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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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Bruce's (Laura) Application and Dogru's (Cuneyt) Application (Leave Stage) [2011] NIQB 60

IN THE MATTER of an Application by Laura Bruce for Judicial Review

-and-

IN THE MATTER of an Application by Cuneyt Dogru for Leave to Apply for Judicial Review

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McCLOSKEY J

Introduction

[1] Leave to apply for judicial review has been granted in the first of these cases (Bruce), but not the second (Dogru). Taking into account the accumulation of affidavit evidence, the first case (that of Ms Bruce) is presently ready for substantive hearing, if considered appropriate. In the second case (that of Mr. Dogru) the only evidence before the court is that presented by the Applicant and leave to apply for judicial review has not yet been granted. For present purposes, the main factor which these cases share in common is that they involve challenges by the Applicants to immigration decisions which have been overtaken, but not extinguished, during the progress of these proceedings. For convenience, I shall describe the Respondent in the first case and the proposed Respondent in the second as the United Kingdom Borders Agency ("*UKBA*").

The Immigration (Notices) Regulations 2003

[2] I consider that the provisions of The Immigration (Notices) Regulations 2003 relating to notification of decisions are of some importance in the present context. Regulation 4(1) stipulates that every immigration decision and every appealable EEA decision must be the subject of "*written notice*" to the person concerned. By

Regulation 5(1), such notice must incorporate "*a statement of the reasons for the decision to which it relates*". Regulation 5(3) provides:

> "*(3) Subject to paragraph (6), the notice given under regulation 4 shall also include, or be accompanied by, a statement which advises the person of –*
>
> *(a) his right of appeal and the statutory provision on which his right of appeal is based;*
>
> *(b) whether or not such an appeal may be brought while in the United Kingdom;*
>
> *(c) the grounds on which such an appeal may be brought; and*
>
> *(d) the facilities available for advice and assistance in connection with such an appeal."*

By Regulation 5(4), it is provided:

> "*(4) Subject to paragraph (6), the notice given under regulation 4 shall be accompanied by a notice of appeal which indicates the time limit for bringing the appeal, the address to which it should be sent or may be taken by hand and a fax number for service by fax.*"

Regulation 7 provides:

> *"7 (1) A notice required to be given under regulation 4 may be –*
>
> *(a) given by hand;*
>
> *(b) sent by fax;*
>
> *(c) sent by postal service in which delivery or receipt is recorded to:-*
>
> *(i) an address provided for correspondence by the person or his representative; or*
>
> *(ii) where no address for correspondence has been provided by the person, the last-known or usual place of abode or place of business of the person or his representative;*
>
> *(d) sent electronically;*

(e) sent by document exchange to a document exchange number or address;

(f) sent by courier; or

(g) collected by the person who is the subject of the decision or their representative.

(2) Where –

(a) a person's whereabouts are not known; and

(b)

(i) no address has been provided for correspondence and the decision-maker does not know the last-known or usual place of abode or place of business of the person; or

(ii) the address provided to the decision-maker is defective, false or no longer in use by the person; and

(c) no representative appears to be acting for the person,

the notice shall be deemed to have been given when the decision-maker enters a record of the above circumstances and places the signed notice on the relevant file.

(3) Where a notice has been given in accordance with paragraph (2) and then subsequently the person is located, he shall be given a copy of the notice and details of when and how it was given as soon as is practicable.

(4) Where a notice is sent by post in accordance with paragraph (1)(c) it shall be deemed to have been served, unless the contrary is proved, –

(a) on the second day after it was posted if it is sent to a place within the United Kingdom;

(b) on the twenty-eighth day after it was posted if it is sent to a place outside the United Kingdom.

(5) For the purposes of paragraph (4) the period is to be calculated –

(a) excluding the day on which the notice is posted; and

(b) in the case of paragraph (4)(a), excluding any day which is not a business day.

(6) In this regulation, "business day" means any day other than Saturday or Sunday, a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom to which the notice is sent, Christmas Day or Good Friday.

(7) A notice given under regulation 4 may, in the case of a minor who does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child."

