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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EMEN BASSEY

STEPHENS J

[1] Emen Benjamin Bassey, a national of Nigeria, applied for leave to commence judicial review proceedings to challenge various immigration decisions which had been made in relation to him. In respect of the application for leave an Order 53 statement was lodged together with an affidavit sworn by the applicant's wife, Eunice Funke Bassey, which affidavit had been sworn by her on 25 September 2007. Mr Justice Weatherup granted leave. A Notice of Motion dated 3 October 2007 was served on the respondent, the Secretary of State for the Home Department. Two affidavits were lodged on behalf of the respondent; those affidavits having been sworn on 1 October 2007 by Peter Bradshaw and John Andrew Garratt, both of the Liverpool Immigration Service. The hearing of the substantive application was listed before me yesterday, 16 June 2008. Mr Ronan Lavery appeared on behalf of the applicant and Ms Connolly appeared on behalf of the respondent.

[2] Emen Bassey's wife, Eunice Funke Bassey, a national of Nigeria, who had sworn the affidavit purporting to verify the facts relied on by Emen Bassey, has also applied for leave to commence judicial review proceedings to challenge various immigration decisions which had been made in relation to her. Those decisions were made at the same time and on the same grounds as the decision in respect of her husband. Her Order 53 statement is dated 16 October 2007. The affidavit lodged in relation to her application was the same affidavit that she swore on 25 September 2007 and which was lodged in relation to her husband's application. Her application for leave to apply for judicial review was also listed before me yesterday. The parties anticipated that the application in relation to Emen Bassey would be highly relevant to, if not determinative of, not only Eunice Bassey's application for leave but also the merits of her substantive application. Again Mr Ronan Lavery appeared

on behalf of the applicant and Ms Connolly appeared on behalf of the respondent.

[3] In addition the three children of Emen Bassey and Eunice Bassey have applied for leave to commence judicial review proceedings to challenge various immigration decisions. Those decisions either directly affect them by declaring them illegal immigrants or alternatively indirectly affect them by declaring their parents illegal immigrants. Again those decisions were made at the same time and in essence on the same grounds as the decisions in respect of their parents. I set out some details in relation to the children and their applications as follows:

(a) Donald Bassey, a national of Nigeria, born on 31 August 1996, now 11 years of age. His Order 53 statement is dated 16 October 2007. The affidavit lodged in relation to his application is the affidavit of his mother, Eunice Bassey, which she swore on 25 September 2007 and which was lodged in relation to her husband's application.

(b) Karen Bassey, a national of Nigeria, born on 23 April 2000, now 8 years of age. Her Order 53 statement is dated 16 October 2007. The affidavit lodged in relation to her application is the affidavit of her mother, Eunice Bassey, which she swore on 25 September 2007 and which was lodged in relation to her husband's application.

(c) Loretta Bassey, a national of Ireland, who was born on 22 October 2004 in Belfast. She is now 3 years of age. Her Order 53 statement is dated 16 October 2007. The affidavit lodged in relation to her application is the affidavit of her mother, Eunice Bassey, which she swore on 25 September 2007 and which was lodged in relation to her husband's application.

[4] The applications by all three children for leave to apply for judicial review were also listed before me yesterday and again the parties anticipated that the application in relation to Emen Bassey would be highly relevant to, if not determinative of, not only their applications for leave but also the merits of their substantive applications.

[5] The immigration decisions sought to be challenged in all the proceedings were taken on the basis that four out of the five members of the Bassey family were illegal immigrants. The respondent contends that their entry was a clear case of entry by deception. The respondent contends that the deception was practised at two separate, but interrelated stages. Firstly, Emen Bassey and Eunice Bassey were silent as to material facts when they completed their visa application forms to the On Entry Clearance Officer and specifically, they failed to declare as follows:-

(a) That they had an Irish born daughter, namely, Loretta Bassey, born on 22 October 2004 in Belfast, Northern Ireland.

(b) That they wanted their children to attend school in Northern Ireland.

(c) That Eunice Bassey had given birth to her daughter Loretta in Belfast in 2004 and that she had maintained an address in Belfast since her daughter's birth and that she had opened a bank account in 2004.

