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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AVELINA XIMINES BELO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Amy Kerr BL (instructed by Phoenix Law) for the Applicant
Rachel Best BL (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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ROONEY J

Introduction

[1] The applicant is a Timor-Leste national, who first entered the jurisdiction of Northern Ireland on 9 September 2022 from Faro, Portugal. The applicant had made the trip from East Timor via Dubai to Portugal. On arrival at Belfast International Airport, the applicant was spoken to by Border Force officials, detained and thereafter brought to Larne House Detention Centre on the same day.

[2] The applicant's primary language is Bahasa. On 9 September 2022, the applicant was interviewed by an immigration officer without the benefit of an interpreter. Following the interview, an immigration officer on behalf of the respondent made a decision refusing the applicant leave to enter the UK as a genuine visitor.

[3] On 10 September 2022, judicial review proceedings were issued on behalf of the applicant to challenge the said decision, essentially on the basis that when assessing whether the applicant was a genuine visitor, the respondent had failed to provide the services of an appropriate interpreter.

[4] As a matter of urgency, the matter was listed before Horner LJ who made an order for interim relief, namely, that the applicant was not to be removed from this

jurisdiction until an appropriate interpreter was made available during the interview to determine the applicant's status as a genuine visitor.

[5] On 11 September 2022, the respondent issued the following response to the matters raised in the Pre Action Protocol letter:

> "The Secretary of State has reviewed the decisions of 9 and 10 September 2022 to refuse your clients' permission to enter and have reconsidered the matter in light of the representations you have submitted.
>
> It has been decided that the appropriate response is to withdraw the decisions of 9 and 10 September 2022. Border Force has now scheduled further interviews that will be carried out on 13 September 2022 at Larne House using a Bahasa interpreter and Border Force will reassess their cases in line with the immigration rules."

[6] The judicial review proceedings were then dismissed by this Honourable Court on 12 September 2022 on foot of the Home Office's response as detailed above.

[7] On 13 September 2022 the applicant was interviewed by a Border Force official with the benefit of a Bahasa interpreter.

[8] Following the interview, the respondent issued a decision refusing the applicant leave to enter the United Kingdom as a genuine visitor. The decision will be considered in more detail below. In essence, the border official was not satisfied (i) that the applicant was seeking entry to the UK for the purpose of visiting friends/family; (ii) that she had sufficient funds for the trip; and (iii) that the applicant intended to return home after the visit. Permission for the applicant to enter the UK under the Immigration Rules, Appendix V4.2(a) and (b) was accordingly refused.

[9] Following the decision, a direction was issued that the applicant would be removed from this jurisdiction to Portugal on 16 September 2022. As a consequence, the applicant lodged judicial review proceedings challenging the said decision. Bail pending the decision of the High Court was granted. However, the applicant voluntarily left this jurisdiction on a flight to Faro, Portugal on Friday, 30 September 2022. The applicant's passport was returned to her at Belfast International Airport prior to departure.

Grounds of Challenge

[10] The applicant's grounds of challenge, as provided in the Order 53 statement include:

(a) illegality;

(b) failing to consider material facts/considerations;

(c) taking into consideration immaterial facts/considerations;

(d) procedural unfairness;

(e) irrationality, in that the decision was unreasonable in the *Wednesbury* sense in that no decision maker properly instructed on the law, could have made such a decision;

(f) substantive legitimate expectation;

(g) breaches of Article 6, Article 8 and Article 14 of the European Convention on Human Rights (ECHR);

(h) breach of the policy to include breach of the Immigration Rules, Appendix V.

The Relief Sought

[11] The applicant sought the following relief:

(i) an order of certiorari to quash the decision of the respondent;

(ii) a declaration that the said impugned decision was unlawful, ultra vires and of no force or effect;

(iii) a declaration that the decision by the proposed respondent was unreasonable or irrational;

(iv) a declaration that the decision to remove the applicant without full procedures having been followed was contrary to the applicant's rights under Article 6, Article 8 and Article 14 of the European Convention on Human Rights;

(v) an order of mandamus preventing the respondent from continuing to implement the policy of removing individuals without allowing an appropriate notice period between the decision to remove and subsequent removal;

(vi) such further or other relief as is this Honourable Court shall deem just; and

(vii) damages and costs.

