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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 FYNEFACE BOMA EMMANSON FOR JUDICIAL REVIEW

STEPHENS J

Introduction

[1] This is an application by Fyneface Boma Emmanson for judicial review challenging a number of decisions made on 29 April 2007 by the Secretary of State for the Home Department. On that date the Secretary of State decided that the applicant was an illegal entrant to the United Kingdom. Secondly that he should be removed from the United Kingdom and thirdly removal directions were set. By these proceedings the applicant seeks to challenge those decisions. The grounds on which the applicant relies are set out in his amended Order 53 statement as follows:

> a. The Respondent has failed to provide any or sufficient reasons for the decision to declare the Applicant an illegal entrant, contrary to the principles of natural justice and procedural fairness.
>
> b. The Respondent has failed to provide the Applicant with the opportunity to make meaningful representations in relation to the impugned decision, contrary to the principles of natural justice and procedural fairness.
>
> c. The Respondent made the impugned decisions without providing the Applicant with any or adequate access to legal advice, thereby further denying the Applicant the opportunity to make meaningful representations, contrary to the principles of natural justice and procedural fairness.

d. The Respondent has failed to apply its own policy, namely Chapter 50 of the Operation Enforcement Manual, in that he failed to apply the PACE codes of conduct to the interview with the Applicant, contrary to the Applicant's legitimate expectation.

e. The Respondent has failed to demonstrate to the standard required by the House of Lords in *Khawaja* [1984] 1 AC that the Applicant is an illegal entrant.

f. …

g. …

h. …

i. The Respondent has failed to apply his own policy, namely Chapter 7 of the Operation Enforcement Manual in that he has failed to take into account relevant factors in the exercise of his discretion, namely the representations or the possible representations of the Applicant, contrary to the Applicant's legitimate expectation.

j. The Respondent has failed to apply his own policy, namely Chapter 44 of the Operation Enforcement Manual, in that 72 hours notice was not provided to the Applicant between the service of the removal directions and the proposed removal, contrary to the Applicant's legitimate expectation.

k. The decision to detain the Applicant is made contrary to the Respondent's own policy, and therefore is not in accordance with the law, and is contrary to Article 5(1) of the European Convention on Human Rights in conjunction with section 6 of the Human Rights Act 1998 in this and in the following respects:

    i. The respondent unlawfully and arbitrarily blended the exercise of administrative powers with the exercise of criminal powers;
    ii. There was no lawful basis which empowered the respondent to subject the applicant to the detailed questioning that occurred between 7am and 7.30am, or further to detain him to that end, in the absence of any reasonable

grounds for suspecting that (a) he had committed a criminal offence contrary to s. 24A or 26 of the 1971 Act; or alternatively (b) was someone in respect of whom directions may be given pending a decision about what directions should issue pursuant to paragraph 16 of Schedule 2 to that Act, if the court holds that that provision applies in the context of this case.

iii. Given the nature and purpose of the questioning and the interview the respondent unlawfully failed to have regard to all relevant provisions of the PACE Codes of Practice contrary to s. 66(8) of The Police and Criminal Evidence (NI) Order 1989 and s.145 of the Immigration and Asylum Act 1999 and Chapters 7 and 50 of the OEM. These provisions would have required the respondent to advise the applicant, in the absence of an arrest that he did not have to submit to questioning and could leave at any time but if he stayed (or was arrested or detained) that he had a right to obtain legal advice.

iv. Unlawfully and contrary to the respondent's policy as set out in Chapter 50 of the OEM and EPU 05/06, a criminal caution was issued in the absence of the lawful exercise of criminal powers of arrest or detention

v. If the respondent in questioning him was exercising administrative powers, then the respondent acted unlawfully and contrary to its policies contained in Chapters 7 & 50 of the OEM and EPU 05/06 in issuing the criminal caution to him and in failing to advise him that he did not have to remain for questioning but that if he did, he had the right to obtain legal advice (Chapter 7, Chapter 50 -50.3 and 50.1.4- and PACE Code C 10.2).

vi. Unlawfully and contrary to the respondent's policy as set out in Chapter 44 of the OEM the applicant was not given 72 hours notice that he was to be removed on 2 May 2007.