(d) That they intended to bring their children to the United Kingdom to obtain an education.

[6] Second the respondent contends that the applicants were silent as to material facts on arrival to the Immigration Officer at London, Heathrow on 10 September 2007. Specifically that they failed to declare to the Immigration Officer that it was their intention that Eunice Bassey and her children would remain in Belfast on a long term basis. That they had failed to mention that they wanted their children to obtain an education at Methodist College, Preparatory School.

[7] The circumstances giving rise to the allegations that all five members of the Bassey family were illegal immigrants not only depends on the contents of the visa application forms but also on events which occurred at Belfast docks on 24 September 2007 when all five members of the family were stopped by an Immigration Officer. The affidavit of Eunice Bassey sworn on 25 September 2007 which purports to verify the facts in relation to the applications by the other members of her family contains not only direct evidence for instance as to the contents of the visa application forms but also hearsay evidence. An instance of the hearsay evidence was as to the intentions of Emen Bassey.

[8] At the start of yesterday's proceedings Ms Connolly indicated that as a preliminary point she wished to apply for an order that the application brought by Emen Bassey should be dismissed on the basis that no affidavit verifying the facts had been sworn by him. She submitted that it was a requirement that the applicant should swear the affidavit verifying the facts and that if, as in this case, he failed to do so, then that the court should dismiss the application. Ms Connolly relied on the judgment of Treacy J in *Wanderval Oliveira Da Silveira* [2008] NIQB 58. That judgment had been delivered on 5 June 2008. In that case the applicant sought to impugn a decision that he was an illegal entrant to the United Kingdom. The application at the leave stage was on the basis of the applicant's "unsworn affidavit" which was exhibited to the affidavit of the applicant's solicitor. The solicitor's affidavit contained an undertaking

> "to have a sworn affidavit of the applicant filed with the court if same has been returned by the applicant to this office".

At the substantive hearing in that case there was no sworn affidavit and accordingly one effect of the applicant's failure to provide a sworn affidavit was that his solicitor did not discharge the undertaking. At paragraph 12 of his judgment Treacy J stated:-

> "Judicial review is a discretionary remedy. In my view the failure or refusal of this applicant to swear an affidavit verifying the facts relied upon by him require this application to be dismissed. His conduct has meant that the requirements of Order 53 have been flagrantly breached; it may betoken as I said earlier a lack of interest in the proceedings or refusal to depose on oath or both; and it has led to the solicitor being unable to fulfil the undertaking she gave in her own (sworn) affidavit."

[9] In the case before me no prior indication had been given to the court on behalf of the respondent that the point taken by Ms Connolly would be made. No other authority was referred to by Ms Connolly apart from the decision in *Wanderval Oliveira Da Silveira*. I indicated that I wished to receive submissions in relation to the decision in *Re Copeland* [1990] NI 301 which was referred to by Treacy J in *Wanderval Oliveira Da Silveira.* That I also wished to receive submissions as to the effects, if any, of the Civil Evidence (Northern Ireland) Order 1997 taken together with the provisions of Order 41, rule 5 of the Rules of the Supreme Court (Northern Ireland) 1980. That rule deals with statements of information and belief in an affidavit. The provisions of Order 41, rule 5 having been amended on 5 September 2001 which presumably was a result of the commencement of Article 3 of the Civil Evidence (Northern Ireland) Order 1997. Mr Lavery, on behalf of Emen Bassey, indicated that he had only just been informed by Ms Connolly that this point would be taken and he had only just been referred to the decision of Treacy J in *Wanderval Oliveira Da Silveira*. That accordingly he was not in a position to deal with the matter. I rose for a short period of time. Mr Lavery was then content to deal with the application which I proceeded to hear. In the circumstances and as a result of the late notice that was given I did not hear full argument in relation to the issue which I have to decide.

[10] Order 53, rule 3(2)(b) of the Rules of the Supreme Court (Northern Ireland) 1980 requires that:-

> "An application for leave must be made ex parte by lodging in the Central Office-

…
(b) an affidavit or affidavits, as the case may require, verifying the facts relied on."

[11] If leave is granted to make an application for judicial review then Order 53, rule 5(2) provides:-

> "The application shall be grounded on the original statement and affidavit or affidavits lodged in support of the application for leave."

