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Judgment: approved by the Court for handing down | *Delivered:* **22/10/10**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Emmanson's (Fyneface) Application [2010] NICA 35

IN THE MATTER OF AN APPLICATION BY FYNEFACE EMMANSON FOR JUDICIAL REVIEW

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Girvan LJ Coghlin LJ and Sir John Sheil

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by the appellant, a Nigerian national, from the judgment of Stephens J who on 11 April 2008 dismissed the appellant's judicial review challenge to the respondent's decisions made on 29 April 2007 that he was an illegal entrant and that he should be detained and removed from the United Kingdom ("the impugned decisions").

[2] The appellant challenges the judge's finding that he was an illegal entrant. He also challenges the judge's dismissal of his other grounds of appeal which included complaints of procedural unfairness and failure to provide him with adequate legal advice; failure to give adequate reasons for the decisions; failure to follow the Secretary of State's own policies and procedures; breach of Article 5(1) of the Convention; and failure to follow appropriate PACE Codes of Practice. The thrust of the appellant's case is that the decisions were unlawfully reached in consequence of the carrying out by immigration officers of an operation known as Operation Gull which, it was contended, was carried out without statutory authority and hence unlawfully.

The factual evidence

[3] The affidavit evidence adduced in the judicial review application was hotly contested and the judge concluded that he was unable to resolve the issues of credibility as between the appellant and the relevant immigration officer Mr Garratt without the opportunity of assessing their demeanour. He considered that these witnesses should have an opportunity to deal with the exact details of the encounter that occurred on 29 April 2007 which formed the background to the decisions. He granted leave to cross-examine both witnesses limited to the identified disputed facts. Neither party to the appeal criticised the judge for taking that course which was clearly correct.

[4] The judge in the course of his judgment set out his findings of fact which can be summarised thus.

(a) The appellant applied for and was granted a UK Visitor's Visa in Port Harcourt, Nigeria. On his application form he stated the purpose of his visit to the United Kingdom to be "visiting vacation". He stated that he would be staying in the Holiday Inn, Carburton Street, London. The visa was valid between 2 March 2007 and 2 September 2007.

(b) On 27 April 2007 he travelled from Nigeria to Gatwick Airport where he presented his passport and his UK visa. He was interviewed by an immigration officer. He did not inform the immigration officer that he intended to travel to the Republic of Ireland.

(c) He travelled by coach from London to Stranraer where he caught the ferry to Belfast arriving on 29 April 2007.

(d) When he arrived in Belfast immigration officers were carrying out an operation code named "Operation Gull", the purpose of which was to monitor the movement of illegal immigrants within the United Kingdom with particular focus on those travelling illegally between the UK and the Republic of Ireland and vice versa.

(e) Mr Garratt an immigration officer who was taking part in Operation Gull encountered the appellant whom he asked for identification. The appellant produced his Nigerian passport and UK visa.

(f) In the ensuing conversation between the two the appellant stated that he had arrived in the UK on 27 April 2007 and had travelled to Belfast to look around the shops.

(g) Mr Garratt did not consider the appellant's reason for being in Northern Ireland plausible. Mr Garratt then identified himself and told the

appellant that he was not under arrest but that he would like his co-operation. The applicant was co-operative and stood to one side until Mr Garratt had an opportunity to speak to him.

(h) After a period a further conversation between the two took place. When asked who was going to come and meet him the appellant proffered his mobile phone which showed a number with a Republic of Ireland code. Mr Garratt asked if he could conduct a voluntary baggage search and prior to doing so he asked the appellant whether the bags were his, whether he was aware of the contents of the bags and whether he was carrying anything for anybody. He sought and obtained the applicant's verbal consent to search his bag which contained €1,280 and £220.

(i) The judge rejected the appellant's evidence that he had the Euros because the black market currency dealer with whom the appellant had dealt did not have enough sterling. He concluded that he had them because he intended to travel to the Republic. The bags also contained ladies' clothing, children's clothing and jewellery. The judge was satisfied that the ladies' clothing was intended for the woman Fyne Blessing to whom the appellant referred in his subsequent interview.

