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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Dahal's (Mukunda Prasad) Application [2010] NICA 41

IN THE MATTER OF AN APPLICATION BY MUKUNDA PRASAD DAHAL FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Treacy J

MORGAN LCJ

[1] This is an appeal from the decision of Weatherup J to dismiss an application for judicial review of the decision of the immigration authorities made on 2 February 2008 that the appellant was an illegal entrant to the United Kingdom and a person liable to detention and removal from the United Kingdom. Mr McGrory QC and Mr Stockman appeared for the appellant and Mr McGleenan for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The appellant is a Nepalese national born on 21 September 1976. 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 appellant was issued with a letter of approval. The appellant 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 appellant entered the United Kingdom on 5 October 2007 on an HSMP visa.

[3] The government introduced the HSMP in January 2002. The relevant White Paper 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 stated the requirements to be met by a person seeking leave to enter as a highly skilled migrant as being that the 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. "

The valid document under the first requirement was satisfied when the appellant obtained an "Immigration Employment Document" from Work Permits (UK).

[4] Qualification for an immigration employment document is based on a points system with points awarded based on age, qualifications and earnings. The appellant required 75 points in order to obtain the document. At age 30 he earned 5 points. He gained a Masters degree in 2005 for which he earned 35 points. He, therefore, required an additional 35 points based on his income. Income in excess of £2000 will earn only 20 points. The next band was an income in excess of £3500 which earned 45 points.

[5] In his application the appellant relied on employment and income from three sources. The first was as a full time teacher at a higher secondary School, the second was as a part-time lecturer in English at a college and the third was as an adviser with Rural Integrated Community Development Forum. He required the income from each of these employments in order to achieve the necessary band. When the appellant made his application to Work Permits (UK) the British Embassy in Kathmandu made inquiries and received confirmation of the applicant's first employment but was unable to establish contact with the other two bodies.

[6] On his arrival in the United Kingdom the appellant lived in London and worked initially as a helper. He then travelled to Carrickfergus on 26 November 2007 where he worked as a waiter in a restaurant until the beginning of January 2008. At that stage he returned to London where he obtained employment as a sales assistant in Sainsburys supermarket commencing at the end of January 2008 and also undertook training with the Security Industry Authority as a security officer.

[7] On 2 February 2008 the appellant returned to Northern Ireland. He claimed that this was 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. He was interviewed by immigration officers. The record of the interview indicates that he told the immigration officer that a friend who used to be his neighbour in Nepal told him about the job as a waiter in Carrickfergus before he left the United Kingdom and offered it to him. When he arrived in the United Kingdom he saw an immigration officer and told him that the purpose of travelling to the United Kingdom was to continue with his teaching career. He did not disclose that he intended to use his visa to take up employment as a waiter and admitted that it was never his intention to seek employment in a professional capacity allied to his profession as a teacher.

[8] The appellant disputed these answers in his affidavit but in our view Weatherup J was entirely right to reject his account. The appellant was a teacher of English in Nepal. There was no suggestion that he had any difficulty with the English language or that he did not understand the interviewer. He initialled each of the answers in the record of interview. There was no reason to doubt the accuracy of the record of interview.

[9] In light of his answers at interview and the other facts then established the immigration officer concluded that he was an illegal entrant who had used deception by being silent in his statement to the on-entry immigration officer as to material facts in that he intended to utilise his UK entry clearance as a highly skilled migrant in order to take up the offer of employment as a waiter at a restaurant. He was served with the relevant notices and detained as his deportation was imminent. On 4 February 2008 removal directions were set. The appellant applied for judicial review of the decision to declare him an illegal entrant and detain him on 8 February 2008. Leave was granted and the removal stayed. Thereafter the appellant was admitted to bail.

[10] Subsequent to the appellant's detection the British Embassy made further inquiries about the Rural Integrated Community Development Forum through the telephone numbers listed on their letterhead. They discovered 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 that where more than one employment was being declared usually one of them was false. The appellant's case was that the Rural Integrated Community Development Forum was a non-governmental organisation financed by donations. The appellant had left Nepal seven months previously and could not explain what had become of it. Although the appellant relied upon a document from the Inland Revenue Office at Kathmandu confirming deposits of tax on the income from the 3 employments the respondent noted that the correspondence from each of the employers indicated that tax had been deducted from income and then deposited in "the concern tax office". It is highly unlikely that such a term was used by each independently.

[11] The respondent also relied upon a CV prepared by the appellant and found in his luggage at the time of interview. The CV referred to his employment as a teacher from July 2005 until September 2007 but did not refer to the other two employments upon which he relied. There was a reference to him working an evening shift as a receptionist during this period and as a sales executive in a department store prior to that. The CV was clearly recent as it included the employment as a waiter in Carrickfergus. In his replying affidavit the applicant disclosed a CV which relied upon the three employments which were the basis of his claim but did not include any other employments.

[12] It was submitted on behalf of the appellant that a CV might be tailored to a particular job application. In general that proposition is correct but there is nothing to indicate why it would have been appropriate to tailor the CV in this case. Secondly the CV disclosed in the luggage included a reference to employment as a receptionist which would have generated income upon which the appellant could have relied in his HSMP application. Indeed it is inexplicable why he would not have done so unless he realised that the disclosure of that employment would have made it less likely that he was undertaking the employments upon which he was relying. We consider that this evidence is highly relevant as it strongly supports the view that the appellant is a person who is prepared to use deception.