The Test for Leave

[12] In *Re Morrow and Campbell's Application* [2001] NI 261, Kerr J stated that the relevant test was as follows:

> "On an application for leave to apply for judicial review, an applicant faces a modest hurdle. He need only raise an arguable case; or, as it is sometimes put, a case which is worthy of investigation."

[13] This test was recently confirmed in *Re Ni Chuinneagain's Application* [2022] NICA 56, wherein the Court of Appeal stated that an applicant is required to satisfy the court at the leave stage that there is an arguable case with the realistic prospect of success, and which is not subject to a discretionary bar such as delay.

The Respondent's Arguments

[14] Ms Rachel Best BL, on behalf of the respondent, makes the following submissions:

(a) Since the applicant has voluntarily left the jurisdiction, the application for judicial review is academic, namely, that no useful purpose can or will be served by these proceedings.

(b) On the facts as stated and on any analysis of the impugned decision, the applicant has failed to raise an arguable case and that the test for leave has not been satisfied.

(a) Whether the application is academic

[15] The argument advanced by the respondent is that since the applicant has now voluntarily left the UK, these judicial proceedings, practically speaking, are now academic. It is argued that immigration bail was granted to the applicant pending the decision of this court, but rather than remaining and waiting for the outcome of the judicial review proceedings, her passport was returned to her, and she took a flight to Faro, Portugal. The current whereabouts of the applicant are not known.

[16] Ms Best BL, in support of this argument, refers the court to the principles in *R (Salem) v Secretary of State for the Home Department* [1999] 1 AC 450 in which Lord Steyn stated at p. 456-7:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so as, for example, (but only by way of example) when a discrete point of statutory construction

> arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[17] In this jurisdiction, the authors of *Judicial Review in Northern Ireland: A Practitioner's Guide* (SLS 2007) at paragraph 5.27 state that the issue is whether "the result of the proceedings can have no practical effect or serve no useful purpose between the parties."

[18] In essence, the argument advanced by the respondent is that this application no longer serves a practical purpose. The respondent states that the applicant has not breached immigration laws. Whilst it is correct that the applicant was refused entry to the UK as a visitor on this occasion, the respondent submits that there is nothing to prevent the applicant from making another application in the future. The respondent claims that there is no impediment to the applicant reapplying for a visitor's visa in the future and that each application will be reviewed on its own merits.

[19] Ms Kerr BL, on behalf of the applicant, strenuously opposes the argument that the matter is academic. Firstly, the applicant maintains that the reason she left this jurisdiction on 30 September 2022 was because she was fearful that immigration bail would be revoked resulting in further detention. Secondly, and particularly pertinent to the judicial review proceedings, the impugned decision will form part of her immigration records and inevitably be highlighted as a black mark against future immigration assessments and decisions. The applicant further submits that the impugned decision may be interpreted as an example of deception on her part. The applicant refers to the Immigration Rules (Appendix V 4.2), and the Home Office Visit Guidance (version 11.0) dated 6 October 2021 at p. 22 and states that in its determination, the respondent may take into consideration whether:

> "The applicant, their sponsor (if they are visiting a friend or relative) or other immediate family member has, or has attempted to, deceive the Home Office in a previous application for entry clearance, permission or stay."

[20] The applicant further argues that pursuant to paragraph 9.8.1 of the Immigration Rules, the decision maker must refuse entry, clearance, or permission to enter if, inter alia, the applicant has previously breached immigration laws.

[21] In response to this latter argument the respondent states that the applicant is not considered to have breached any immigration law. Accordingly, paragraph 9.8.1 of the Immigration Rules is not relevant. Simply put, the respondent reaffirmed that there was no impediment to the applicant making a further application for a visitor's visa in the future. It is also reaffirmed that each application will be reviewed on its own merits.

[22] During legal argument in respect of the above issues, at the instigation of the court, the respondent was invited to provide reassurance for the applicant that the respondent's decision to refuse entry will not prevent or act as a detriment or black mark in the event that the applicant makes a future application.