(j) At 7.27 am on 29 April 2007 Mr Garratt interviewed the appellant. At the start Mr Garrett administered a caution in the following terms:

> "You do not have to say anything but it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given in evidence."

He also told the appellant that he was not under arrest and that he was relying on the applicant's full co-operation. He did not tell the appellant that he was free to leave at any time. When an immigration officer is exercising administrative rather than criminal law powers to question a person the proper procedure is to use a caution ("the caution+2") which incorporated that additional requirement.

(k) In paragraph [19] of his judgment Stephens J set out verbatim the text of the interview. The appellant stated that he was going to Dublin that day to see Fyne Blessing with whom he had been in contact for a year over the internet. They chatted whenever they came on-line. He had planned to visit her in Dublin a long time ago and said any time he got to the UK he would pay her a visit. He had a friend called Jack from Ireland to whom he had been introduced in London by a person who told Jack to come and pick the appellant up to take him to Dublin. He was going to Dublin for a day or two. He had brought jewellery, dresses and clothes to surprise Fyne Blessing. He

had not considered applying for a visa for Ireland. He knew he needed a visa for the UK and he thought he could travel to Ireland and visit a friend when he applied for his UK visa. He had not said that it was his intention to visit Fyne Blessing in Dublin. He did not give the immigration officer in Gatwick any information about his planned visit to Ireland. He just wanted to surprise her. He had obtained the Euros in Nigeria. He said he did not obtain them to spend in Dublin. The money exchanger had not had sufficient sterling. He said he wanted to shop in Belfast and then wanted to see Fyne Blessing. He apologised for not stating he was going to travel to Ireland and he agreed he only informed Mr Garratt that he was going to Ireland when he produced the Irish phone number.

(l) The judge accepted that the appellant had signed each page of the interview and accepted the truth and accuracy of the record. He rejected the appellant's suggestion that during the course of the interview and the other exchanges that took place Mr Garratt tried to trick him.

(m) The Chief Immigration Officer Mr Bradshaw agreed with Mr Garratt's recommendation that the appellant should be considered to be an illegal entrant on the grounds that he had practised verbal deception under section 24(1)(a) of the Immigration Act 1971, the deception being that the applicant failed to disclose material facts to both the visa immigration officer in Nigeria and the immigration officer at Gatwick namely that he had the intention to travel illegally to the Republic via the United Kingdom to visit Fyne Blessing.

(n) Mr Bradshaw authorised removal and detention on the basis that the appellant was an illegal entrant. He was served with a form ISI51A ("Notice to a Person Liable to Removal (Illegal entrants and section 10 administration removal cases"). He was also served with a Form ISI51A Part I2 ("Notice of Immigration Decision and Decision to Remove an Illegal Entrant/Person Subject to Administration Removal under Section 10 of the Immigration and Asylum Act 1999"). He was also served with the Form IS91R ("Notice to Detainee Reasons for Detention and Bail Rights"). The effect of these documents was to inform him that a decision had been made to remove him from the UK; that he was entitled to appeal and that if he did not voluntarily leave the United Kingdom directions would be given for his removal from the UK to Nigeria. He was also informed of the decision that he should remain in detention because his removal from the United Kingdom was imminent. The decision was reached because he had used or attempted to use deception in a way which led the immigration authorities to consider that he may continue to deceive and had failed to give satisfactory and reliable answers to an immigration officer.

(o) On 29 April 2007 at Belfast Docks the appellant signed Form IS101 stating that he intended to leave the UK for Nigeria as soon as possible and

that he did not wish to delay his departure for at least 72 hours if it could be arranged earlier.

(p) The appellant was taken from Belfast Docks to Antrim police station. At 10.50 am on 29 April 2007 the applicant was informed of the right to legal advice. He was then taken to Dungavel Immigration Removal Centre in Scotland.