[2] The submissions of the parties approached those grounds under a number of distinct headings. I will refer to those headings in this judgment.

[3] Ms Higgins QC and Mr Flanagan appeared on behalf of the applicant. Mr Maguire QC and Ms Fionnuala Connolly appeared on behalf of the respondent. I am indebted to both sets of counsel for their comprehensive written and oral submissions. The Northern Ireland Human Rights Commission was granted leave to intervene. An affidavit was sworn by the Chief Commissioner and written submissions were made by Michael Lavery Q.C. and Mark McEvoy. I also record the assistance afforded by those submissions.

The factual dispute and cross examination.

[4] The applicant is a single man of Nigerian nationality who is now aged 30. The respondent asserts that the applicant was guilty of deception when applying for a United Kingdom visitor's visa in Port Harcourt, Nigeria. On his application form for that visa the applicant had replied to the question "Why are you going to the UK?" by stating "Visiting/vacation". It is the respondent's case that in addition to visiting the United Kingdom for the purpose of a vacation the applicant intended to travel to the Republic of Ireland, for which country he did not have a visa, via the land border between Northern and Southern Ireland, to visit a friend of his known as Fyne Blessing. That in addition the applicant was guilty of the same deception when he presented his visitor's visa to the immigration officer on arrival from Nigeria at Gatwick Airport on 27 April 2007.

[5] The applicant travelled from London to Stranraer by coach on 28 April 2007. He arrived at Belfast Docks on the morning of 29 April 2007. He was spoken to by an immigration officer and then formally interviewed. Three affidavits have been sworn by the applicant in relation to what occurred on his arrival in Belfast and a similar number of affidavits have been sworn in reply by John Andrew Garratt, immigration officer. There was a clear conflict of evidence as to what had occurred on the applicant's arrival in Belfast. Either the applicant or Mr Garratt could not be telling the truth. In essence Mr Garratt deposed that the applicant informed him that he intended to travel to Dublin in the Republic of Ireland to visit his friend, Fyne Blessing. On the other hand the applicant denied that he had informed Mr Garratt that he intended to travel to the Republic of Ireland. Rather he contended that it was only on 28 April 2007 that he had decided to travel to Belfast and that he had made this decision as a consequence of having been informed, on his arrival in London, by an unidentified friend, that Belfast was an inexpensive city in which to buy clothes. That he intended to do some shopping in Belfast and then to return to London. The applicant averred:

> "I confirm that at no time did I have an intention of travelling to the Republic of Ireland. At no stage did I indicate any such intention to any immigration officer."

He also averred that:

> "I have read the interview record attached to Mr Garratt's affidavit. I do not accept that the document is an accurate record of the interview which took place."

In relation to his signatures on the interview record the applicant averred that:

> "I was simply told to sign the document and I did so. … I did not read the interview record before signing it."

[6] Ms Higgins, on behalf of the applicant, applied pursuant to Order 38, Rule 2(3) the Rules of the Supreme Court (Northern Ireland) 1980, for leave to cross-examine Mr Garratt on the basis that it was not possible to resolve the conflict of evidence between the applicant and Mr Garratt on the basis of the affidavits. The affidavit grounding the application for leave to cross-examine listed out a number of disputes of fact as to what had occurred between the applicant and Mr Garratt. Ms Higgins identified further disputes of fact during the course of her submissions. Mr Maguire was content that both the applicant and Mr Garratt be cross-examined if the court felt that was useful. Accordingly he did not object to an order for leave to cross-examine.

[7] I was referred to *Cullen v Chief Constable of the RUC* [2004] 2 All ER 237. In that case Lord Hutton stated at paragraph [39]:

> "In many cases where judicial review is sought of an administrative decision cross-examination is unnecessary and is not permitted but there is a power to allow it whenever it is necessary for justice to be done."

