Neutral Citation no. [2008] NICA 3 (1) | *Ref:* **CAM7031**

Judgment: approved by the Court for handing down | *Delivered:* **10/01/08**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CHUKWUMA CHARLES OKARO FOR JUDICIAL REVIEW

CAMPBELL LJ

[1] This is an appeal from a judgment of Gillen J. dismissing an application by Chukwuma Charles Okaro for judicial review of a decision to detain him as being an illegal entrant under the Immigration Act 1971 and to have him removed from the United Kingdom.

[2] The appellant was granted leave by the judge, under Order 53 rule 3(1), to apply for judicial review on the ground that "the respondent had failed to consider its own policy document (Operation Enforcement Manual) Chapter 7 which is headed 'Chapter 7- Service of Notice of Illegal Entry –Procedures' and failed to show that the Immigration Officer had exercised his discretion sufficiently or at all before deciding to determine the applicant as an illegal entrant." The issues before this court was whether the judge erred in holding that there had not been a failure by immigration officers to consider the policy document and that the discretion referred to in Chapter 7 of the Manual had been exercised by the Chief Immigration Officer before deciding that Mr Okaro was an illegal entrant.

[3] Mr Okaro, a Nigerian national, entered the United Kingdom in March 2006 on a multiple entry visitor's visa that was valid until 2011. He describes himself as being the owner of a business importing clothing and other goods from the United Kingdom and Europe to Nigeria. In his affidavit he states that he had been in the United Kingdom since March 2006 apart from a few trips to Italy

on business. He last re-entered the United Kingdom on 24 February 2007 following a two day visit to Italy, and travelled to Belfast International Airport on 25 February 2007.

[4] On arrival at Belfast International Airport Mr Okaro was stopped by an immigration officer, Mr John Harrison. Mr Okaro produced to Mr Harrison a contact number in the Republic of Ireland and when the officer rang this number he spoke to Mr Okaro's wife who told him that her husband intended to visit her and their children in the Republic of Ireland for a few days. Checks with the GARDA National Immigration Bureau showed that Mrs Okara was at the time residing in the Republic of Ireland as she has an Irish born child and that she had been living there since February 2003. With the consent of Mr Okaro his baggage was examined and was found to contain a number of gifts for children. He explained that he intended to post them to the children from Northern Ireland as it was cheaper than posting them from elsewhere in the United Kingdom.

[5] During the afternoon of 25 February 2007 Mr Okaro was interviewed, under caution, by Mr Harrison at Belfast International Airport for a period of 70 minutes. He told him that he had come to Belfast on holiday and that he would like to make some business calls. He explained that he intended to stay for a day or two and then he would purchase a return air ticket either over the counter or on the internet. He told the officer that his wife has lived in the Republic of Ireland for three or four years with her daughter who is Irish. He denied that he intended to travel to the Republic of Ireland and said that he did not tell the on-entry immigration officer, when he arrived in the United Kingdom, that his wife was resident in the Republic of Ireland and that he had two children resident there one of whom was born in Ireland.

[6] At the conclusion of the interview the immigration officer advised the Chief Immigration Officer, Mr Peter Bradshaw, that on the basis of this interview there were reasonable grounds to suspect that Mr Okaro had made misrepresentations on his visa application form. When the visa application form was obtained it showed that he had stated that his wife was in Nigeria; and that both his children were born in Nigeria.

[7] Mr Bradshaw said that when the case was referred to him as Chief Immigration Officer he was advised by Mr Harrison that Mr Okaro had used deception in his statements to the on-entry immigration officer at London Heathrow airport by failing to declare the true reason for travelling to the United Kingdom.

[8] Both officers considered that Mr Okaro should be served with papers as an illegal entrant having practised verbal deception. They agreed that he was an

illegal entrant as defined in section 33(1) of the Immigration Act 1971. The Chief Immigration Officer authorised the removal and detention of Mr Okaro and notices were served on him regarding his removal and giving reasons for detention and bail. When Mr Harrison served the notices on the appellant he invited him to ask questions and Mr Okaro asked to be given the interview record sheet.