(q) On 1 May he was given notice that he would be removed to Nigeria on 2 May 2007. Later on 1 May 2007 he was transferred to a detention centre in Manchester and thence to a facility at Gatwick Airport. Judicial review proceedings were commenced on 2 May 2007. The applicant was subsequently given temporary leave to remain in the United Kingdom and has remained here ever since. He has thus been in the United Kingdom for 3½ years although his original visa permitted him to be in the UK for a maximum six months and on his own case he had only intended to be in the United Kingdom for a short holiday.

[5] While the judge criticised Mr Garratt for a slip-shod approach to his task he found him to be a truthful and honest witness. The judge made clear in paragraph [13] of his judgment that he determined the essential factual dispute in favour of the respondent. He accepted his account as truthful while he considered the appellant to be untruthful. There were aspects of the appellant's evidence which the judge could not believe. In particular he rejected the appellant's evidence that he had not read the record of the interview. He rejected the appellant's claim that prior to 29 April 2007 he did not know that there were two separate parts of Ireland. He rejected his evidence that he said to Mr Garratt that he would have ensured that any meeting with Fyne Blessing would take place in Belfast.

[6] The appellant in his affidavit evidence alleged that the immigration officer had said Belfast was not part of the United Kingdom; that the immigration officer had tried to trick him into saying that he was in the Republic of Ireland; that he had no intention of going to the Republic of Ireland. In his second affidavit deposing that he knew that he had to come before the court with clean hands he stated that at no time did he have an intention of travelling to the Republic. His only intention was to travel to Belfast and do some shopping there and return to London. He only formed that intention once he had arrived in London after being informed that Belfast was an inexpensive city in which to buy clothes. He claimed that he was advised by a friend that he was permitted to go to Belfast with his UK visa. Before being so advised he alleged that he had believed Ireland was a single and separate country from the United Kingdom and he would not have expected that he could have travelled to any part of Ireland with his UK visa. His friend Jack was going to show him around Belfast. He asked the court to discount the report of his interview which he said was inaccurate. He said he

had no plans to see Fyne Blessing in Dublin. The female clothing was for a female cousin in Nigeria but if he met up with Fyne Blessing in Belfast he would give her some as a gift. The judge's factual findings and his conclusions about the lack of veracity of the appellant establish clearly that the appellant in his initial affidavit presented false evidence to found his judicial review challenge.

[7] Having regard to the judge's findings of fact which are not challenged in this appeal, it follows that the appellant presented an entirely false story in support of his case and failed to be fully frank and candid to the court. This was a point upon which Mr Maguire QC on behalf of the respondent strongly relied in support of his persuasive argument that the appellant's case should be dismissed and that he should be debarred from any relief. The respondent had not presented such an argument to the court below although, as Mr Maguire pointed out, the judge having reserved judgment gave judgment in terms which rejected the appellant's evidence but proceeded immediately to deal with the legal arguments without having addressed the question whether the case should be dismissed on the grounds of lack of candour on the part of the applicant. Nor was the point taken in the initial hearing of the appeal when the matter was remitted to the judge to reach a conclusion on a new point which the appellant sought to add to the Order 53 statement, namely the argument that the appellant was free to enter the Republic of Ireland as part of the Common Travel Area and that Operation Gull was unlawful in seeking to restrain entrants from freely moving within the Common Travel Area. The question whether the appellant's lack of candour debars him from relief will only arise if he makes out a case that the respondent has acted unlawfully. Having regard to the way in which the matter has proceeded we consider that the proper course is to consider the merits of the appellant's arguments which raise issues of complexity and importance. We fully recognise that in an appropriate case a court may consider it proper to dismiss a judicial review challenge in limine if the applicant has been guilty of serious lack of candour and dishonesty. If a respondent is seeking to persuade a court to take such a course the point should be raised at the earliest opportunity.