[8] In *Re McCann's Application* (unreported 13 May 1992) Carswell J stated:

> "It is by now clearly established that the Court has power to order the attendance of deponents who have sworn affidavits in an application for judicial review to attend for the purpose of cross-examination. In *O'Reilly v Mackman* [1983] 2 AC 237, 283, Lord

> Diplock said that the exercise of this jurisdiction should be governed by the same principle as in actions begun by originating summons, and should be allowed whenever the justice of the particular case so requires. He did however qualify the effect of his observations by indicating that by the nature of the issues that normally arise on judicial review cross-examination is rarely required. Recognised exceptions exist in respect of allegations of procedural unfairness or breach of natural justice. Lord Diplock warned, however, that to allow cross-examination presents the Court with a temptation, not always easily resisted, to substitute its own view of the facts or the merits of the decision (which are not a matter for consideration by the Court in its exercise of its supervisory powers) for that of the decision making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament."

[9] Carswell J suggested the following factors that may be relevant to the Court's consideration of the issue; (a) whether certain factual matters are exclusively within the knowledge of the deponents; (b) whether the issue is one in respect of which the Court will require to be satisfied through the investigation of oral evidence; and (c) whether the issue is such that the study of affidavits, however carefully and scrupulously prepared, will not be sufficient for the Court to determine the matter. The judge concluded that the party seeking cross-examination must make out a case that in the particular circumstances there is something specific which requires such further investigation. Furthermore, the judge stated that if cross-examination is permitted,

> "…it is of importance that any cross-examination should be directed only to specified issues and that the party cross-examining should not be at liberty to range over all of the evidence in the hope of establishing something on which he might fasten to found a case on some issue."

[10] I considered that I was unable to resolve the issue of credibility as between the applicant and Mr Garratt without an opportunity of assessing the demeanour of both of those witnesses. I also considered that those witnesses should have an opportunity to deal with the exact details of the encounter that occurred on 29 April 2007. I granted leave to cross-examine both witnesses but such leave to be limited to the identified disputes of fact.

[11] I had the opportunity of assessing the demeanour of both the applicant and Mr Garratt in the witness box. There were aspects of the evidence of Mr Garratt which indicated a slipshod approach by him and by the Immigration Service. For instance prior to the formal interview of the applicant a caution was given. The respondent's Enforcement Policy Unit document 05/06 envisages that when "the sole purpose of asking the person questions is with a view to securing their administrative removal and there is no intention or possibility that a criminal prosecution will be pursued" a "caution + 2" should be given. The caution component of a "caution + 2" is:-

> "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".

The "+2" component of the "caution + 2" is

> "(i) you are not under arrest; and
> (ii) you are free to leave at any time."

The Immigration Service Form "ISCP4", which was the record of interview form used in this case, has the caution component printed on it. Mr Garratt gave evidence that the correct form of caution in this case was the "caution + 2" and that he gave the caution component and a version of "+ 2" component to the applicant. He made no record of having given his version of the "+ 2" component. He also stated that the Immigration Service have no pre-prepared interview record form with the "caution + 2" printed on it. This failure by the Immigration Service has to be seen in the context that under their policy 98% of the interviews conducted in Northern Ireland require a "caution + 2" to be given. The effect has been that in this and previous cases an incomplete record has been presented to the court. The failure by Mr Garratt to record the full caution actually given to the applicant and the failure by the Immigration Service to have an interview record form that has printed on it a caution that complies with the respondent's own policy document EPU 05/06 is deprecated.

[12] As I have indicated aspects of Mr Garratt's evidence indicated a slipshod approach. However his demeanour in the witness box was that of a truthful and honest witness. I do not consider that his lack of precision substantially undermines his evidence. I accept as truthful his account that he was told by the applicant that the applicant was travelling to Dublin to meet Fyne Blessing. I reject the evidence of the applicant in that respect and in a number of other respects. He did not appear to me to be truthful. There were aspects of his evidence which I could not believe. The applicant describes himself as a businessman. Having seen the applicant in the witness

box I consider that this description of his occupation reflects a not inconsequential degree of business ability. His case was that he had signed each page of the interview notes without reading them. He was being cross-examined as to why he did that particularly given that he was a businessman. He accepted that at the time that he signed he knew that the reason why he was being asked to sign was to verify the record. He stated that:-

> "Actually where I am from, Nigeria, we sign things without reading them".

