

Neutral Citation No. [2009] NIQB 104

Ref: **WEA7718T**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **21/12/2009**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY
YU LAN FEI**

WEATHERUP J

[1] This is an application for judicial review of a decision of the immigration authorities of 25 October 2009 that the applicant is an illegal entrant to the United Kingdom. It is proposed that this application proceed by way of a rolled-up hearing. Mr Flannigan appears for the applicant and Mr Coll for the respondent.

[2] The applicant was born in China on 2 September 1990 and arrived in the United Kingdom under a student visa on 25 August 2009. He enrolled in a pre-sessional English course at Lincoln's College Hammersmith in London. This was a one-year course leading on to a two year business course resulting in a Diploma in Administrative Management. The applicant commenced the course at Lincoln's College on 15 September 2009.

[3] The course was closed for 9 days over Halloween. The applicant, who had relatives in Northern Ireland, came across on the ferry to visit his uncle who has been residing here for the last 12 years. When he arrived at Belfast docks he was stopped by an immigration officer. The applicant's first language is Mandarin and his command of English is weak. He was provided with an interpreter whose first language was Cantonese and who spoke poor Mandarin and the applicant contends that the interpreter confused him with his questions and his accent.

[4] In order to obtain the student visa and confirmation letter for acceptance as a student on the Lincoln's College course the applicant was required to complete an English language examination under the "Common European Framework of Reference for Languages". The applicant completed the examination in China and he passed. This examination was organised by agents in China on behalf of Lincoln's College.

[5] The interpreter reported the applicant's answers to the questions of the immigration officers to the effect that someone else had taken the English examination on behalf of the applicant. The applicant disputed that he had given that answer. His version was that he had told the interpreter in answer to the question from the immigration officers that he had known and studied the answers before sitting the exam. No one sat the exam for him. What appears to have happened is that someone, who obviously had better English than the applicant, completed the exam before the applicant and then told the applicant what the questions were and what the answers were. The applicant then learned the answers by rote. While the applicant's English was very poor, he went into the exam knowing the questions and the answers and he was able to recite the answers. He obviously gave the right answers to the right questions because he passed the exam and obtained his certificate.

[6] The immigration authorities issued a notice to the applicant on 25 October 2009 that he was a person liable to removal from the UK. The stated reason was -

"You have stated that you came to the UK as a student, however, in order to obtain your UK Student Visa you had to sit an English exam. You have admitted that another person sat part of the test for you to obtain a pass. You have obtained your visa and entered the UK by deception. You are not a genuine student."

[7] On behalf of the immigration authorities an affidavit was filed by John Anthony Garrett, an immigration officer with the UK Border Agency. He described meeting the applicant at Belfast docks on 25 October 2009. The applicant produced a Tier 4 Student Visa. When he was being interviewed he requested a Mandarin interpreter which he said was his first language. The applicant's luggage was searched and it comprised a very large suitcase, a large black canvas bag and a backpack. The suitcase contained a large number of items of clothing and shoes. The large black canvas bag contained a very thick blanket and pillows and a large amount of English coursework which was undated. The backpack contained the applicant's college letters which supported his UK Students visa application, together with bank statements, educational certificates and copies of his parents' identity cards. The applicant's uncle arrived at the docks and he admitted that he had spoken to the applicant's father in China in August 2009 and had agreed to help the applicant find cheaper accommodation in Belfast because London was too expensive and that the applicant might transfer to another college such as the Belfast Metropolitan College.

[8] The Mandarin interpreter was engaged and a taped interview was conducted. As a result of the interview and based on the information available, Mr Garrett was satisfied that the applicant was an illegal entrant on the grounds of verbal deception towards both the visa officer and the immigration officer on entry on 25 August 2009. This conclusion was on the basis, first of all, that the applicant had admitted that another person had taken his English exam in China, that he could not speak

English, that he had been unable to pursue his course of study and that he was not a genuine student. Secondly, immigration believed that funds had been transferred into the applicant's bank account in order to obtain his visa and these funds were immediately transferred out of the account once the visa had been issued and before his arrival in the UK on 25 August 2009. Thirdly, immigration believed that the applicant intended to relocate to Belfast and work illegally.