The judge's conclusions

[8] Stephens J concluded that:

(a) The UK had the right to control the entry and continued presence of a person within its territory and Article 5(1)(f) of the Convention is based on that assumption.

(b) The state's powers are exercisable not only at the port of entry but also within the United Kingdom.

(c) The Immigration Act 1971 provides on the one hand administrative powers which are contained in Schedule 2 and on the other criminal investigatory powers for offences contained in Part III of the Act. These are parallel but distinct powers. Administrative powers can be exercised to enable immigration officers to remove those who have no right to be in the United Kingdom.

(d) Administrative decisions do not involve a determination of civil rights or obligations under Article 6.

(e) Under Schedule 2 paragraph 2A(1) and (2) Mr Garratt had power to examine the applicant if there were circumstances giving rise to a doubt as to whether he was entitled to be in the United Kingdom. Applying Baljinder Singh v Hammond [1987] 1 All ER 829 the judge held that the immigration officer had a power to examine and detain pending examination if he had some information in his possession which caused him to enquire. In this instance the threshold had been met.

(f) In this case the immigration officers were carrying out an administrative function. The potential for a criminal investigation did not mean that a criminal investigation was being conducted. The PACE provisions were for the protection of persons subject to criminal investigation. The judge accepted and found as a fact that Mr Garratt's purpose was solely to ascertain the appellant's immigration status. He found as a fact that this was not a criminal investigation. Mr Garratt should have made this clear to the appellant but his failure do so did not undermine the conclusion that in fact this was not a criminal investigation. The judge granted a declaration that the caution used should have been the "caution + 2."

(g) The appellant had not been treated unfairly. He had a full opportunity to put forward anything of relevance to his case.

(h) The appellant knew the essential legal and factual grounds for his detention, namely that he was considered to be an illegal entrant and that he had committed deception in that he had failed to disclose his intention to travel to the Republic of Ireland in circumstances in which he did not have a visa for that jurisdiction.

The parties' submissions

[9] Miss Higgins QC contended that the judge was wrong to have concluded that the appellant was an illegal entrant in the circumstances. She argued that there was no lawful basis for Operation Gull. Immigration

officers had no power to examine the appellant in country. Moreover those questioned by immigration officers on local journeys within the United Kingdom or within the Common Travel Area do not have to answer questions unless the immigration officer has a reasonable suspicion in relation to an identified immigrant. The respondent has no statutory power to prevent people from leaving the United Kingdom or questioning them about their travel plans unless there is reason to suspect that they are involved in a crime. If, contrary to that submission, an immigration officer has a general power to stop and question visitors who have been given leave to enter in the absence of grounds for suspicion such a power was not exercisable for a purpose intra vires the 1971 Act in the present instance. The purpose of Operation Gull did not fall within the scheme of the Act because it is not unlawful for a non-national entering the United Kingdom on a visitor's visa to enter the Republic of Ireland during the course of his stay. If, contrary to the primary submission that the immigration officer had no administrative power to stop and examine a third country visitor, there is such a power it is not untrammelled. The officer must have some information causing him to enquire or some doubt as to whether the person is entitled to be here as an entrant. In this instance the immigration officers had no information which could have caused them to question the appellant as to whether he was entitled to be in the country. Miss Higgins went on to argue that in fact Mr Garratt was investigating a suspected criminal offence and he failed to follow the PACE Codes of Practice and the Operation Enforcement Manual ("OEM") Chapters 7 and 50 which rise to a legitimate expectation of access to legal advice and the need for adequate cautions. If Mr Garratt was exercising an administrative power there was no administrative power to detain the appellant and the exercise of an administrative power did not fall within one of the permitted justifications in Article 5(1) of the Convention. The objective evidence indicated that the process was of a criminal character. The immigration officers made a finding that the appellant was guilty of the criminal offence of verbal deception and the interview by Mr Garratt of the appellant had all the hallmarks of a criminal enquiry. The alleged subjective state of mind of Mr Garratt that there was no intention to charge him with a criminal offence could not change the true nature of the enquiry. In the particular circumstances of the case Article 5 required that he be given safeguards including the right of access to a lawyer to ensure that the detention was not arbitrary. Counsel also made the case that the trial judge erred in concluding that adequate reasons had been given for the decisions impugned in the application.

