Neutral Citation No. [2010] NIQB 96 | *Ref:* **MOR7924**

Judgment: approved by the Court for handing down | *Delivered:* **17/09/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEENS BENCH DIVISION (JUDICIAL REVIEW)

_____

Bassey's (Emen) Application [2010] NIQB 96

IN THE MATTER OF AN APPLICATION BY EMEN BASSEY FOR JUDICIAL REVIEW

_____

MORGAN LCJ

[1] The applicant challenges a decision made by the Immigration Service on 24 September 2007 when he was detained as an illegal entrant and thereafter transferred to Dungavel prior to his release on bail on 3 October 2007. Ms Higgins QC appeared with Mr Ronan Lavery for the applicant and Mr Maguire QC appeared with Ms Connolly for the respondent. I am grateful to all counsel for their helpful oral and written submissions.

Background

[2] The applicant and his wife are Nigerian nationals. They have three children. The first two children were born in Nigeria in 1996 and 2000. In September 2004 the applicant's wife visited Northern Ireland. On 22 October 2004 she gave birth to their third child. This child was issued with a Republic of Ireland passport on 11 November 2004 and returned to Nigeria with her mother during that month. While in Northern Ireland the applicant's wife rented property at Kimberley Street Belfast and opened an account with a building society.

[3] In March 2005 the applicant's wife again visited Northern Ireland and sought advice from a solicitor's firm about how she might apply for permanent residence in the United Kingdom. She took out a BUPA policy for her third child. She returned to Nigeria in May 2005. She maintained her rented address in Belfast and her building society account.

[4] On 1 August 2007 the applicant, his wife and the two older children applied for visitor's visas to visit the United Kingdom. In his application form the applicant disclosed that the two older children were travelling with their parents but made no reference to the youngest child. He was asked to give the full address and telephone number of all places where he would be staying during the visit and provided an address at Bromsgrove. He stated that he was going to the United Kingdom for a vacation for a period of 7 days. The applicant signed the usual declaration that the information he had given was complete and true to the best of his knowledge. A visitor's visa valid for the period from 22 August 2007 until 22 February 2008 was issued to the applicant, his wife and two older children.

[5] On 10 September 2007 the applicant and his family arrived in the United Kingdom. The applicant, his wife and 2 older children presented their visitors visas. It appears that there was some change to their arrangements because they initially stayed in Peckham. On 16 September 2007 the applicant's wife visited Northern Ireland to stay with friends. She booked an appointment with a firm of solicitors for 26 September 2007. On 22 September 2007 the applicant's wife booked ferry tickets to Belfast for the family for travel on 24 September 2007.

[6] On arrival at Belfast Docks the applicant's wife was interviewed by an immigration officer. When asked how long she was intending to stay in Northern Ireland she explained that was her intention to apply for residence documents on the basis of her youngest daughter's nationality. If that application was not successful the family would go back to Nigeria.

[7] The applicant was then interviewed. He explained that an application form for employment with McDonald's in the luggage was for his wife because she might want to work for them if she were to stay here. He was also asked about application forms for Fullerton Preparatory School in Belfast in his luggage and stated that he wanted his three children to attend that school. He said that when he arrived at London Heathrow on 10 September 2007 he had told the immigration officer that he was on holiday until 25 September 2007.

[8] The Immigration Officer then referred the case to the Chief Immigration Officer. Both concluded that the applicant was an illegal entrant and the Chief Immigration Officer made the decision that he should be treated as such. He was detained and subsequently moved to Dungavel in Scotland. The third child subsequently applied for a registration certificate and at an appeal on 23 May 2008 the AIT concluded that she was a self sufficient person within Regulation 4(1)(c) of the 2006 EEA Regulations. The AIT then concluded that the applicant and his wife and children were entitled to be with the minor child by virtue of paragraph 257C of the Immigration Rules. None of these determinations are at issue in these proceedings.

[9] The applicant's primary argument was that he was entitled to enter the United Kingdom as of right as the family member of an EEA national by virtue of Directive 2004/38/EC (the Directive) as explained in the decision of the European Court of Justice in Metock and others (Case C-127/08). The applicant also asserted a right of entry arising directly from the treaty and confirmed by the ECJ in Chen (Case C-200/02). Thirdly the applicant contends that it is for the respondent to demonstrate as a precedent fact that the applicant was an illegal entrant and that it failed to do so. Alternatively if the applicant was an illegal entrant the respondent did not consider whether to treat him as such or alternatively acted irrationally in detaining him.

The EEA family permit issue

[10] It is common case that Directive 2004/38/EC is concerned with the right of citizens of the European Union and their family members to move and reside freely within the territory of the member states. The first recital of the Directive, however, makes it clear that there are limitations and conditions laid down in relation to the exercise of these individual rights. In order to make the right of the Union citizen practical and effective the Directive also recognises in the fifth recital that the right to move and reside freely must also be granted to the citizen's family members.

