45 points for his declared income level in Nepal. He had declared employment and income from three sources. The first was as a full-time English teacher at a higher secondary school with an income of 139,900 NRs. The second was as a part-time lecturer in English at a college with an income of 125,000 NRs. The third was as an advisor with Rural Integrated Community Development Forum where he had an income of 250,800 NRs. When the applicant first made his application to Work Permits (UK) the British Embassy in Kathmandu made enquiries and received confirmation of the applicant's first employment but was unable to establish contact with the other two bodies.

[20] After the applicant's detention by the immigration authorities the British Embassy in Kathmandu made further enquiries with the college and was told that the applicant worked at the college on a monthly salary of 15,000-20,000 NRs. This would be approximately twice the rate declared by the applicant. The applicant's explanation was that staff at the college must have assumed he was a full-time employee whereas he was a part-time employee.

[21] The British Embassy made further enquiries about the Rural Integrated Community Development Forum through the telephone numbers listed on their letterhead. They found that two of the numbers related to visa consultancies dealing with HSMP applications. The British Embassy stated that it was "highly likely" that the documents provided from the Rural Integrated Community Development Forum were false. The Embassy added that recent checks on HSMP applicants in Nepal showed more than one employment being declared and that usually one of them was false. The applicant's explanation was that the Rural Integrated Community Development Forum was a non-governmental organisation financed by donations and that since the applicant had left Nepal seven months previously he could not explain what has become of the Forum. If employment with the Rural Integrated Community Development Forum was false then the applicant would not have had a sufficient income level in Nepal to qualify for an HSMP visa.

[22] Further, the respondent questioned the letters of confirmation from the three employers as they all used the same expression about tax deducted

from income which was said to have been deposited in "the concern tax office". On the other hand the applicant referred to a statement from the Inland Revenue Office at Kathmandu confirming deposits of tax on the income from the three employments.

[23] In addition the respondent contrasted two CV's prepared by the applicant. One CV listed the three employments in Nepal that the applicant declared on the HSMP application. The other CV, clearly more recent, listed his employment in the restaurant in Carrickfergus and his employment as a teacher at the school to which he referred in his visa application, but did not mention his work as a part-time lecturer at the college or as an adviser at the Forum. Instead the CV referred to work as a sales executive in a department store in Katmandu for five years to 2005 and work as a receptionist on the evening shift at a publishing house in Katmandu for seven years to 2007.

[24] The applicant relied on the 2006 changes in the Immigration Rules which introduced an additional ground for refusal of applications by highly skilled migrants where the applicant is aware that a document submitted is forged or not genuine or there is cause to doubt the genuineness of any document and having taken reasonable steps to verify the document the immigration authorities are unable to verify that it is genuine. The additional ground applies to the refusal of an application for entry or for extension of stay as a highly skilled migrant, neither of which applied to the applicant who had already been granted entry and was not applying for an extension. The Explanatory Memorandum describes the purpose of the changes as being to tackle evidence of general abuse under the scheme, to enable an application to be refused for a forged document that is not material to the application and where a document about which there are reasonable doubts has not been shown to be genuine.

[25] The applicant would be an illegal entrant if he practiced deception by obtaining the HSMP visa on the basis of a false document that was material to the application. The information in relation to the applicant's employment in Nepal was not available to the immigration officers when the decision was made that the applicant was an illegal entrant. However when the matter comes before the Court the approach of the Court involves not merely reviewing the decision of the immigration authorities but deciding whether the precedent fact has been established that the applicant was an illegal entrant. In so doing I am satisfied that the Court is entitled to take into account such evidence as is then available on that issue, whether favourable to or adverse to the applicant.

[26] Accordingly I take into account the information in relation to the applicant's employment in Nepal. I am satisfied that it is highly probable that the applicant's claim in relation to his employment with and income from the Rural Integrated Community Development Forum was false. That claim was

material to the applicant obtaining the Immigration Employment Document from Work Permits (UK) and the HSMP visa in that if the Forum income is left out of account the applicant would have secured 20 points and not 45 points in respect of income and would have failed to reach the points total required for admission to the HSMP.

[27] The applicant contends that it could not have been his intention to take up lower skilled employment when he is qualified for highly skilled employment. However the measure of high skills includes the capacity to obtain employment at a certain level of income in one's home State. As the applicant was unable to meet that requirement, as I find to have been the case, he was not sufficiently highly skilled and this would have inhibited his capacity for employment in the UK, in addition to the retraining difficulties to which he refers.

[28] I am satisfied that the applicant practiced deception in obtaining the HSMP visa by making false claims about employment and income in Nepal. Accordingly the applicant is an illegal entrant to the UK on two counts, first of all because he obtained his visa by deception and secondly because he did not intend to use his visa for the purpose of obtaining highly skilled employment, as he was not sufficiently qualified to do so, being unable to secure sufficiently highly paid employment in Nepal.

[29] Finally, the applicant contends that his detention from 2 to 9 February 2008 was unlawful. The "Notice to a Person Liable to Removal" dated 2 February 2008 stated that the immigration officer was satisfied that the applicant was an illegal entrant for the reasons quoted at paragraph [4] above. The Notice further stated that the applicant was liable to detention pending the completion of arrangements for dealing with him under paragraph 16 of schedule 2 of the Immigration Act 1971 and that it was proposed to give directions for his removal from the UK. The applicant was also served with "Notice to Detainee – Reasons for Detention and Bail Rights" on 2 February 2008 where it was stated that the applicant should remain in custody because his removal from the UK was imminent. That decision had been reached on the basis that the applicant did not have any close ties that made it likely that he would stay in one place, that he had used or attempted to use deception in a way that led the immigration authorities to believe that he may continue to deceive and that he had failed to give satisfactory or reliable answers to the immigration officer's enquiries.

[30] I am satisfied that the immigration authorities had good grounds for examining the applicant and concluding that he was an illegal entrant, related to his use of the HSMP visa. The immigration authorities had statutory powers to detain the applicant, subject to the power to grant bail, pending direction for removal from the UK. The existence of the powers under the Immigration Act 1971 and the Nationality, Immigration and Asylum Act 2002

is not an issue, but rather their application to the present case. I am against the applicant on the facts and the immigration authorities had power to detain the applicant in the circumstances.

[31] It is now a frequent occurrence in these applications for judicial review that those interviewed by immigration officers dispute the written record of interview, whether on the basis of language difficulties causing confusion as to the questions asked and the answers given or that the record is otherwise inaccurate. Judicial review proceedings, generally conducted on affidavit evidence rather than by oral evidence, may not always be the best forum for resolving such factual disputes. In any event the absence of detention facilities for immigration cases in this jurisdiction and the removal of those concerned to detention facilities in Scotland or England impacts on the administration, expedition and cost of requiring their return to give oral evidence, where it is otherwise appropriate to direct that oral evidence should be received. The prevalence of these disputes about the accuracy of the interview record might be relieved by the recording of interviews by the immigration officer and the production of a transcript should the matter proceed to judicial review. Of course there are difficulties to be overcome in producing a transcript in a case involving a three way conversation between an immigration officer, an interviewee and a translator on the telephone. However as the recording and transcribing technology is available and assists in other situations it might be considered by the immigration authorities as a means of addressing disputes about the statements made at interview.

[32] The application for judicial review is dismissed.