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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Emmanson's (Fyneface Boma) Application (No.2) [2009] NIQB 70

IN THE MATTER OF AN APPLICATION BY FYNEFACE BOMA EMMANSON FOR JUDICIAL REVIEW (No.2)

STEPHENS J

Introduction

[1] I gave judgment in relation to this application for judicial review and the citation for that judgment is [2008] NIQB 38. The applicant brought an appeal and presented to the Court of Appeal an argument which he accepted had not been advanced at first instance. The first indication of this new argument was contained in the applicant/appellant's skeleton argument for the Court of Appeal dated 14 January 2009. On 26 January 2009 the appeal came on for hearing the respondent's contending that the new point had not been before me at first instance, had not been the subject of any ruling nor had any opportunity been afforded to the respondent to adduce evidence by filing an affidavit in relation to it, if it so chose. The Court of Appeal adjourned the hearing of the appeal, remitted the case to allow an application to be made for the Order 53 statement to be amended, for further evidence to be filed if the parties chose to do so, subject to the leave of the court, and for rulings to be given in relation to the new matter.

[2] The further hearing before me took place on 27 and 28 April 2009 and 2 June 2009 there having been some difficulty in listing as the applicant's previous solicitor had in the meantime been suspended from practice.

The new matter.

[3] There was no agreement between counsel as to the exact parameters of the new point which the applicant had made to the Court of Appeal and accordingly the point in relation to which I am to rule. Paragraphs 2.2.2 – 2.2.3 of the applicant's skeleton argument for the Court of Appeal dated 14

January 2009 assists in giving definition to the new point. In those paragraphs the applicant contended:-

> "The purpose of the 1971 Act is to regulate the entry and continued presence of aliens in the territory of the United Kingdom. The purpose of Operation Gull in Northern Ireland does not fall within the scheme of the Act as its objective is to identify and prevent people who seek to unlawfully enter the Republic of Ireland: …. The use of statutory powers under the 1971 Act to this end was therefore ultra vires and unlawful.
>
> 2.2.3 Furthermore it is not unlawful for a non national entering the United Kingdom on a visitor's visa to journey to the Republic of Ireland during the course of his or her stay. In fact, under Section 11 and Section 3(4) of the 1971 Act such a person is deemed not to have left the United Kingdom when travelling within the common travel area. Section 1(3) of the 1971 Act provides that a local journey from or to the Republic of Ireland shall not be subject to the control of the 1971 Act. It follows that there would have been no power to question the appellant with the purpose of finding out in accordance with the objective of Operation Gull whether he planned to visit the Republic of Ireland."

[4] That new point could be summarised as follows:

> "Further by reason of the existence of the common travel area the use of any powers under the Immigration Act 1971 in this case was unlawful."

In support of that proposition the skeleton argument refers to Sections 1(3), 3(4) and 11 of the Immigration Act 1971 and factual findings at paragraphs [19] and [43] of my judgment. I was informed by Ms Higgins QC on behalf of the applicant that in addition to referring to those sections of the Immigration Act 1971 and those paragraphs of my judgment she brought to the attention of the Court of Appeal Clause 46 of the Orders, Citizenship and Immigration Bill (HL) as introduced in the House of Lords on 14 January 2009. Clause 46 proposed an amendment to Section 1(3) of the Immigration Act 1971.

[5] During the course of the further hearing before me Ms Higgins also referred to Clauses 25 and 26 of the Immigration and Citizen Bill dated July

2008. That Bill did not deal with the common travel but she called it in aid in support of the proposition that Section 4(2)(c) of the Immigration Act 1971 should not be construed so as to enable the powers set out in Schedule 2 to be exercised otherwise than at the port of entry. That was a point which I had decided against the applicant at paragraph [43] of my judgment. Ms Higgins also referred me to the decision of the House of Lords in *R v Naillie & Anor* [1993] AC 674 in relation to the same point. That was an authority to which she had not referred at the original hearing. She invited me to alter my decision based on that authority. I consider that my function is to rule in relation to the new issue which was brought to the attention of the Court of Appeal. That issue might be referred to as the common travel area issue. My function does not include revisiting conclusions which I had already reached in this case. In arriving at the conclusion that the powers under Schedule 2 are not confined to the port of entry I relied on the decision of the Court of Appeal in England and Wales in *Badjinder Singh v Hammond* [1987] 1 WLR 283 and also on what Lord Wilberforce said in *Khawaja v Secretary of State* [1983] 1 All ER 765 at 774d. I will confine myself to the new point which was raised before the Court of Appeal rather than revisiting conclusions which I had previously reached. Accordingly I allow the amendments at paragraphs 3(a), (ii) and (iii) of the Order 53 statement but do not allow the amendment at paragraph 3(a)(i) as this requires me to deal with a matter which I have already decided and which was not remitted to me by the Court of Appeal.