He was questioned further in relation to this proposition and as to whether he always did this and whether he did it regardless as to whether he knew the reliability of the person preparing the document. He maintained that explanation. I consider that the applicant was being untruthful in the answer that he gave. In addition the applicant was quite clear in his evidence that prior to 29 April 2007 he was unaware that there were two separate and distinct parts of Ireland. He stated that the first time that he was aware that there were two separate parts of Ireland was when he was in the detention centre on 29 April 2007. However in paragraph 11 of his second affidavit the applicant had deposed that Fyne Blessing lived in Dublin and that he had no plans to meet up with her on his trip "as she lived in Ireland". Furthermore that if he had got round to making any such plans he would have ensured that any meeting would have been in a location where his visa was valid, eg. Belfast. That he explained the gist of this to Mr Garratt but that Mr Garratt grossly distorted his answers. The interview with Mr Garratt was prior to the applicant being in the detention centre. For the applicant to explain this to Mr Garratt at that stage he must have known the difference between Northern Ireland and the Republic of Ireland and accordingly he would have known this prior to his arrival in the detention centre on 29 April 2007.

[13] I determine the essential factual dispute in this case in favour of the respondent. I hold that the applicant did tell Mr Garratt that he was travelling to the Republic of Ireland on 29 April 2007. I also resolve a number of the other factual disputes in favour of the respondent. I draw a number of inferences against the applicant. I set out the findings of fact in this case.

The facts

[14] The applicant applied for a United Kingdom visitor's visa by completing Form VAF1 on 27 February 2007. He declared that the reason he was going to the United Kingdom was to visit for the purpose of a vacation. That he would be staying in the Holiday Inn, Carburton Street, London. At the time when he completed Form VAF1 the applicant intended not only to travel to the United Kingdom but also to the Republic of Ireland to visit Fyne Blessing, a person with whom he had struck up an acquaintance on the internet. The applicant did not have a visa for the Republic of Ireland.

[15] The applicant was granted a United Kingdom visitor's visa which was valid between 2 March 2007 and 2 September 2007. The visa was on condition that the applicant did not work and had no recourse to public funds.

[16] On 27 April 2007 the applicant travelled from Nigeria and arrived at Gatwick Airport. He presented his passport and United Kingdom visitor's visa. He was interviewed on his arrival by an immigration officer. He did not inform the immigration officer that he intended to travel to the Republic of Ireland.

[17] On 28 April 2007 the applicant travelled by coach from London to Stranraer. He then caught the ferry to Belfast where he arrived on the morning of 29 April 2007. On that day an enforcement operation named "Operation Gull" was in force at Belfast Docks. The purpose of Operation Gull was to monitor the movement of illegal immigrants within the United Kingdom with particular focus on those travelling illegally between the United Kingdom and the Republic of Ireland and vice versa. All the passengers on the ferry, on which the applicant had travelled, were invited to answer questions about their immigration status in the United Kingdom. As part of that operation Mr Garratt, who was in uniform, encountered the applicant, who, when asked for identification, produced a valid Nigerian passport with the United Kingdom visitor's visa. At this stage Mr Garratt had not introduced himself to the applicant. A conversation then ensued in which the applicant informed Mr Garratt that he had arrived in the United Kingdom on 27 April 2007 and that he had travelled to Belfast to look around the shops. That he had not booked any accommodation and had travelled on a one way ticket, though he had a return ticket for a flight from London to Nigeria on 24 May 2007. Mr Garratt considered that the applicant, having arrived in the United Kingdom on 27 April 2007 and having immediately travelled by a coach and ferry to Northern Ireland had no plausible reason for being in Northern Ireland. Mr Garratt then told the applicant who he was and that he would like to ask him further questions on a voluntary basis. He told the applicant that he was not under arrest but that he would like his cooperation. The applicant was cooperative and stood to one side until Mr Garratt had an opportunity to speak further to him.