[10] In addition to arguing that the appellant's appeal should be dismissed because of his lack of candour and dishonesty Mr Maguire on behalf of the respondent contended that in the light of the judge's findings there were only two relevant issues for determination by the court. Firstly, was the judge in error in deciding that the appellant was an illegal entrant and secondly, was the judge in error in rejecting the appellant's argument that he had not been

given adequate reasons for the impugned decisions? Counsel argued that the judge was right on both conclusions. On a wider and alternative basis Mr Maguire argued that there must be a workable system for the civil enforcement of immigration controls and such a system is bound to involve checks being made on those who have been given leave to enter or remain to ensure that the system is not being abused. When abuse is found the respondent is entitled and bound to take steps to ensure that the integrity of the system of immigration control is upheld. There is no reason why with the consent of the person concerned he or she cannot be questioned about his immigration status and intentions. The present case was a case of civil enforcement of immigration control. The evidence established that the appellant was an illegal entrant. The requirement of Article 5(1)(f) of the Convention were satisfied in that the Article authorises lawful detention of a person against whom action is being taken with a view to deportation, which concept includes administrative removal, a step authorised by paragraph 16 Schedule 2 of the Immigration Act 1971. The respondent rejected the argument that that Article contained within it any right for an individual in the appellant's position to be provided with legal representation at the time of an interview in connection with civil enforcement as a potential illegal entrant. Immigration administrative controls do not involve the determination of civil rights or obligations nor do such decisions involve the determination of a criminal charge. The OEM does not create an enforceable right to the provision of legal advice at any interview which forms part of civil enforcement. Chapter 50 relates to the investigation of offences. The PACE procedures relate to criminal enforcement powers. The appellant was not under arrest or reasonable suspicion of having committed a criminal offence. In relation to the argument of inadequate reasons for the decisions reached the judge's approach of considering the entire encounter and not just the forms served was realistic and sensible.

Was the appellant an illegal entrant?

[11] In Khawaja v Secretary of State for the Home Department [1984] AC 74 the House of Lords held that on the true construction of the Immigration Act 1971 "illegal entrant" included a person who has obtained leave to enter from an immigration officer by use of deception or fraud. Silence as to a material fact was capable of amounting to deception or fraud depending on the circumstances. It was also held that where an immigration officer makes a decision which would restrict or take away the subject's liberty and which is dependent on the existence of certain facts the court must itself be satisfied on the civil standard of proof to a high degree of probability that those facts did exist at the time the powers were exercised. As Lord Fraser stated at 1984 AC 74 at 96:

> "… an immigration officer is only entitled to order the detention and removal of a person who has entered

> the country by virtue of an ex facie …… permission if the person is an illegal immigrant. That is a "precedent fact" which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond enquiring only whether he had reasonable grounds for his belief."

[12] Having considered the applicant's evidence and that of Mr Garratt, the trial judge concluded that the appellant was an illegal entrant on the basis that he committed a material deception. He obtained an entry visa for the purpose of a vacation in the United Kingdom and his undeclared intention at the time was to use the entry visa as an opportunity to travel to Northern Ireland and hence to the Republic of Ireland. He presented his visa on arrival at Gatwick airport and did not disclose his true intention. The judge's conclusion was amply justified on the evidence. In his visa application the appellant stated that he was coming to visit the United Kingdom on vacation. In reply to the question which asked him to provide the address of all the places he planned to stay in the UK he gave his address in the United Kingdom as the Holiday Inn in Carburton Street, London. When asked where he was going after the UK he gave no answer. The impression created by the visa application and the material information that he supplied was misleading to the point where it could said that he intended to deliberately mislead the UK authorities as to his true intentions when visiting the United Kingdom.