[9] The relevant passage in Chapter 7 of the Operation Enforcement Manual Service which covers an additional procedure to be followed in all illegal entry cases reads as follows;

> "Following the judgment in the case Uluyol and Cakmak, and after taking legal advice, it was decided to introduce an additional procedure to be followed in **all** illegal entry cases.
>
> Notwithstanding the fact that a person has been identified as an illegal entrant, as defined in the Immigration Act 1971 (as amended), there is nevertheless discretion as to whether such a person is actually treated as an illegal entrant.
>
> The consideration of any additional factors, or representations, already forms part of the decision-making process followed by officers dealing with illegal entry cases. However, previously, this had not been demonstrably separated from the consideration of the illegal entry connection. The judgment referred to means that it is now necessary to do so and to record the fact that the discretion whether or not to serve the papers has been considered. Officers not only have to do it; they have to be able to show they have done it.
> …
>
> **The fact that service of illegal entry papers may disadvantage the subject in some way does not automatically mean that they should not be served if you conclude that it is appropriate to do so.** Again, the reasons for the decision need to be recorded on the file.

> It is **vital** that there is a written record showing that we have considered exercising discretion not to serve the notice and that this issue has been addressed separately from the question of whether or not the subject is an illegal entrant.
>
> **The authority to serve illegal entry notices rests with a CIO and this will be the appropriate grade to deal with this additional issue."**

[10] In a supplementary affidavit Mr Harrison stated;

> "3. … We concurred that the Applicant was an illegal entrant as defined within Section 33(1) of the Immigration Act 1971. Following that conversation, CIO Bradshaw authorised the removal and detention of the Applicant. All discretionary areas were considered by CIO Bradshaw and myself in accordance with Home Office policy".

Mr Bradshaw, the chief immigration officer, in his affidavit said;

> "Following the briefing by Mr Harrison, and following careful consideration of the case, I authorised the removal and detention of the Applicant on the basis that he was an illegal entrant, having practised deception. As Chief Immigration Officer, I took into account all discretionary areas in compliance with Home Office policy. In this particular case, it was not appropriate to exercise discretion in favour of the Applicant".

The decision of Gillen J.

[11] Gillen J. considered the evidence of Mr Harrison and Mr Bradshaw and concluded that the respondent had not failed to consider its own policy document or to show that the immigration officers had exercised their discretion sufficiently or at all before deciding to determine the application. The reasons given by the judge for arriving at this conclusion were:

(i) There was no evidence to contradict the assertion of the immigration officers that they had complied with the policy document and exercised the appropriate discretion in compliance with the Home Office policy.

(ii) This case could be distinguished from *The Queen on the application of Uluyol and Cakmak v an Immigration Officer* (unreported 3 November 2000) where there had been no exercise of discretion unlike the present case where he found that the discretion had been exercised. The judge added "I find nothing in this case to indicate that failure to keep note of the exercise of that discretion somehow negatives the finding that a discretion was made".

(iii) The judge accepted that the policy admonition that notes should be kept of the exercise of the discretion was breached but he stressed the need to appreciate that it is a policy document and quite different, for example, to an Act of Parliament. In his view the policy document provided guidance to immigration officers in order to ensure that they complied with the decision of Gage J. in *Uluyol and Cakmak*. He said of the policy document;

> "…this was a document which indicated good practice and a useful aide-memoire to officials as to the steps they should take so as to best ensure their evidence would be accepted [in] a court setting. It did not impose any legally binding obligation to comply with every single guidance contained therein. Obviously, failure to comply with the note-taking exercise, may make for difficulties for an Immigration Officer persuading a court that the exercise of the discretion has occurred. Indeed had there been some positive evidence in this case to the effect that the discretion was not exercised or some other reason to believe that it may not have taken place, then the absence of the notes would clearly have been an important evidential factor. However that is not the case and I am satisfied that the discretion was exercised. Hence the absence of notes in this instance has less impact than might be the case in other circumstances".