In both of the present cases, there was, in the language of the Regulations, an "*appealable EEA decision*" impacting adversely and directly on each Applicant.

The Judicial Review Challenge: Ms Bruce

[3] In the first case (Bruce), the Applicant challenges a series of immigration decisions made by the UKBA in March and April 2010. These proceedings were initiated on 23rd April 2010 and leave to apply for judicial review was granted on 25th May 2010. As these proceedings advanced, this Applicant appealed successfully to the Immigration and Asylum Chamber (First Tier Tribunal), thereby securing the grant of permanent residence in the United Kingdom, with effect from 26th August 2010. This was secured pursuant to the Immigration (EEA) Regulations 2006 ("*the 2006 Regulations*"). Notwithstanding, this Applicant invites the court to list her case for substantive hearing to enable her to pursue the following remedies (in summary):

(i) Orders of Certiorari quashing:

(a) The issue of removal directions against the Applicant on 9th March 2010.

(b) The detention of the Applicant on the same date.

(c) The taking of the Applicant's fingerprints on the same date.

(d) The grant of temporary admission to the Applicant on 10th March 2010.

(e) A decision by the UKBA that it would consider the Applicant's departure from the United Kingdom as signifying a withdrawal of her aforementioned appeal.

(f) The service on the Applicant of a voluntary removal disclaimer before her departure to Canada on 11th April 2010.

(g) The UKBA's failure to provide an assurance to the Applicant that her UK immigration status would be unaffected by travelling to Canada.

(h) The grant of temporary admission to the United Kingdom to the Applicant on 18th May 2010.

(ii) In the alternative to quashing orders, declarations relating to each of the acts and determinations listed above.

(iii) Damages for trespass to the Applicant's person arising out of her detention and the taking of her fingerprints on 9th/10th March 2010.

[4] One particular feature of Mrs. Bruce's case should be highlighted. In January 2009, she applied for the grant of permanent residence under the 2006 Regulations. On 5th February 2010, her application was refused by the UKBA. In such circumstances, a statutory right of appeal was exercisable by this Applicant (and was duly exercised by her in due course, successfully). As appears from the foregoing, all of the impugned acts and decisions of the UKBA post dated this. In particular, on 9th March 2010 she was assessed to be an illegal entrant and, in consequence, was detained, had her fingerprints taken and was the subject of removal directions. The Applicant avers that, when these events occurred, she had not been notified of this adverse decision. She claims that she had been in regular telephone contact with the UKBA in February 2010 and that no mention of this adverse decision was made. She asserts that it was first notified to her when she raised the issue, following her detention on 9th March 2010. Having instructed solicitors, her appeal against this decision was submitted on 16th March 2010, culminating in a successful outcome on 29th July 2010. The dispute between the parties concerning notification of the adverse decision emerges in the following averments in the UKBA's affidavits:

> "*Evidence from Home Office records shows that the Applicant made phone calls to the Home Office both before and after 4th February 2010 requesting the return of her passport for travel to Canada. It therefore appears that the Applicant was in the UK at the time of the decision and the decision was sent to her in written form on 4th February 2010 by Recorded Delivery that same day …*
>
> *She did not leave the UK until 10th February 2010 …*
>
> *The Royal Mail 'tracker' which was recorded on the Applicant's file … records that the letter was 'not called for', which signifies that attempts were made to deliver the letter to the Applicant but there was no recipient and so a 'receipt' was left at the property instructing the Applicant to go to the relevant depot to collect the letter*".

The Applicant's sworn riposte asserts three telephone calls to the Home Office on 5th and 8th February 2010, of some 27 minutes duration altogether, during which she was not informed of the adverse decision. Furthermore, she avers that, following her detention on 9th March 2010, her solicitor suggested that the UKBA had acknowledged the absence of any proof of *delivery* of the notification. I shall revisit this issue presently.