[13] An application for leave to enter the United Kingdom falls to be determined according to detailed Immigration Rules dealing with the particular purpose for which the applicant wishes to come to the United Kingdom. Under rule 320 ground 4 entry clearance or leave to enter is to be refused in the case of failure to show that he is acceptable to the immigration authorities in another part of the Common Travel Area to which the applicant wishes to travel. Thus as stated in *McDonald on Immigration Law and Practice* (7th Edition) at 6.23 passengers arriving in the UK are to be refused leave if there is reason to believe that they are headed for another part of the Common Travel Area where they would not be acceptable to the immigration authorities. By misleading the immigration authorities as to his true intention and by representing that he intended to stay within the United Kingdom when in fact he intended to travel quickly to the Republic of Ireland the appellant gained entry to the United Kingdom by means of deception. If he had given a true explanation of his intentions the appellant who intended to travel to the Republic of Ireland without a visa could not have satisfied the entry requirements for the United Kingdom since he did not hold the requisite visa to enter the Republic of Ireland.

[14] Once those two arguments raised by Ms Higgins are rejected the thrust of her case is that notwithstanding that the appellant was an illegal entrant who had gained entry by deception the respondent was not entitled to rely on the evidence against him because of procedural errors, because of the way in which the evidence was obtained and because he had not been given adequate reasons.

The distinction between administrative and criminal law powers

[15] In view of the judge's clear findings of fact that Mr Garratt was not carrying out a criminal investigation we must reject the appellant's argument that the relevant PACE codes relating to criminal investigations apply. Although it would have been open to Mr Garratt to have conducted a criminal investigation on the judge's findings he was not doing so.

[16] The judge correctly differentiated between administrative powers vested in immigration officers to enforce the provisions of the Immigration Act 1971 as amended and their powers of investigation into offences against immigration law. Lord Wilberforce in Khawaja explained the nature of the administrative powers thus.

> "A person is found in this country in circumstances which give rise to doubt whether he is entitled to be here or not: often suspicions are provoked by an application made by him to bring in his family. So investigations are made by the Home Office *under powers which it undoubtedly has* under the Immigration Act 1971 (Section 4) and (Schedule 2 paragraphs 2 and 3). Enquiry is made of him and other witnesses when and how he came to the United Kingdom. What documents he had, what leave if any to enter was given. Further enquiry may have to be made in his country of origin: often this is done through the High Commission there and through the entry clearance officer from whom he may have obtained an initial clearance. Sometimes very extensive enquiries have to be made. … The point is – and I tried to make this in Zamir's case – that the conclusion that a person is an illegal entrant is a conclusion of fact reached by immigration authorities *upon the basis of investigations and interviews which they have power to conduct,* including interviews of the person concerned, of an extensive character often abroad and of documents

> whose authenticity has to be verified by enquiries." (italics added)

The debate in Khawaja as to the standard of proof in relation to an allegation that a person is an illegal entrant shows that there is a distinction between an administrative (civil law) finding that a person is an illegal entrant and a criminal prosecution for entry by deception. In the former situation the case falls to be proved to the civil standard of proof albeit the degree of probability will be proportionate to the nature and the gravity of the matter whereas in the latter the criminal standard of proof beyond reasonable doubt applies. In arriving at a conclusion that a person is an illegal entrant an immigration officer exercising administrative powers will be concerned to determine whether it is shown to the civil standard of proof as explained in Khawaja that a person is an illegal entrant. This is a somewhat different task from determining whether the case is one that justifies a prosecution taking account of the criminal burden and standard of proof.