[18] After a period, during which Mr Garratt was dealing with a number of other passengers from the ferry, a further conversation ensued between him and the applicant. The applicant was asked who was going to come to meet him and in reply he proffered his mobile telephone showing a number which he had selected which had a Republic of Ireland code. Mr Garratt then asked the applicant whether he could conduct a voluntary baggage search and prior to doing this he asked the applicant whether the bags were his, whether he was aware of the contents of the bags and whether he was carrying anything

for anybody else. He also sought the applicant's verbal consent which the applicant gave. A search then occurred and Mr Garratt found 1,280 euro and £220. I reject the applicant's explanation that he had the euros in his possession because the black market currency dealer with whom he had dealt only had a limited amount of sterling. I consider that the applicant had the euros in his possession as he was intending to travel to the Republic of Ireland. In addition to the euros Mr Garratt found lady's clothing, children's clothing and jewellery. I hold that the lady's clothing was a present for Fyne Blessing which the applicant intended to give to her when he met her in Dublin.

[19] At 7.20 am on 29 April 2007 Mr Garratt interviewed the applicant under caution. A record of that interview is contained on Form RSCP4. At the start of the interview Mr Garratt administered the following caution:

> "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 applicant that he was not under arrest and that he was relying on the applicant's full cooperation. He did not tell the applicant that he was free to leave at any time. Mr Garratt then asked the applicant a series of questions which he recorded verbatim together with the applicant's replies. I set out the questions and answers as recorded on that form:

> "Q 1: Are you fit and well?
> A: Yes.
>
> Q 2: Where are you traveling to today?
> A: Dublin.
>
> Q 3: Who are you going to see in Dublin?
> A: Fyne blessing, we have been chatting on the internet.
>
> Q 4: How long have you been talking to Fyne blessing?
> A: One year plus.
>
> Q 5: When did you plan to visit her in Dublin?
> A: A very long time ago I sent an e-mail but she didn't reply. I told her anytime I got to the UK I will pay her a visit.

Q.6: Did you speak to her on the phone?
A: No.

Q.7: Do you have any other friends in Ireland?
A: CJ guy 00353861 770430.

Q.8: Is CJ coming to Belfast Docks today to collect you by car
and take you to Dublin?
A: No. Jack is coming to take me to Ireland, his phone number is 07850501633.

Q.9: Who introduced you to Jack who lives in Ireland?
A: The person stays in London who introduced me to Jack who told Jack to come and pick me up and take me to Dublin.

Q.10: How long were you going to stay in Dublin for?
A: Two days, no one day.

Q.11: Where were you going to stay in Dublin?
A: I will discuss with Jack into how to locate her Fyne blessing and hopefully stay with her, he doesn't know Fyne blessing.

Q.12: You have bought jewellery and dresses and children's clothes, who are these for?
A: Yes, I wanted to surprise her.

Q.13: How often have you been talking to Fyne blessing on the internet?
A: We chat anytime she comes on line.

Q.14: When did you tell Fyne blessing you were going to visit her in Dublin?
A: A long time ago, sometime last year. I told her I would come and visit her for one day in Dublin.

Q.15: Did you consider applying for a visa for Ireland?
A: No.

Q.16: Did you know you needed a visa to visit Fyne blessing in Ireland?
A: I know I need a visa for the UK and I thought I could travel to Ireland and visit my friend.

Q.17: When you applied for your UK visit visa in Abyle on 2/3/07 did you tell the visa officer it was your intention to visit Fyne blessing in Ireland?
A: No.

Q.18: When you arrived in the UK on 27/4/07 at Gatwick South did you tell the Immigration Officer you intended to visit Fyne blessing in Dublin, that you had been talking by e-mail for over a year, told her last year you intended to visit her in Ireland and made arrangements to travel to Ireland?
A: No. I just wanted to surprise her.

Q.19: Why didn't you tell either the Visa Officer and Immigration Officer you wanted to visit Ireland?
A: This is just a surprise visit.

Q.20: How much money do you have in euros?
A: 1280 euros and £220.

Q.21: When did you obtain the euros?
A: In Nigeria on Tues or Wed this week.

Q.22: Did you obtain the euros to spend in Dublin?
A: No in the UK, they didn't have enough sterling at the exchange so they gave me euros.

Q.23: Why did you state earlier the reason you had traveled to Belfast today was to shop for clothes to myself and CIO Bradshaw?
A: I still want to shop that is the main thing and I then want to see Fyne blessing.