[11] The Directive defines those who are family members in Article 2(2).

> "2. 'family member' means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"

The sixth recital recognises that there may be others outside this definition who may be important to the maintenance of the unity of the family in a broader sense. The position of such persons should be examined by the host member state on the basis of its own national legislation taking into account specified factors. The Directive itself recognises a further class of persons whom it describes as beneficiaries and provides rights in relation to such people by virtue of Article 3(2).

> "2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

[12] The Directive was implemented in this jurisdiction by the Immigration (European Economic Area) Regulations 2006 (the Regulations). The Regulations maintain the distinction between family members as defined in the Directive and beneficiaries or other family members who are described in the Regulations as extended family members. As a result of the decision of the European Court of Justice in Metock it is clear that the requirement in the Regulations that a family member accompanying an EEA national had to be lawfully resident in an EEA state beforehand imposes a restriction which is contrary to the terms of the Directive.

[13] Articles 5 and 6 of the Directive deal with rights of entry and rights of residence for Union citizens and family members. Union citizens and family members who are not nationals of a member state must be given leave to enter with a valid passport. Each is entitled to a right of residence on the territory of another member state for a period of up to three months. No such right is accorded to those who are not family members within the definition of the Directive and the Regulations. These rights reflect the language of the

recitals acknowledging the importance of the family unit but recognising a distinction between that unit and the broader family. The rights contained within the Directive in Article 5 and 6 have been transposed in Regulations 11 and 13 of the 2006 Regulations. It is not necessary for me to consider any arguments in relation to the validity of the transposition except to note the distinction drawn between the position of family members as defined in the Directive and others.

[14] The importance of the distinction for this application is that the applicant does not fall within the definition of family member in the Directive or Regulations. I consider, therefore, that neither the Directive nor the Regulations provide the applicant with a right of entry or a right of residence. The distinction between family members and others has been considered by the English Court of Appeal in Bigia and others v Entry Clearance Officer [2009] EWCA 79. This is most clearly set out at paragraph 42.

> "42 The policy, even before the Citizens' Directive , was to recognise:
>
> "… the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty "
>
> (Metock at [56]). The same interpretation "must be adopted *a fortiori* " with respect to the Citizens' Directive , it being apparent from Recital (3) in the Preamble that "it aims in particular to ' *strengthen* the right of free movement and residence of all Union citizens'…" (Metock at [59]). The scheme of the Directive is then to distinguish between art.2(2) "family members" of the Union citizen and OFMs. The former, if they accompany or join the Union citizen when he exercises his rights of free movement and residence, benefit from his rights and from the policy that he is not to be discouraged from exercising them by national immigration rules that impact adversely on his "family members". OFMs, on the other hand, are provided with a lesser protection. The host Member State must "facilitate entry and residence" for them and "undertake an extensive examination of the personal circumstances and … justify any denial of entry or residence…" (art.3(2)). "

Although not binding on me this is clearly a strongly persuasive decision and reinforces the view that I had formed on a consideration of the Directive and the Regulations.

The argument under Article 18EC and Chen

[15] In Chen (Case C-200/02) the European Court of Justice had to determine the right of entry and residence of a minor national to another member state when accompanied by a person who was a national of a nonmember country and the child's primary carer. Article 18EC was held to be a clear and precise provision granting directly to every citizen of the union the right to reside in the territory of the member states subject to any relevant limitations and conditions. The court held that the right to reside would not be practical or effective for the child if the child carer were refused admission since this in effect would lead to the exclusion of the child. Relying on provisions found in Council Directive 90/364/EEC and now found in the Directive the court held that the child and child carer had a right of residence provided that the child was covered by sickness insurance and the carer had sufficient resources to ensure that the child would not be a burden on the host state.

[16] This jurisprudence was considered by the English Court of Appeal in W (China) [2007] 1 WLR 1514 and Liu and others [2007] EWCA Civ 1275. The effect of those decisions was to recognise that the requirements in relation to the child also arose in relation to the child carer. Accordingly it was necessary in order to take advantage of the right of entry and residence to demonstrate both the existence of sickness insurance for the child and child carer and that neither the child nor child carer would become a burden on the host state.

[17] The respondents maintain that these arrangements are not to be found in paragraph 257C of the Immigration Rules. Indeed it was on that basis that Immigration Judge Grimes granted the applicant the right to reside with the child. My attention has been drawn to a decision of the Upper Tribunal, ECO (DUBAI) v M (Ivory Coast), apparently promulgated on 12 July 2010. In that decision Blake J analysed the right under Chen and concluded that since the right derived from the Treaty it could not be made subject to the Immigration Rules.