Questioning in-country

[17] Section 4 of the Immigration Act 1971 provides so far as material:

> "(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) … shall be exercised by the Secretary of State; and unless otherwise allowed by or under this Act those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class or person by order made by statutory instrument.
>
> (2) The provisions of Schedule 2 to this Act shall have effect with respect to:
>
> (a) the appointment and powers of immigration officers and medical inspections for purposes of this Act;
>
> (b) the examination of persons arriving in or leaving the United Kingdom by ship or aircraft … and the special powers exercisable in the case of those who arrive as or with a view to becoming

members of the crews of ships and aircrafts; and

(c) the exercise of the immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and

(d) the detention of persons pending examination or pending removal from the United Kingdom; and

for other purposes supplementary to the foregoing provisions of this Act."

Schedule 2 paragraph 2(1) provides:

"An immigration officer may examine any persons who have arrived in the United Kingdom by ship or aircraft including transit passengers, members of the crew and other not seeking to enter the United Kingdom for the purpose of determining –

(a) whether any of them is or is not a British citizen;

(b) whether, if he is not, he may or may not enter the United Kingdom without leave; and

(c) whether, if he may not;

(i) he has been given leave which is still in force;

(ii) he should be given leave and for what period and in what conditions if any; or

(iii) he should be refused leave.

……..

(3) A person, on being examined under this paragraph by an immigration officer … may be required in writing by him to submit to further examination; but a requirement under this sub-paragraph shall not prevent a person who arrives as a

> transit passenger or is a member of the crew of a ship or aircraft or for the purpose of joining a ship or aircraft as a member of the crew from leaving by his intended ship or aircraft."

Paragraph 2A empowers an immigration officer to examine a person who has arrived in the United Kingdom with leave to enter which is in force but given before his arrival. He may be examined by an immigration officer for the purpose of establishing –

(a) whether there has been such a change in the circumstances of his case since that leave was given that it should be cancelled;

(b) whether that leave was obtained as a result of false information given by him or his failure to disclose material facts; or

(c) whether there are medical grounds on which that leave should be cancelled.

[18] In Baljinder Singh v Hammond [1987] 1 All ER 829 the Divisional Court (Glidewell LJ and Otton LJ) held that the under the provisions of Section 4(2)(c) and paragraph 2(1) of Schedule 2 an immigration officer might conduct an examination at a place outside the port of entry and on a date subsequent to the person's entry into the United Kingdom provided the immigration officer had information which caused him to enquire whether the person was a British citizen or a person entitled to enter the United Kingdom with or without leave. Counsel for the immigration authorities in that case argued that once it came to the notice of the officer that the defendant had entered in one name and had previously entered under another name he had reason to believe that the defendant might be remaining unlawfully. He argued that the immigration officer would thus be entitled to conduct an examination under paragraph 2, a provision falling within Section 4(2)(c). An examination is part of the powers of the immigration officer forming an integral part of his function and duties in relation to investigating persons who have entered or remain unlawfully. Alternatively counsel argued that the immigration officer was entitled to question a person and if the person provided false information he was committing an offence. Glidewell LJ concluded:

> "For my part I take the view that Mr Gordon's first argument is correct. An examination I would hold can properly be conducted by an immigration officer away from the place of entry and on a later date after the person the subject of examination has already entered if the immigration officer has some information in his possession which causes him to

> enquire whether the person being examined is a British citizen and, if not, whether he may enter the United Kingdom without leave and, if not, which is the relevant question in this case, whether he should have been give leave and on which conditions. The question as to whether he should have been given leave was dependent on deciding whether he was here lawfully or not."

[19] Miss Higgins argued that Baljjinder Singh v Hammond had been wrongly decided and was the subject of criticism in *McDonald* which indicates that it has not been followed though no authority is cited for that proposition apart from referring to the case of R v Naillie [1993] AC 674, an authority in which the decision was not cited and which is not in point because it dealt with a quite separate question, namely when a person could be said to have entered the country after arrival. Since the judge found that the appellant was voluntarily co-operating with the immigration officer at all material times Mr Maguire argued that it was unnecessary to decide whether Baljinder Singh v Hammond was correctly decided or not.