[5] On the date when judgment herein was originally scheduled to be delivered (4th May 2011), the court acceded to a request that Ms Bruce be permitted to file a further affidavit. In this she recounted that on 1st May 2011, she had been detained by UKBA at London Heathrow Airport upon her arrival from Johannesburg. She described an incident in which she was questioned by an immigration officer. She asserted that she informed the officer that her application for permanent residence had been rejected initially but was successful on appeal. Her passport was scanned by the officer, who confirmed that the computer did not disclose the fact of permanent residence. The immigration officer then completed a Form IS 81 ("Notice to a Person Required to Submit to Further Examination") and served this on Ms Bruce. The immigration officer confirmed that she was detaining Ms Bruce, stating that it would be necessary for her to make further enquiries. Some fifteen minutes later, having done so, according to Ms Bruce:

> "[The immigration officer] *indicated that my complex immigration history required her to detain me to verify that I had legal standing to enter the United Kingdom*".

The immigration officer then apologised for the delay and returned Ms Bruce's passport to her. The duration of the incident was some thirty minutes. Ms Bruce avers:

> "*I respectfully consider that this encounter shows unequivocally that my immigration history as communicated via my passport does in fact set off alarms sufficient to trigger my attention at Heathrow …*
>
> [This] *is akin to being treated like a criminal or persona non grata. It is most upsetting and distressing …*".

Finally, Ms Bruce deposes to an asserted suggestion by the immigration officer that she would recommend that certain information be deleted from Ms Bruce's immigration history, with a view to avoiding a recurrence of this incident.

[6] The copy Form IS 81 substantiates the detention of Ms Bruce in the circumstances and for the purpose alleged by her. A short replying affidavit sworn by the immigration officer concerned confirms the absence of any substantial factual dispute about the events of 1st May 2011. The deponent explains that Ms Bruce

presented a Canadian passport which did not contain either an entry clearance certificate or a residence card. Upon further enquiry, Ms Bruce produced her residence card. The course of events thereafter is not contested. The immigration officer suggests, in terms, that she conducted routine checks designed to determine Ms Bruce's suitability for admission to the United Kingdom. She avers that the service of Form IS 81 is not recorded in her immigration history. According to the immigration officer:

> "*An amendment to her records which should have been made following her successful appeal had not been done …*
>
> *I advised Ms Bruce that I would recommend that the amendment … be made to her records that would mean that she should not be delayed on subsequent entry to the United Kingdom. I made such a recommendation with the authority of my Chief Immigration Officer*".

The immigration officer avers, finally, that this amendment has now been made and she suggests that, upon future entry to the United Kingdom, it would be advisable for Ms Bruce to produce both her passport and her residence card.

The Judicial Review Challenge: Mr. Dogru

[7] In the second case, that of Mr. Dogru, the factual matrix is altogether less convoluted. Mr. Dogru, when lawfully present in the United Kingdom in accordance with a visitor's visa and prior to the expiry thereof, applied to the UKBA for permanent residence under the 2006 Regulations. On 14th January 2010, a decision was made rejecting his application. This was unknown to him. On 19th January 2010, he was arrested in Stranraer on the basis that he was an illegal immigrant, removal directions and detention ensued and he was detained for nine days in consequence. It is common case that, at this stage, the decision of 14th January 2010 had not been notified to the Applicant and he was not otherwise aware of it. It first came to his attention following his arrest and detention. Service by hand is, of course, permissible by virtue of Regulation 7(1)(a) of the 2003 Regulations. Upon exercising his right of appeal, on 22nd January 2010, the Tribunal granted him bail, on 28th January 2010. On 8th July 2010, the Tribunal acceded to his appeal and he thereby secured permanent residence in the United Kingdom under the 2006 Regulations. In bringing this application for leave to apply for judicial review, Mr. Dogru seeks the following relief:

(a) Orders of Certiorari quashing the aforementioned removal and detention decisions.

(b) In the alternative, suitable declaratory orders.

(c) Damages.