[9] Further enquiries were made by the immigration authorities with Lincoln's College and it was confirmed to immigration that the applicant had not paid any money to the College since his arrival and that he was in the lowest entry level class because his English was so poor. It transpired that a company called "Gateway Education Limited", based in Nottingham, had been responsible for overseas studies and this company had been dropped from September 2009 because they were referring students to the College who could not speak English. The Prime Minister's Office has issued a statement indicating that there will be a review of the student visa scheme based on a number of irregularities that have emerged in relation to the provision of student visas.

[10] There is a dispute as to the interpretation of the interviews. The applicant is said to have declared that another student completed the exam on his behalf. I am satisfied, on the balance of probabilities, that what happened was that the applicant was coached into providing the correct answers in English before he took the exam. It is clear that the applicant does not have the necessary level of proficiency in English to pass such an exam.

[11] The adult student visa system requires an applicant to obtain 40 points in order to be granted the visa. This is achieved by securing 30 points upon being admitted to a course with an approved education provider, known as a sponsor. In this case Lincoln's College was such an approved education provider. An applicant requires a visa letter or a confirmation of acceptance for studies issued by such a provider. To secure acceptance on the course an applicant must pass the English exam. Once an applicant has secured a pass in the English exam and secured a place in an approved College, he will be able to obtain the relevant visa letter to be forwarded to the visa authorities. An applicant will then be issued with the relevant visa for the course of study. Further an applicant may obtain the additional 10 points by demonstrating that the presence of sufficient money to cover the course fees and monthly living expenses. This requires a bank statement confirming that the necessary funds are in the applicant's account. The rules do not require that the funds be retained in the account. The obvious practice that seems to have been followed in this case was that once the account has been checked and the funds are shown to be present the funds are transferred out of the account.

[12] Thus the applicant obtained his visa and came to England in August 2009 and he commenced the course at Lincoln's College. How did he progress on the course? It appears that he attended the weekly lectures which were conducted in English. The staff at the College do not appear to have been aware that his ability in English

was so limited. After a lecture one of the applicant's fellow students, who did speak English, explained to him what the lecture had been about and coached him. It has been confirmed that the applicant attended the course from its commencement in September up to Halloween.

[13] The respondent contends that the actions of the applicant amounted to obtaining entry by deception. The deception being first of all the manner in which he passed the English exam in China, secondly the transferring the money out of his account and thirdly the proposed move to Belfast at Halloween. On the other hand the applicant contends that if his actions amounted to deception it concerned the manner in which he took the English exam and related to the examiners and the College rather than his immigration visa or his entry to the UK. The applicant passed the English exam, although he had the good fortune to know the questions and answers in advance. If there is a problem with this it is said that it is a matter for the rules of the College. Further the applicant contends that he also had the good fortune to meet the financial test, although, of course, the money was withdrawn from his account. However this was not contrary to the rules of the scheme. In addition the applicant denies that he was moving to Belfast. He states that he brought all his possessions with him to Belfast, including his blankets and pillows, because he did not believe that they would be safe in the student accommodation in London during his absence.

[14] The applicant sat the English exam and he passed. The testing procedures were clearly lax. He obtained a place on the course at Lincoln's College, a recognised education provider. He arranged for the necessary finances to be in place at the relevant time, as required by the visa scheme. He obtained a student visa for entry to the UK. Was this a sham or did the applicant enter the UK to undertake the specified studies? He registered as a student when he arrived and he registered with the police. He took up his place on the course and his accommodation and he attended the lectures. He worked at the course and his fellow students briefed him about the classes. He remained on the course to the Halloween break when he decided to visit his uncle.