[20] Entry of persons seeking to come within the United Kingdom is subject to controls at the point of entry but such controls will on occasion be insufficient to prevent abuse by persons seeking entry who may, for example, gain entry by deception of the immigration authorities by providing false and misleading information as to their true intent at the port of entry. The administrative control of immigrants, as Lord Wilberforce's comments in Khawaja demonstrate, necessitates effective powers of investigations and interview. If these powers are to be effective they cannot be limited to the port of entry through which an illegal entrant ex hypothesi may have entered by virtue of his deception. Glidewell LJ's reasoning in his judgment is entirely logical and we would see no reason to depart from the decision if the question were decisive of the point. However, we accept as correct Mr Maguire's argument that the judge's finding determines that the appellant was voluntarily co-operating with the immigration officer.

[21] There were three stages in the questioning of the appellant at Belfast Docks. Firstly, the appellant was asked to produce his identification and asked the purpose of his visit. It was as a result of this conversation that the appellant stated that he came to Belfast to look round the shops, a story which Mr Garratt reasonably considered to be implausible leading him to decide to carry out further questioning (the second stage) during which there was a voluntary bag search. Mr Garratt clearly had information which caused him to enquire whether the appellant had entered UK for a proper purpose at the second stage. What he learned at the second stage reinforced

Mr Garratt's suspicions. This was then followed by the interview under caution (the third stage).

[22] A question arises at to whether in the absence of express statutory authority and in the absence of a ground for suspicion in relation to an identified individual a uniformed immigration officer has a power to stop members of the public travelling freely within the United Kingdom, ask them to produce identification and ask questions about their immigration status or the purpose of their journey . At common law everyone is entitled to move freely within the country in the absence of strictly defined statutory limitations which satisfy the requirements of necessity and proportionality. An alien admitted to the country is in no different position in that regard from that of a British citizen (per Lord Scarman in Khawaja.) Where an immigration officer presents himself in uniform and places himself in a physical position that implies to a member of the travelling public that he or she must stop, present identification and answer questions it is questionable whether it can truly be said that the immigration officer is merely "inviting" individuals to provide ID or answer questions and is merely "encountering" individual travellers. On the other hand there will be many bona fide travellers who, anxious to ensure the integrity of the immigration system, will be willing to co-operate with an ad hoc operation run by immigration officers designed to pick up persons who should not be in the country. Such persons could properly be considered to be voluntarily co-operating with the authorities. In this case it is unnecessary to resolve the question whether the immigration officers exceeded their statutory powers because the judge has made a finding of fact that in relation to Mr Garratt's initial encounter with the appellant the appellant did voluntarily co-operate with Mr Garratt during that initial encounter. The judge made no finding of fact which would justify the conclusion that there was an abuse of power by the immigration authorities in relation to this appellant or that he was not truly voluntarily co-operating with the authorities. By the time of the second and third stages of the questioning the immigration officer had ample grounds to suspect that the appellant was an illegal entrant and he would have been justified in exercising compulsory powers of questioning in-country following the reasoning in Baljinder Singh v Hammond.

Reasons

[23] The appellant must have been well aware of the reasons for his detention and the decision to remove him. In the course of the interview it was clear to him that the immigration officer was challenging him in relation to his entry into the UK when he had not disclosed his true intention of going to the Republic of Ireland. The notices served on him made clear that the ground for his detention was the fact that he had gained entry to the UK by deception. Even if there had been a lack of adequate reasons this would not have made the detention unlawful (see Lord Slynn in Saadi v Secretary of

State for the Home Department [2002] 4 All ER 785 at 799). The judge was right to reject the appellant's argument on the alleged inadequacy of reasons.

Disposal of the appeal

[24] We are satisfied that the appellant has failed to establish any ground for challenging the judge's decision and he has not made out a case for challenging the lawfulness of the impugned decisions. The appeal must accordingly be dismissed.