The judge said that the court should be slow to frustrate the purpose of the policy which was simply to ensure that discretion is exercised by immigration officers in compliance with the decision in *Uluyol and Cakmak*. Once he was satisfied this was done in the present case he did not consider that the failure to comply with the admonition to make a note should vitiate that purpose.

(iv) Finally the judge observed that this was a fact specific finding and he did not rule out the real possibility that there will be other instances where the failure to comply with the note-making admonition in this policy document could prove crucial in a court's determination depending upon the context in which it is set.

Grounds of Appeal

[12] In summary, the grounds contained in the notice of appeal are;

[i] The learned judge erred in deciding that the respondent had acted lawfully fairly and reasonably in its determination that the appellant was an illegal entrant and had not failed to adhere to the additional illegal entrant procedure set out in Chapter 7 of the Operations Enforcement Manual.

[ii] The learned judge erred in law in failing to find that the applicant had been unlawfully denied his legitimate expectation that the respondent would act in accordance with Chapter 7 of the Operations Enforcement Manual.

[iii] The learned judge erred in imposing an incorrect and unfair evidential burden on the appellant.

[iv] The learned judge misdirected himself and was unreasonable in concluding the evidence pointed towards the Immigration Officer being truthful and in concluding that it was unarguable to suggest that it was unreasonable for the immigration authorities to have determined that the appellant was an illegal entrant.

[13] The judge stated in his judgment that he had refused leave on all grounds other than the ground referred to as 'm', which relates to the policy document. There is no indication that the judge was persuaded at a later stage to revise this decision and to grant leave on any additional ground nor did the appellant appeal against the refusal of leave on any of the remaining grounds in the Order 53 statement. As Lord Woolf CJ said in *R (Smith) v Parole Board* [2003] 1 WLR 2548 at para [17] "if permission is refused in respect of a particular ground, the Court of Appeal on an appeal from a hearing at first instance will not be able to consider that matter …" At the outset of the hearing of this appeal the court ruled that the appeal was confined to the single ground upon which leave was granted.

The appellant's case

[14] It was submitted on behalf of the appellant that:

> (i) The Operation Enforcement Manual is designed to ensure that the Immigration Service complies with the duty under section 6 of the Human Rights Act by acting in manner compatible with article 5(i) (f) of the Convention in the deprivation of liberty in connection with immigration and deportation. It is therefore an instruction to be applied rigidly.
>
> (ii) Once the immigration officer identified the appellant as an illegal entrant he ought to have asked him, before any decision was made to serve a notice of illegal entry, if he wished to bring to the notice of the officer any way in which the service of such a notice would disadvantage him.
>
> (iii) A general averment by the Chief Immigration Officer that he had taken into account all discretionary areas in compliance with Home Office policy was, counsel submitted, insufficient. It was necessary to have a proper record, as stated in the policy, that the discretion had been exercised.

The respondent's case

[15] It was submitted on behalf of the respondent that:

> (i) As is stated in the policy document it contains "guidance and information for Immigration Service officers." As such it should not be elevated beyond its stated purpose.
>
> (ii) The issue raised in ground"m" is whether there had been a failure to consider the policy and a failure to show that the discretion had been exercised. The judge had before him the evidence on affidavit of the immigration officers that all discretionary issues relating to policy were considered. He was fully aware of the absence of any note of the process when he was satisfied that the discretion had been exercised.

(iii) The issue of an opportunity being provided for representations to be made by the appellant did not form part of the Order 53 statement either in its original form or as amended and should not form part of an appeal to this court.