[23] The respondent's response to the court's request was as follows -

> "The previous refusal will not *necessarily* be taken as a detriment. Each application will be determined on its own merits. The applicant(s) will still need to satisfy officers that they qualify for entry as a visitor under the Immigration Rules (Appendix 4 - 2(a) - (d)). The fact that there has been a previous refusal is logged on the system, it is not an automatic bar to prevent the applicant(s) entering the United Kingdom. Border Force officials can only refuse entry on the basis that they are not satisfied that the applicant(s) are not genuine visitors, and the burden of proof remains on the applicant(s) to do this."

[24] Unsurprisingly, Ms Kerr BL was not prepared to accept that the above statement would provide any or any adequate reassurance to the applicant in the event of future applications to enter this jurisdiction as a genuine visitor. The use of the phrase that the "previous refusal will not necessarily be taken as a detriment" was demonstrably vague and imprecise and essentially provided no safeguards for the applicant for future applications.

[25] Having carefully considered the above submissions in respect of this issue, it is my decision that the proceedings are not academic. The decision to refuse entry to the applicant as a genuine visitor will be recorded on the applicant's immigration records. The decision will directly affect the applicant's rights in the event that she makes a further application to enter the United Kingdom as a visitor. Accordingly, I reject the submission that the result of the proceedings could have no practical effect or serve no useful purpose between the parties.

(b) Whether an arguable case has been made

[26] In respect of this applicant, the impugned decision dated 14 September 2022 stated as follows:

> "You sought entry to the UK as a visitor for a period of 6 months.
>
> On arrival you told officers that you were coming to the UK to visit your family. You state you earn 15 US dollars a month selling clothes in East Timor and have £700 with

> you now. I believe that you do not hold sufficient funds to support yourself for 6 months.
>
> During the interview on 13/9/2022 you stated that you want to work in the UK and will 'work anywhere.' I am, therefore, satisfied that you will take up employment in the UK.
>
> Considering the above, I am not satisfied you are a genuine visitor and are seeking entry to the UK for the purpose of visiting friends/family, you do not hold sufficient funds for your trip, and I am not satisfied that you intend to return home after your visit. I would, therefore, refuse you permission to enter the UK under V4.2 (a) and (d)."

[27] For the avoidance of any doubt, I have determined that in its assessment of the applicant and in reaching its decision, the respondent is not entitled to rely on any details obtained from the applicant arising out of the interview on 9 September 2022 without a Bahasa interpreter. The reason is obvious. The applicant's primary language is Bahasa. On the face of the interview notes for 9 September 2022, it does not appear that the applicant was asked whether she could speak and understand English. When judicial review proceedings were instigated on 10 September 2022, interim relief was granted by Horner LJ that the applicant was not to be removed from this jurisdiction until an interpreter had been made available and was present during an interview of the applicant. Correctly, in my view, the Secretary of State withdrew the decision of 9 September 2022 and scheduled a further interview with the applicant using a Bahasa interpreter on 13 September 2022, expressing stating that on that date the Border Force would reassess her case in line with immigration rules.

[28] I have carefully considered the content of the applicant's rescheduled interview on 13 September 2022. Fundamentally, the applicant was asked (with the aid of the Bahasa interpreter) if she intended to work in the UK. The applicant responded "No, I don't want to work. Actually, I do want to work." A further question was asked as to where she would want to work which prompted a response, "If I can work in England I will work in a restaurant. I don't mind. I can work hard." When the Border Force official asked the applicant again whether she wanted to work in the UK, she made the following response, namely, "Yes, but I am afraid of Immigration."

[29] Pursuant to the Immigration Rules (Appendix V4.2) the applicant must satisfy that the decision maker that she is a genuine visitor. One of the conditions is that the applicant must not intend to work in the UK or take up any employment.

[30] On the basis of the applicant's said responses during the interview regarding her intention to take up employment, the decision to refuse the applicant entry as a genuine visitor was plainly rational, lawful and Wednesbury reasonable.

Conclusion

[31] By reason of the foregoing, I dismiss the applicant's application for leave to apply for judicial review.

[32] I am persuaded that the matter in issue between the parties is not academic. However, for the reasons given, the applicant cannot establish an arguable case on which there is a reasonable prospect of success in accordance with the test to be applied by the Court of Appeal in *Ni Chuinneagain's Application* [2022] NICA 56, (at paragraph § 42).