Q.24: Why didn't you state you were going to travel to Ireland?
A: I'm sorry for that.

Q.25: It was only when you informed that you had Irish phone numbers in your phone did you tell us you were traveling to Ireland?
A: Yes."

[20] I hold that those questions were asked and those answers were given. At the end of the interview Mr Garratt read back to the applicant all the questions and answers and invited the applicant to sign each page. Mr Garratt explained that by signing this meant that the applicant accepted the questions and answers recorded to be a true and accurate account of the interview. The applicant then signed each page of the interview record. I reject the applicant's suggestion that during the course of that interview and the other exchanges that took place between himself and Mr Garratt, Mr Garratt tried to trick the applicant.

[21] Mr Garratt then briefed Chief Immigration Officer Peter Bradshaw who agreed with his recommendation that the applicant was an illegal entrant on the grounds that he had practiced verbal deception which is an offence under Section 24(1)(a) of the Immigration Act 1971. The verbal deception being that "the applicant failed to disclose material facts to both the visa immigration officer at Port Harcourt (Nigeria) and the immigration officer on arrival at Gatwick Airport on 27 April 2007 of his intention to travel illegally to the Republic of Ireland via the United Kingdom to visit Fyne Blessing".

[22] All discretionary areas were then considered by Mr Garratt and Mr Bradshaw. Mr Bradshaw then authorised removal and detention of the applicant on the basis that he was an illegal entrant, having practiced deception.

[23] At Belfast Docks the applicant was then served with a number of forms. The first form was IS151A which is headed "Notice to a Person Liable to Removal (Illegal entrants and section 10 administrative removal cases)". The form was signed by Mr Garratt on behalf of the Secretary of State and it stated that Mr Garratt had considered all the information available to him and he was satisfied that the applicant was a person in respect of whom removal directions may be given in accordance with paragraphs 8 to 10A of Schedule 2 to the Immigration Act 1971 as an illegal entrant as defined in Section 33(1) of the Immigration Act 1971. The form went on to state that the applicant was "therefore a person who is liable to be detained under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 pending a decision whether or not to give removal directions and, where relevant, (his) removal in pursuance of such directions."

[24] The second form was Form IS151A Part 2. This form was also signed by Mr Garratt on behalf of the Secretary of State. The form was headed

"Notice of Immigration Decision". It was also headed "Decision to Remove an Illegal Entrant/Person Subject to Administrative Removal under Section 10 of the Immigration and Asylum Act 1999". By this form the applicant was informed that a decision had been taken to remove him from the United Kingdom, that he was entitled to appeal this decision and that if he did not now leave the United Kingdom voluntarily, directions would be given for his removal from the United Kingdom to Nigeria.

[25] The third form was Form IS91R. This form was also signed by the Mr Garratt on behalf of the Secretary of State. The form was headed "Notice to Detainee Reasons for Detention and Bail Rights". The applicant was informed that the Secretary of State was ordering his detention and that the detention powers were contained in paragraph 16 of Schedule 2 to the Immigration Act 1971 or Section 62 of the Nationality Immigration and Asylum Act 2002. The applicant was also informed that it had been decided that he should remain in detention because his removal from the United Kingdom was imminent. This decision, namely the decision that he should remain in detention, was because:

> "You have used or attempted to use deception in a way which leads us to consider you may continue to deceive".

and

> "You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries".

The applicant was also informed of his bail rights.

[26] On 29 April 2007 at 8.50 am at Belfast Docks the applicant also signed Form IS101. The form stated that the applicant intended to leave the United Kingdom for Nigeria as soon as possible. That he did not wish to delay his departure by at least 72 hours if it can be arranged earlier. The applicant's signature was witnessed by Mr Garratt.

[27] The applicant was then taken from Belfast docks to Antrim Police Station. At 10.50 am on 29 April 2007 at that station the applicant was informed of his right to legal advice by Sergeant Clingen of the Police Service of Northern Ireland. The applicant was then taken to Dungavel Immigration Removal Centre in Scotland.