[15] As a result of the House of Lords in Khawaja v. Secretary of State for the Home Department [1983] UKHL 8 a number of propositions in relation to obtaining entry by deception may be set out –

- i. The immigration authorities do have authority to detain and remove a visa holder if that person is an illegal entrant.
- ii. The immigration authorities have to satisfy the Court to a high degree of probability that the applicant is an illegal entrant, that is the status of illegal entrant is a precedent fact to removal.

- iii. The applicant may become an illegal entrant by being guilty of deception in the application for a visa or the information furnished on entry to the UK.
- iv. The deception must be effective in securing entry to the UK.
- v. There is no duty of candour on the part of an applicant. However, the authorities must not be misled on material facts that are effective in securing entry, whether on the visa application or in communication with the immigration officials and whether by what is said or by conduct or by silence coupled with conduct.
- vi. In the light of the decision of the Court of Appeal in Northern Ireland in Udu and Nyentys Applications [2007] NICA 48, where a visa is obtained on specified grounds and the applicant intends to enter the UK for alternative or additional reasons, there is a duty to disclose the full grounds for entry and it amounts to deception to impliedly represent that there has been no change of circumstances to the specified grounds of entry by producing the visa for the specified purpose and not stating the true purpose.

[16] I am satisfied that the applicant was a genuine student, at least up to Halloween. It is not as if he had obtained the student visa and then ignored the College and took up employment elsewhere, as if the visa process had all been a ruse to get into the country to work. If there was a ruse it was to get on to the course.

[17] Did the manner in which he passed the English exam constitute deception for the purposes of the immigration authorities right to detain and remove? It was certainly a deception of the College and the examiners in China and on the agency company that arranged the exam on behalf of the College. I consider that, initially, this is a matter for the College to determine whether or not the applicant is qualified to be on the course, now that they will learn that he has obtained his certificate in English in the manner in which he has admitted. I assume that the College has become aware of the applicant's limited proficiency in English because it is stated that he has been placed on the lowest level of proficiency. The College, in considering the manner in which he secured his place on the course, may put him off the course, depending on their rules. If he ceases to be a registered student at the College or is not qualified to continue on the course, the immigration authorities might consider the status of the applicant's student visa. On the other hand the College might allow the applicant to continue on the course and attempt to pass his first year English. When he comes to renew his visa, which will be in September 2010, in order to get on to the Business Administration course, it will be a matter for the immigration authorities as to whether he is entitled to the extension of his visa.

[18] An applicant for a visa may be an illegal entrant to the UK if they practice deception in a material respect, one that is effective in the obtaining of the visa or in gaining entry. In the present case there were no fraudulent documents in that the applicant completed the exam and he obtained the relevant certificate. This is a comment on the adequacy of the testing system required by the College rather than any deception on the immigration authorities. The agency that organised the testing is no longer being used by the College. The applicant became a registered student who undertook his studies, however inadequately. Again this is a comment on the adequacy of the instruction and supervision provided by the College. This is a genuine course run by an approved education provider. What occurred is in the first place an issue for the College rather than the immigration authorities.

[19] Then there is the financial issue. The applicant met the requirements of the student visa scheme because he had the necessary money in the required place at the relevant time. Again this is a comment on the adequacy of the supervision of the system that there is no requirement that the necessary money remains in place. The whole scheme is under review.

[20] Then there is the question of the applicant's move to Northern Ireland. I am not satisfied that the applicant was abandoning his course at Lincoln's College. It may be that he had hoped to transfer to Northern Ireland as his uncle has suggested and perhaps with family here he would have transferred to the Belfast Metropolitan College. Whether he would be allowed to do so under the terms of his student visa has not been addressed.

[21] I am not satisfied of the precedent fact that the applicant was an illegal entrant. There is an issue for Lincoln's College to take up with the applicant and depending upon what action they take the immigration authorities may respond accordingly. An Order will issue quashing the decision of the immigration authorities to declare the applicant an illegal entrant.