(iv) The effect of the admitted breach of the notation requirement does not render the decision unlawful. The note is designed to protect immigration officers by assisting them to demonstrate that they have done what they ought to have done. Where there is a breach of a procedural requirement it is necessary to look at the intended consequence — see *In the matter of an application by JA for Judicial Review* [2007] NIQB 64 — and it was not the intended consequence that a failure to keep a note would render the entire exercise unlawful.

Conclusion

[16] It is accepted that the appellant was an illegal entrant. In chapter 7 of the Operations Enforcement Manual it is stated that notwithstanding the fact that a person has been identified as an illegal entrant there is nevertheless discretion as to whether such a person should actually be treated as an illegal entrant. The judge was satisfied by the evidence of the immigration officers that they had exercised the discretion before deciding that the appellant should be treated as an illegal entrant. Counsel for the appellant drew attention to the failure of the officers to provide any detail as to how they exercised the discretion beyond saying that they took into account all discretionary areas in compliance with Home Office policy. The immigration officers had to decide if it would be fair in all the circumstances to treat Mr Okaro as an illegal entrant and serve a notice of illegal entry on him and after papers had been served on him they had to bear in mind that they had a continuing discretion as to whether to maintain or withdraw the notice of illegal entry should further information be obtained, or as a result of a change in circumstances. This is not a complex policy and the judge was entitled to regard a statement by the officers that it had been followed as sufficient, in the circumstances, without requiring a more detailed account from them. The judge took account of the absence of a note as to the discretion having been exercised and he decided that this did not detract from the statement by the officers that they had exercised discretion in accordance with the policy. In my view he was right in concluding that they had done so.

[17] The question as to whether the failure of the immigration officers to keep a written record in compliance with the procedure, as set out in the Operations Enforcement Manual, vitiated the exercise of the discretion was also considered by the judge and this is the conclusion that he reached;

> "I have no doubt that the Immigration Officers ought to have proper regard to the policy guidance set out in this document. However I do not consider that it was intended to be absolutely binding in the context of note-taking. I conclude that this was a document which indicated good practice and a useful aide-memoire to officials as to the steps they should take so as to best ensure their evidence would be accepted in a court setting. It does not impose any legally binding obligation to comply with every single guidance contained therein. Obviously, failure to comply with the note-taking exercise, may make for difficulties for an Immigration Officer persuading a court that the exercise of the discretion has occurred…I am satisfied that the discretion was exercised. Hence the absence of notes in this instance has less impact than might be the case in other circumstances."

[18] What matters is that the immigration officers have exercised the discretion given to them and it is difficult to appreciate how it can be said that keeping a note adds to the exercise of the discretion. The purpose that it serves is to assist the officers, if afterwards they are called upon to do so, to prove that they did exercise the discretion. It cannot have been the intention of the policy maker that the failure of an officer to keep a note would render the entire procedure void. However, as the judge observed, it is important that immigration officers do keep a written record if only to protect themselves should a question be raised about the exercise of the discretion.

[19] At the hearing of the appeal counsel for the appellant claimed that the appellant had not been give an opportunity to explain to the immigration officers, after they had decided that he was an illegal entrant and before the decision was made to serve illegal entry papers on him, how service of illegal entry would disadvantage him. As counsel for the respondent has said this is not a ground upon which leave was sought to apply for judicial review nor has the judge referred to it in his judgment. It is therefore not a matter that requires to be considered by this court. It suffices to observe that the appellant had a lengthy interview with an immigration officer before he was found to be an

illegal entrant and he was invited to ask questions after the officer had concluded that he was an illegal entrant. This provided him with ample opportunity to bring to the attention of the officer any unusual factors that made the service of a notice of illegal entry disadvantageous to him. As has been seen earlier the officers had a continuing discretion as to whether to maintain or withdraw the notice of illegal entry. On the same day as the notice was served upon him the appellant was advised by a solicitor and there is no suggestion that following this any additional information was provided to the immigration officers to show that it was unfair to maintain the notice.

[20] For the reasons that have been given the appeal is dismissed and the order of the trial judge is affirmed.