The Secretary of State's Policy

[8] In each of these cases, the court enquired at an earlier stage whether, given the later grant of permanent residency to each of the Applicants under the 2006 Regulations, the earlier impugned immigration decisions would be expunged from the UKBA's records. This stimulated letters from the UKBA, containing the following passages:

> "*It is not clear to the [UKBA] how your client would be prejudiced by the decisions remaining in* [her/his] *record. The decisions properly form part of* [her/his] *immigration history and are relevant in order to explain to officers of the UK Border Agency how your client claimed to have entered the United Kingdom and to have an EEA permit. They are lawfully held for an immigration purpose and do not contravene the Data Protection Act 1998. Indeed, if details of these decisions were removed from* [the] *file there would accordingly be gaps in* [the] *immigration history which might give rise to difficulties in determining future applications or a need to seek clarification concerning why past decisions had been made …*
>
> *Immigration officers or case workers … who have cause in the future to access either your client's computer records or* [the] *case work file will be fully aware that the decision to give notice of intention to remove is no longer of legal effect. The taking of these decisions, of themselves, should not cause an officer to make a further decision which prejudices your client other than that which is in accordance with the Immigration Act, Immigration Rules, published policy or any other statutory provisions…*
>
> *Moreover, your client will no doubt have paperwork from this Agency confirming* [her/his] *entitlement to reside in the United Kingdom. I would anticipate that this would include a Resident's Permit in* [the] *passport. These documents are intended to assist your client in the exercise of free movement rights …*
>
> *The maintenance of those decisions on* [the] *file should assist in preventing adverse decisions being taken against your client, given that officers will know why they are no longer of legal effect*".

Stated succinctly, this letter conveys to the court that the UKBA operates a policy of maintaining records of immigration decisions and associated matters on its files (presumably computerised) indefinitely, for the reasons proffered.

The Issue: Application of the "Salem" Principle

[9] The issue to be determined is whether either of these cases should be permitted to progress further in the Judicial Review Court, in the circumstances outlined above, having regard to what has become known as the "Salem" principle.

[10] The principles to be applied are familiar to practitioners. I consider the following approach to be generally correct. Fundamentally, the resolution of this issue involves an exercise of the court's discretion. The parties have no right to *demand* a substantive hearing. The rationale of the discretion in play is that these are public law proceedings in which there is no *lis* inter-partes. A further doctrinal consideration of relevance is that public law remedies are discretionary in nature. The exercise of this discretion in any given case will be informed by *inter alia*, the overriding objective and, in particular, the allocation of the court's limited time and resources and the competing demands of other, more pressing cases in the system. The court will also take into account the Applicant's ability to pursue a remedy in an alternative forum and consideration will be given to the nature of such remedy and the question of whether such forum is preferable to that of the judicial review court in the particular circumstances of the individual case. The court may also form some view of the Applicant's prospects of securing any of the remedies currently sought. Finally, it will be appropriate for the court to reflect on the efficacy of the remedies sought by the Applicant and, in particular, whether they will truly serve a real and appropriate purpose, taking into account the significant change of circumstances which typically materialises in cases of this kind.

[11] In ***R –v- Secretary of State for the Home Department, ex parte Salem*** [1999] AC 450, the House of Lords expounded the principle that in circumstances where a dispute between the parties has become moot, the court has a discretion whether to perpetuate the proceedings, to be exercised with caution and only where there is good reason in the public interest for doing so. Lord Slynn suggested, inexhaustively, that a substantive hearing in an individual case is unlikely to be appropriate where the court is required to embark upon detailed consideration of the facts and there are no indications of a substantial number of other cases, extant or anticipated, in which the same issue arises. I also take into account what was said in ***R (Smeaton) –v- Secretary of State for Health*** [2002] 2 FLR 146, where Munby J observed that it is the constitutional function of the courts to -

> "[2] … *resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires of controversies in the academy, however intellectually interesting or jurisprudentially important the problem and*

however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires".

The ever increasing importance of the over-riding objective, coupled with the contemporary culture of litigation, gives this pronouncement added vigour.

Conclusion

[12] In determining the preliminary issue which has arisen in both cases, I take into account the following main considerations:

(a) Both cases are manifestly fact sensitive, particularly that of Ms Bruce, where there are also material factual disputes.

(b) It cannot be gainsaid that there have been significant changes in circumstances since the initiation of both legal challenges.

(c) In both cases, the UKBA's solicitor has confirmed unequivocally that the impugned decisions have been rendered obsolete and are no longer of any force or effect.