[28] On Tuesday 1 May 2007 the applicant was provided with a form advising him that his removal to Nigeria would take place the following day, Wednesday 2 May 2007 at 1.00 pm. Later on 1 May 2007 the applicant was transferred first to a detention centre in Manchester and then to a detention

facility at Gatwick Airport. These judicial review proceedings were commenced on 2 May 2007 and the applicant has since then remained in the United Kingdom.

General legal principles.

[29] In *R (On the application of Ullah) v Special Adjudicator* [2004] 3 All ER 785 at page 793 Lord Bingham, in giving the assistance of the House on the present state of the Strasbourg authorities, returned to first principles and stated at paragraph [6]:

> "As Lord Slynn of Hadley recorded in *R* (*on the application of Saadi*) *v Secretary of State for the Home Dept* [2002] UKHL 41, [2002] 1 WLR 3131:
>
> > '[31] In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory. Even as late as 1955 the eighth edition of *Oppenheim's International Law* pp 675–676 (para 314) stated: "The reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory." Earlier in *A-G for Canada v Cain, A-G for Canada v Gilhula* at 546, [1904–7] All ER Rep 582 at 584–585, the Privy Council in the speech of Lord Atkinson decided: "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations,* book I, s. 231; book 2, s. 125." This principle still applies subject to any treaty obligation of a state or rule of the state's domestic law which may apply to the exercise of that control. The starting point is thus in my view that the United Kingdom has the right to control the entry and continued presence of aliens in its territory. Article 5(1)(f) seems to be based on that assumption.'

> This is a principle fully recognised in the Strasbourg jurisprudence: see, for example, *Vilvarajah v UK* (1992) 14 EHRR 248 at 286 (para 102), *Chahal v UK* (para 73), *D v UK* (para 46), *Bensaid v UK* (para 32), *Boultif v Switzerland* (2001) 33 EHRR 1179 at 219 (para 46). As these statements of principle recognise, however, the right of a state to control the entry and residence of aliens is subject to treaty obligations which the state has undertaken."

Accordingly there is a recognition that the United Kingdom has the right to control the entry and continued presence of aliens in its territory and Article 5(1)(f) of the European Convention on Human Rights is based on that assumption. For the purposes of this case the relevant controls are contained in the Immigration Act 1971 as extensively amended.

[30] Article 5(1)(f) of the European Convention on Human Rights is in the following terms:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. "

[31] The meaning of the words in the first limb of Article 5(1)(f) ("… lawful … detention of a person to prevent his effecting an unauthorised entry into the country …") were interpreted by the European Court of Human Rights sitting as a Grand Chamber in the case of *Saadi v United Kingdom* (Application No 13229/04). From that case I take the following principles:

(a) The general rule set out in Article 5(1) is that everyone has the right to liberty.

(b) Article 5(1)(f) provides an exception to that general rule, permitting states to control the liberty of aliens in an immigration context. States, subject to the obligations under the Convention, enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory".

(c) Under the first limb of Article 5(1)(f) it is a necessary adjunct to the sovereign right of a State to control aliens entry into its territory that it be permitted to detain would be immigrants

who have applied for permission to enter, whether by way of asylum or not. That until a State has "authorised" entry to the country, any entry is "unauthorised". Thus an asylum seeker who has surrendered himself to the immigration authorities and is seeking to effect an authorised entry still falls within the first limb of Article 5(1)(f) and can be detained. "To interpret the first limb of 5(1)(f) as permitting detention only to a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the state to exercise its undeniable right of control …". The Strasbourg jurisprudence does not place a narrow construction on the terms of 5(1)(f) or on the powers of the state. In the case before me I consider that it is consistent with that jurisprudence for the state's power to be exercised not only at the port of entry but also within the United Kingdom.

(d) The detention must be "lawful". Whether the detention is lawful including whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law. Accordingly I am enjoined to consider whether there is a procedure prescribed by national law in connection with the detention of the applicant. In that respect the respondent relies in this case upon Schedule 2 of the Immigration Act 1971 submitting that the detention occurred when the forms were served on the applicant by Mr Garratt after the interview and the caution.