Further evidence in relation to Operation Gull.

[6] In my earlier judgment at paragraphs [17] and [42] I found that the purpose of Operation Gull was to monitor the movement of illegal immigrants within the United Kingdom with particular focus on those travelling illegally between the United Kingdom and the Republic of Ireland and vice versa. For the purpose of this further hearing Mr Suta brought greater focus to the purpose of Operation Gull. I accept his evidence.

[7] Mr Suta states that Operation Gull arose out of an increasing cooperation between the authorities in the United Kingdom and in the Republic of Ireland. Initially the authorities in the Republic of Ireland and the United Kingdom met to see if it would be possible in the interests of better enforcement of the immigration laws in both jurisdictions to achieve greater cooperation and coordination of efforts. It was decided that these goals should be advanced and a variety of initiatives were put forward, for example:-

(a) In respect of data sharing between the authorities on either side of the border.

(b) In respect of secondment of staff to each other's operations.

(c) In respect of the appointment of Liaison Officers.

(d) In respect of training of Immigration Officers and staff.

(e) In respect of pooling of resources.

[8] From these efforts in 2002 Operation Gull was devised together with its southern counterpart, Operation Sonet. Operation Gull seeks to monitor flights and sailings at the Northern Ireland airports and seaports. Such monitoring enables the authorities on both sides of the border better to perform their functions by reason of the greater flow of information it generates.

[9] Mr Suta heads the United Kingdom Border Agency Enforcement and Compliance Unit for Northern Ireland. He deposes that his unit, which operates within Northern Ireland, has as its general remit the detection of persons who are unlawfully in the United Kingdom. I conclude that the function of Operation Gull is the detection of persons who are unlawfully in the United Kingdom. The operation also benefits the authorities in the Republic of Ireland and parallels a similar operation in that jurisdiction. However its function is not to identify and prevent people who seek unlawfully to enter the Republic of Ireland except in so far as such activity leads to those persons being unlawfully within this jurisdiction.

Visa requirement for the Republic of Ireland

[10] In paragraphs [4], [12], [14], [16], [19] at Q & A 15 & 16, [59], [63] and [64] of my judgment there are direct or indirect references to the applicant's need to obtain an Irish visa for the Republic of Ireland. I concluded that the deception practiced by the applicant to the United Kingdom authorities was his failure to disclose that he intended to travel to the Republic of Ireland in circumstances where he did not have a visa for that country. I consider that the issue is whether the applicant practised deception in respect of his intentions to the United Kingdom authorities. His status in the United Kingdom is determined by that deception. At the original hearing before me it was accepted by Ms Higgins that the applicant required an Irish visa. However on the remitted hearing she contended that under the law of the Republic of Ireland there was no need for an Irish visa and accordingly there was no material deception to the United Kingdom authorities.

[11] Under section 114(2) of the Judicature Act (Northern Ireland) 1978 judicial notice may be taken of the law of the Republic of Ireland. I turn to consider the Irish legislation under which it is contended that the applicant required an Irish visa. Section 1(1) of the Immigration Act 2003 defines an Irish visa. Section 4 (5) (b) of the Immigration Act 2004 requires those who are not exempt to have an Irish visa. Section 17 (1) of the 2004 Act enables the

Minister by order to in effect exempt non nationals from the visa requirement. The relevant order is the Immigration Act 2004 (Visas)(No. 2) Order 2006. The applicant is not in an exempt class and requires an Irish visa.

Conclusion in relation to the remitted matter

[12] In paragraph [39] of my judgment I recorded the respondent's contention that the examination of the applicant was on a voluntary basis and without recourse to any power contained in the Immigration Act 1971. I found as a fact that the respondent's dealing with the applicant up to 7.30 a.m. when the formal papers were served on him was on a voluntary basis. I also held that the interviews were within the ambit of the administrative powers contained in the Immigration Act 1971 and that the threshold test for the use of those powers had been met. The information could also have been obtained under the statutory scheme.

[13] Accordingly if the common travel area point had been raised before me during the initial hearing I would have found as a fact and do now find that the examination of the applicant was on a voluntary basis without recourse to any power contained in the Immigration Act 1971. That no coercive powers were being exercised. As a matter of law I would have concluded and do now conclude that a voluntary conversation does not require any legal authority. Accordingly whether the existence of the common travel area limits the powers of the Immigration Officer is not necessary to my decision in this case.