(d) Both Applicants wish to have the impugned decisions and surrounding documentary materials expunged from the UKBA's records. However, it is clear from the letters written by the UKBA's solicitor that neither the Orders of Certiorari nor the declarations sought will have this effect. These letters enunciate the UKBA's policy and there is no challenge to such policy in these proceedings.

(e) The declarations which the Applicants seek, in the alternative, would not constitute practical or effective remedies. Realistically, it is extremely difficult to envisage a declaratory order having any real or practical effect in a typical port of entry immigration scenario. Even if declaratory orders were produced by either Applicant to the immigration officer concerned or were otherwise accessible by computer check, such orders would very probably be the cause of uncertainty, delay and, quite possibly, a need to seek legal advice on the part of the relevant official. In the real world, they could well be counterproductive. Furthermore, if Ms Bruce chooses not to produce her residence card, contrary to UKBA advice, that is a matter of choice for her.

(f) In the particular case of Ms Bruce, it is distinctly possible that there will be additional substantial issues to be investigated arising out of her claims for damages for personal injuries and loss of earnings.

(g) Both parties are desirous of pursuing claims for damages for trespass to their respective persons and false imprisonment. This can be adequately accommodated by the exercise of the court's conversion power enshrined in Order 53, Rule 9(5).

(h) The truly effective and concrete remedy pursued by both Applicants is an award of damages. In both cases, if the Applicants are successful, it is almost inevitable that this remedy will be granted by the court. This arises out of both Applicants' challenges to their detention and the taking of their fingerprints. These are acts of trespass to the person which almost invariably stimulate the redress of damages, where established. It is long settled that the County Court and the Queen's Bench Division of the High Court are the appropriate fora in which claims for damages for trespass to the person and false imprisonment are pursued. I consider that each is a preferable forum to that of the Judicial Review Court, having regard to the factors of pleadings, the range of interlocutory mechanisms available - interrogatories, discovery, orders under Section 32 of the Administration of Justice Act 1970, in particular - the intensive judicial case management which can be applied, if required, and the very different way in which the trial will be conducted.

(i) Properly analysed, the County Court or the High Court will be equipped to conduct a more rigorous examination of the legality of both Applicants' arrest and ensuing detention. Furthermore, there can be no sensible challenge to the efficacy of the remedies which both courts are empowered to grant.

[13] In my view, the critical question to be determined is whether some wider public interest will be served by permitting either of these cases to proceed in the Judicial Review Court. The main argument advanced by Mr. O'Donoghue QC (appearing with Ms Connolly) on behalf of the Applicants was that there arises in both cases an issue of general importance relating to the service of notifications under the 2003 Regulations. It was submitted that these cases raise significant questions relating to the powers of UKBA and the rights of suspected illegal entrants in circumstances where an adverse EEA decision has not been notified to the individual in a manner compliant with Regulation 7. Founding on the Ms Bruce's latest affidavit, Mr. O'Donoghue further submitted that the issue of general public importance raised by her challenge is that of expunging certain information from the UKBA records. Having regard to a combination of the unavoidably fact sensitive nature of each case, the provisions of Regulation 7 and, as highlighted above, the absence of any challenge to the UKBA record keeping policy I am unable to accept this argument. I also take into account the most recent UKBA affidavit which includes averments to the effect that an important and ameliorating amendment has now been made to the UKBA records relating to Ms Bruce. Furthermore, I consider that by virtue of the provisions of Regulation 7 there is no

identifiable lacuna in the relevant legal framework. Finally, no issue concerning the proper construction of Regulation 7 arises.

[14] Mr. O'Donoghue further submitted that, in both cases, the written notifications were non-compliant with Regulation 5(3). This point was ventilated at a late stage and, in the circumstances, the court received no argument on the issue of whether the requirements of Regulation 5(3) were overridden, in either case, by virtue of Regulation 5(6). In these circumstances, I consider it inappropriate to undertake any concluded determination of this discrete issue. I would, however, make the following observations. In my view, the first riposte to this complaint, **if** well founded, is that it is plainly fact sensitive. More important, perhaps, **if** this constituted an omission in contravention of the Regulation neither Applicant suffered any material prejudice in the prosecution of their respective appeals. Furthermore, insofar as this discrete issue may have any bearing on the Applicants' claims for damages for trespass to the person and false imprisonment, they will not be precluded from ventilating it in the appropriate forum. Finally, and fundamentally, I consider that this issue does not satisfy the test formulated at the outset of paragraph [13].