[12] Accordingly the substantive application is based on the same affidavit as was lodged in support of the application for leave. However Order 53, rule 6(2) provides that the court may allow further affidavits to be used by the applicant in addition to the affidavit lodged in support of the application for leave. That rule is in the following terms:

> "The Court may on the hearing of the motion direct or allow the applicant to amend his statement, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used."

[13] Order 41, rule 5 of the Rules of the Supreme Court (Northern Ireland) Order 1980 provides:-

> "An affidavit may contain statements of information or belief with the sources and grounds thereof."

[14] Order 41, rule 5 was amended 5 September 2001 by statutory rules of Northern Ireland 2001 No. 254. The explanatory notes to those statutory rules states that the amendment of Order 41 rule 5 was to take account of the Civil Evidence (Northern Ireland) Order 1997. The Civil Evidence (1997 Order) (Commencement No. 2) Order (Northern Ireland) 1999 inter alia, having brought Article 3 into operation on 6 September 1999. Article 3(1) of the Civil Evidence (Northern Ireland) Order 1997 provides:-

> "In civil proceedings evidence shall not be excluded on the ground that it is hearsay."

[15] Civil proceedings are defined in Article 2(3) of that order in the following terms:-

> "In this Order "civil proceedings" means civil proceedings, before any court or other tribunal, in relation to which the strict rules of evidence apply."

[16] The effect of the Civil Evidence (Northern Ireland) Order 1997 is that in "civil proceedings" hearsay evidence is admissible. The court however is directed to the considerations relevant to the weighing of the hearsay evidence by Article 5 of the Order. The provisions of Article 5 are as follows:-

> **5.** - (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.
>
> (3) Regard may also be had, in particular, to the following –
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
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> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the

evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

[16] Accordingly it was submitted by Mr Ronan Lavery that:-

(a) There was no express requirement in Order 53, rule 3(2)(b) or in Order 53, rule 5(2) of the Rules of the Supreme Court (Northern Ireland) 1980 that the affidavit be sworn by the applicant. That this was in contrast to the provisions of Order 54, rule 1(3) and (4) which governs applications for Writ of Habeas Corpus. Those rules provide as follows:-

> "(3) The application must, subject to paragraph (4), be supported *by an affidavit of the person restrained* showing that it is made at his instance and setting out the nature of the restraint.
>
> (4) Where the person restrained is unable for any reason to make the affidavit required by paragraph (3), the affidavit may be made by some other person on his behalf and that affidavit must state for what reason the person detained is unable to make the affidavit himself."

(b) The decision in *Re Copeland* [1990] NI 301 was a decision in relation to an application for Habeas Corpus and accordingly there was in that case a clear breach of Order 54, rule 1(3) which expressly requires (subject to paragraph (4)) the application to be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.

(c) That in any event there must be circumstances in which an affidavit cannot be sworn by the applicant for instance if physically or mentally unable to do so or if the applicant was of an age where he could not be expected to do so. Accordingly that if there is a requirement that the verifying affidavit be sworn by the applicant then it would be a matter of discretion as to what action should

be taken if there was a failure to comply with that requirement.

(d) That an application for judicial review fell within the definition of civil proceedings in the Criminal Evidence (Northern Ireland) Order 1997. Accordingly under that order and provided there was compliance with the provisions of Order 41, rule 5, the facts relied upon by the applicant could be verified by an affidavit containing hearsay evidence.

(e) That the decision in *Wanderval Oliveira Da Silveira* could be distinguished because in that case the applicant had acted in such a way as to prevent his solicitor fulfilling her undertaking to the court.

[17] Mr Lavery acknowledged that the court could draw adverse inferences as to the reliability of any hearsay evidence under Article 5 of the Civil Evidence (Northern Ireland) Order 1997. Mr Lavery also acknowledged that there was no reason that could be advanced as to why Emen Bassey had not sworn an affidavit in relation to his application. His wife and children remained in the United Kingdom awaiting the outcome of these proceedings. Emen Bassey had returned to Nigeria in April 2008 to look after his business affairs. If he had been requested he could have sworn an affidavit. There was a failure to direct proofs in that respect and he had not been asked to do so by his legal advisors. It was not a question of him losing interest in the proceedings or of being unwilling to verify the facts on oath.