[18] In this case I do not have to address that issue. All of the decisions in this area recognise that the entitlement to enter and reside is subject to limitations and conditions. Those conditions relate to the availability of sickness insurance and an ability to demonstrate that those who enter will not be a burden on the host state. It is common case that the applicant did not have sickness insurance at the time of his entry into the United Kingdom. It is further the case that he did not have such insurance at the time of his detection. There is correspondence from his solicitors shortly after his detection asserting had been obtained for him but that correspondence indicated that no documentary evidence would be available for five days. The papers do not contain any evidence of sickness insurance in relation to the applicant nor indeed any other member of this family apart from the third

child. There is nothing to indicate the provision of documentary evidence on this point during the period of detention.

[19] After his detention the applicant did produce bank statements and other material in relation to the conduct of this business. This included evidence of property ownership. The applicant and his wife had £3000 available to them at the time of their detection. It is clear, however, that in the correspondence from the applicant's solicitor no more than the most general assertions were made about the extent to which any of this supported the view that the applicant and his family would not become a burden upon the state. That is, for instance, to be contrasted with the careful analysis which was prepared in order to persuade the AIT that it should allow the applicant's appeal.

[20] I consider, therefore, that in the absence of documentary evidence of sickness insurance and any analysis of the applicant's means to demonstrate his ability to support himself and his family that the applicant had not satisfied the conditions and limitations upon which he was entitled to exercise his Chen rights.

The illegal entrant issue

[21] Section 33 (1) of the Immigration Act 1971 (the 1971 Act) defines "illegal entrant" inter alia as a person unlawfully entering or seeking to enter the United Kingdom in breach of the immigration laws. By virtue of Section 24A(1)(a) of 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) of the 1971 Act a person shall be guilty of an offence if he makes or causes to be made to an Immigration Officer a return, statement or representation which he knows to be false or does not believe to be true.

[22] In Razak's Application [2007] NIQB 41 Weatherup J derived the following propositions after consideration of the leading decision of the House of Lords, Khawaja v Secretary of State for the Home Department [1984] 1 AC 74.

> "i. The immigration authorities do have authority to detain and remove a visa holder if that person is an illegal entrant.
>
> ii. The immigration authorities have to satisfy the Court to a high degree of probability that the applicant is an illegal entrant, that is the status of illegal entrant is a precedent fact to removal.
>
> iii. The applicant may become an illegal entrant by being guilty of deception in the application for a visa or the information furnished on entry to the UK.

iv. The deception must be effective in securing entry to the UK.

v. There is no duty of candour on the part of an applicant. However, the authorities must not be misled on material facts that are effective in securing entry, whether on the visa application or in communication with the immigration officials and whether by what is said or by conduct or by silence coupled with conduct.

vi. In the light of the decision of the Court of Appeal in Northern Ireland in Udu and Nyentys Applications [2007] NICA 48, where a visa is obtained on specified grounds and the applicant intends to enter the UK for alternative or additional reasons, there is a duty to disclose the full grounds for entry and it amounts to deception to impliedly represent that there has been no change of circumstances to the specified grounds of entry by producing the visa for the specified purpose and not stating the true purpose."

I am happy to adopt and rely on those propositions.

[23] In my view the evidence that there was deception in obtaining the visitor's visa and deception by presentation of that visa to the immigration officer is overwhelming. The evidence clearly demonstrates that it was the intention of the applicant to use the visit to the United Kingdom for the purpose of establishing whether he could achieve a right of residence in the United Kingdom for himself and his family. The answer given by him to the question "why are you going to the UK?" was "vacation". In fact the evidence indicates that his intention was that his children should commence school in Northern Ireland and that his wife should obtain employment there. It is plain that the applicant and his wife realised the consequences of securing Irish nationality for their third child by birth and that the entitlements flowing from that were well within their consideration from that time on. I do not accept the applicant's assertion that this decision was one which they independently determined to embark upon after their arrival in the United Kingdom. They had retained premises and a building society account in Northern Ireland for a number of years. When interviewed by the Immigration Officer the applicant told him that he was entering United Kingdom for a holiday. The applicant did not disclose his intention in relation to his family and I have no doubt that this experienced businessman was well aware of the materiality of that omission. I am satisfied, therefore, that the applicant was an illegal entrant.

[24] There is no substance in the argument that no consideration was given to whether the applicant should be treated as an illegal entrant. The affidavit of Mr Bradshaw asserts without contradiction that it was so considered and

there is a contemporaneous note stamped on the interview notes of the applicant to that effect. The principal point advanced at the hearing to justify the submission that it was irrational to detain the applicant was the citizenship of the applicant's third child. The status of that child did give the applicant rights of entry but subject to limitations and conditions which he had not satisfied and this did not detract in any way from the deception which I have found established. In those circumstances I see no basis upon which to characterise the judgment made by the Chief Immigration Officer as irrational or unreasonable and no basis upon which to conclude that he left any material matter out of account.

[25] In light of my findings I dismiss the judicial review application.