[15] The main thrust of the submissions advanced by Mrs. Murnaghan (on behalf of the UKBA) was that the application of the "***Salem***" principle points clearly to a rejection of the Applicant's contentions. These submissions highlighted the absent indication of any substantial number of other cases in which the same – or a similar – issue arises and the absence of any significant point of statutory construction, the determination whereof would guide courts and decision makers in other cases, thereby serving some discernible wider public interest. I consider that the unavoidably fact sensitive nature of cases of this kind is underlined by the decision in ***R (Domi) –v- Secretary of State for the Home Department*** [2008] EWHC 571 (Admin), to which Mrs. Murnaghan referred. In short, having regard to my analysis and conclusions in paragraphs [12] to [14] above, I prefer the submissions of Mrs. Murnaghan.

[16] I have, finally, given consideration to the recent decision of the Supreme Court in ***Lumba and Mighty –v- Secretary of State for the Home Department*** [2011] UKSC 12. The main issues therein might be summarised as those of whether breaches of public law can render unlawful detention pending deportation; and, if so, in what circumstances; and, if so, giving rise to what remedy. The statutory context was constituted by Section 3(5)(a) of the Immigration Act 1971 and Schedule 3 thereto. Very briefly, the central ingredient in the matrix was a policy operated by the Secretary of State which (a) imposed a virtually blanket ban on the release of foreign national prisoners awaiting deportation and (b) was unpublished. These were the public law misdemeanours in play. This gave rise to a majority [6/3] decision that in the exercise of the statutory power to detain the relevant public law duties had been infringed, thereby rendering the detentions unlawful **and** rendering the Secretary of State liable in the tort of false imprisonment. The court was unanimously of the view that it is lawful for the Secretary of State to operate a policy

governing the practice to be followed normally in the detention of foreign national prisoners pending their deportation, **provided that** the relevant legal standards are respected viz. the requirements of public law, Article 5(1)(f) ECHR and the principles in ***Ex parte Hardial Singh*** [1984] 1 WLR 704.

[17] By a separate 6/3 majority (the dissenters being three members of the first majority of six), the appropriate remedy was considered to be nominal damages of £1, with no entitlement to exemplary damages. The essence of the disagreement on the part of the chamber of three dissenting judges was that since the Appellants would have been lawfully detained in any event, the Secretary of State was not liable to them in false imprisonment. The majority disagreed, reasoning that the tort of false imprisonment is actionable *per se* and requires no proof of harm. I acknowledge that the decision in ***Lumba*** could conceivably feature at the substantive trial of the Applicants, in whatever forum this proceeds. Beyond this it is inappropriate to venture. Fundamentally, I consider that this decision has no bearing on the court's resolution of the preliminary issues presently being determined.

Disposal

[18] Reflecting the above analysis and conclusions, I am of the opinion that neither of these cases qualifies to be listed for a substantive hearing in the Judicial Review Court. I consider that the appropriate course is to make a conversion order, under Order 53, Rule 9 (5) of the Rules of the Court of Judicature. To facilitate this course in the case of Mr Dogru, I grant leave to apply for judicial review. It is clear from the terms of the Rule that an order of this kind is made *in lieu of* an order refusing the substantive application.

Costs

[19] In my view, it is desirable to address, at this stage, the issue of costs incurred to date, since the mechanism of simply reserving both parties' costs will provide no insight or assistance to the ultimate court of trial. Taking into account that, in each case, when these proceedings were initiated the event which has, ultimately, precipitated this ruling (viz. the successful appeal to the Tribunal) had not eventuated, and given that both applications were in my view properly brought at the relevant time, I consider it appropriate to order (subject to any further argument) that the parties' costs incurred to date be costs in the cause. There will also be legal aid taxation in respect of Mr Dogru.