[18] Ms Connolly submitted that judicial review proceedings were not civil proceedings within the meaning of the Civil Evidence (Northern Ireland) Order 1997. She relied on Section 38 of the Crown Proceedings Act 1947. That section provides as follows:-

> "In this Act, except in so far as the context otherwise requires or it is otherwise expressly provided, the following expressions have the meanings hereby respectively assigned to them, that is to say:—
>
> …
>
> "Civil proceedings" includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division;"

Judicial review proceedings are on the crown side. Accordingly she submitted that these proceedings are not civil proceedings. However it is clear that the definition of civil proceedings in the Crown Proceedings Act 1947 is for the purposes of that act. The definition that is significant from the point of view of hearsay evidence is contained in the Civil Evidence Order (Northern Ireland) 1980 and Ms Connolly did not seek to suggest that judicial review proceedings did not fall within that definition.

[19] Ms Connolly referred me to pages 43 and 187 of "Judicial Review in Northern Ireland; a Practitioner's Guide" by Larkin QC and Scoffield and to *Re Collin's Application* [1987] 5 NIJB 102. In that case Lowry LCJ stated in respect of a judicial review application at page 106:-

> "And finally, we wish to deprecate a procedure which is becoming too common in applications by persons in custody, namely, the swearing of the grounding affidavit by the applicant's solicitor from information and belief instead of by the applicant. This should be done only where the solicitor is unable to gain access to his client, and the Court will rely on the prison authorities to facilitate access by solicitors to their clients in these circumstances."

That condemnation has informed practice in judicial review applications which practice continues. The reasons for the practice are demonstrated by the facts of in *Re Copeland* and also by the adverse inferences that can and will no doubt be taken in appropriate cases under Article 5 of the Civil Evidence (Northern Ireland) Order 1997.

[20] I refuse the application to dismiss the proceedings brought by Emen Bassey. I do not consider that it is a *requirement* that the verifying affidavit be sworn by the applicant and that if the applicant does not do so then that his application should be dismissed on that ground alone or that he is at risk of it being dismissed on that ground alone. I consider that judicial review proceedings are civil proceedings within the Civil Evidence (Northern Ireland) Order 1997. The facts relied on in judicial review proceedings can be verified by hearsay evidence provided that there is compliance with the provisions of Order 41 rule 5 of the Rules of the Supreme Court (Northern Ireland) 1980. The affidavit of Eunice Bassey, in so far as it contains hearsay evidence, does meet the requirements of Order 53, rule 3(2)(b) and Order 53, rule 5(2). If, as here, the applicant does not swear an affidavit then there is a risk of adverse inferences being drawn against him. The practice continues to be that the verifying affidavit should be sworn by the applicant. The obligation on the ex parte application to make full and frank disclosure is an obligation on the applicant. Leave may be set aside or judicial review refused

if there has been a failure to give full and frank disclosure of material facts, see *Re City Hotel (Derry) Ltd* [2004] NIQB 38. Applications for cross examination of a deponent under Order 38 rule 2(3) of the Rules of the Supreme Court (Northern Ireland) 1980 can only be effective if the applicant swears the verifying affidavit. It is the scheme of the rules that it is that affidavit that is used at the substantive hearing unless leave is granted to lodge a further affidavit. For leave to be granted a good reason has to be given as to why the verifying affidavit at the leave stage could not have been sworn by the applicant or needs to be supplemented.

[21] In any event if there is a requirement that the verifying affidavit be sworn by the applicant then clearly whether a breach of that requirement leads to dismissal of the application is a matter of discretion. There must be many circumstances in which the lack of an affidavit sworn by the applicant would not lead to the dismissal of a judicial review application (or indeed any adverse inference being drawn against him). On the facts of this case I would not have exercised my discretion to dismiss the proceedings brought by Emen Bassey bearing in mind that in essence the facts are common to all five applications and much of the evidence of Eunice Bassey is direct as opposed to hearsay evidence.

[22] I accordingly refuse the application to dismiss the proceedings brought by Emen Bassey.