[13] On behalf of the appellant there were essentially three points made. First there was no requirement under the HSMP scheme for an entrant to seek highly skilled employment. Secondly the appellant could not be held to be an illegal entrant unless the strength and quality of the evidence was sufficient to demonstrate that precedent fact. Thirdly it was contended that although subsequently discovered facts can be introduced where they are relevant to the decision the material from the British Embassy was not so relevant and accordingly should not have been relied upon. The respondent was only permitted to rely upon the reasons advanced at the time for the detention.

Consideration

[14] In the court below the appellant contended that it was not necessary for those who have obtained HSMP visas to seek higher skilled employment. He pointed out that the sanction for those who failed to obtain high skilled employment is a refusal of the extension of the visa. There is a points system applied to such extensions that is based on matters such as the nature of the employment and income of the visa holder in the United Kingdom. In addition the appellant pointed out that if it had been the intention of the scheme to require those granted an HSMP visa to seek highly skilled employment then the Immigration Rules would have stated expressly that such was the case. The appellant pointed to a number of examples were such a requirement had been imposed.

[15] In dealing with this argument the learned trial judge recognised that the HSMP did not state in terms that an applicant should seek to obtain highly skilled employment. Indeed he recognised that prior to obtaining such employment it may be necessary for a person admitted under the scheme to obtain employment with lower skills. He correctly recognised that the purpose behind the scheme was to enable highly skilled migrants to contribute their skills to the UK economy and that the programme was not intended to be a vehicle for entry to undertake low skilled employment. He concluded, therefore, that an entrant onto the programme must be expected to seek highly skilled employment.

[16] The decision of the House of Lords in Khawaja v Secretary Of State for the Home Department [1984] 1 AC 74 means that the court will require convincing evidence before being satisfied on the balance of probabilities that a person is an illegal entrant. There is no duty of candour placed upon an entrant but the decision of this court in Udu and Nyenty's Applications [2007] 2007 NICA 48 makes it clear that there are circumstances in which mere silence can constitute a deception. On the basis of his previous finding the learned trial judge concluded that the appellant practised deception in obtaining a visa under the HMSP when it was not his intention to seek highly skilled employment for which he declared he was qualified and that such nondisclosure was material to his application for an HSMP visa.

[17] We agree that the learned trial Judge placed the matter too highly when he found that an entrant onto the programme must be expected to seek higher skilled employment. The scheme itself does not expressly impose such a requirement. Failure to seek higher skilled employment without adequate reason may well be relevant to whether or not deception has occurred. The process for the extension of a visa allows the failure to obtain such

employment to be taken into account. The availability of such employment will vary depending upon the economic circumstances of the area in which the entrant is located. We agree that it might have been difficult to fashion a requirement which identified what was higher skilled employment but that does not lead us to conclude that it is necessary to imply such a requirement into the scheme.

[18] That does not, however, end the matter. We are satisfied that the material uncovered by the British Embassy together with the CV found in the appellant's luggage is substantial evidence leading to the conclusion on the balance of probabilities that the appellant did not enjoy the income from the Rural Integrated Community Development Forum which he alleged and that he practised deception in the material he submitted to Work Permits (UK) in order to obtain the Immigration Employment Document. We consider that it is appropriate to look at the evidence as a whole including the evidence that the telephone numbers provided for this employment are in fact the numbers for a visa consultancy, the absence of any information as to the existence of this employer, the striking similarity in the documents relating to the payment of tax and the absence of any reference to this employer in the CV discovered in the appellant's luggage. Such evidence in our view is of an appropriate quality and sufficiently cogent.

[19] It is submitted, however, that this information cannot be relied upon by the respondent to sustain the decision to detain the appellant and keep him in custody pending deportation. The appellant pointed out that the respondent has a statutory duty to give reasons for immigration decisions under Regulation 5(1)(a) of the Immigration (Notices) Regulations 2003. Such a requirement is designed to ensure that a person in the position of the appellant understands the basis upon which he is being detained and deported. The appellant further relies upon the line of reasoning in cases such as R v Westminster City Council ex p Ermakov [1996] 2 All ER 302 that the courts should be slow to allow a public law decision maker to advance alternative reasons for their decision.

[20] The information conveyed to the appellant at the time of his detention was that he had used deception by his silence as to the fact that he intended to use his HMSP visa for the purpose of obtaining employment as a waiter at a restaurant. The information subsequently obtained has demonstrated that the appellant was a person who on the balance of probabilities knew that he did not meet the qualifying criteria for the scheme but intended to use the visa that he had obtained by deception for the purpose of obtaining his employment as a waiter in a restaurant. He also knew that the purpose of the scheme was to bring into the United Kingdom highly skilled individuals rather than those who were seeking low skilled work. We are quite satisfied that he both obtained his visa by deception but also deceived the on entry immigration officer by failing to disclose the true nature of the employment

that he was seeking because of the risk that his deceit in relation to his visa application would be discovered. The presentation of the visa to the on entry immigration officer was, of course, a deception in itself because the appellant knew that he did not meet the qualifying conditions for such a visa. Although, therefore, the facts subsequently discovered have identified a new deception, being that in relation to the visa, they also confirm the original assertion of deception albeit for reasons other than those found by the learned trial Judge.

[21] We consider that the appellant was an illegal entrant, that he was adequately informed of his deception at the time of his detection and that the evidence establishing that he was an illegal entrant was of sufficient quality to justify that conclusion. The appeal must be dismissed.