(e) Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. "It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1) and the notion of arbitrariness in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

(f) There is no global definition as to what types of conduct on the part of the authorities might constitute arbitrariness. The notion of arbitrariness varies to a certain extent depending on the type of detention involved. There is a variation in the notion of arbitrariness depending on whether the detention is under Article 5(1)(b), (d) or (e) on the one hand and 5(1)(f) on the other. It is not a uniform concept.

(g) The general principle is that detention will be arbitrary where, despite compliance with the letter of national law, there has been an element of bad faith or deception on the part of the authorities.

(h) The notion of arbitrariness in the context of 5(1)(b),(d) and (e) includes an assessment whether detention was necessary to achieve the stated aim. Where a person is detained under the second limb of Article 5(1)(f) with a view to deportation, that is, as long as "action (was) being taken with a view to deportation" there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing. The same concept of arbitrariness applies to the first limb as to the second limb of 5(1)(f).

(i) Under the second limb of Article 5(1)(f) to avoid being branded as arbitrary detention must be carried out in good faith; it must be closely connected to the purpose of action being taken with a view to deportation or extradition; the place and conditions of detention should be appropriate and the length of detention should not exceed that reasonably required for the purpose pursued.

[32] The respondent submits that the applicant is an illegal entrant as he is a person who has entered the United Kingdom in breach of the immigration laws in that his permission to enter has been obtained by his fraud. That accordingly he is liable to summary removal by directions given pursuant to paragraph 8 or 10 of Schedule 2 of the Immigration Act 1971. The House of Lord in *Khawaja v Secretary of State for the Home Department and Anor* [1984] 1 AC 74 considered the expression "illegal entrant" contained in Section 33(1) of the Immigration Act 1971. A distillation of the principles in *Khawaja v Secretary of State for the Home Department and Anor* has been set out by Lord Justice Campbell in the Court of Appeal *In the Matter of an Application by Paul Udu and Valentin Nyenty for Judicial Review* (unreported CAMF5983) and by Gillen J *In the Matter of an Application by Manjur Alem for Judicial Review* Unreported GIL7093). Further judicial consideration has been given to the principles set out in *Khawaja* in *an application by Michael Odunnayo Ajayi for leave to apply for judicial review* [2007] NIQB 87 and in an application by *Toyin Oyewumi Oyegbami for judicial review* [2007] NIQB 95. I seek to apply the principles set out in *Khawaja*. Accordingly if an individual completes a United Kingdom visitor's visa application form on an untruthful basis then he is guilty of deception not only at the time of completion of that form but on each occasion that he presents his visa. In this case untruthfulness in relation to the answers on the applicant's United Kingdom visitor's visa application form has to be assessed not only as at the date of the completion

of that form, namely on 27 February 2007, but also when the applicant presented it at Gatwick Airport on 27 April 2007 and also when he answered questions posed to him by Mr Garratt on 29 April 2007.

[33] In relation to the question as to whether the applicant has been guilty of deception there has to be a failure to disclose facts which the applicant knew or ought to have known would be relevant in considering whether to grant the United Kingdom visitors visa. What amounts to an effective deception was considered by Gillen J *In the Matter of an Application by Manjur Alam for Judicial Review* [2008] NIQB 27. I agree with his conclusion at paragraph [25]:

> "In my view the test still continues to be that laid down in the statute and *Khawaja* namely that the deception or fraud must be the effective, or one of the effective means, of obtaining leave to enter. This does not necessarily mean decisive but does mean more than "mere materiality". In essence the test therefore still remains that the deception must have been one of the effective means of obtaining leave to enter."

[34] The function of the court was described by Lord Fraser in *Khawaja v Secretary of State for the Home Department* [1984] AC 74 at page 96 in the following terms:-

> "The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort … On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that 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* valid permission if the person is an illegal entrant. 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."

Division between administrative and criminal powers in the Immigration Act 1971.

[35] The Immigration Act 1971 provides on the one hand, administrative powers which are contained in Schedule 2 and on the other hand there are

distinct criminal investigatory powers and offences contained in Part III of the Act.

[36] In respect of administrative powers Section 4(2)(C) provides that:

> "The provision of Schedule 2 to this Act shall have effect with respect to …
>
> (c) The exercise by immigration officers of their powers in relation to entry into the United Kingdom, and removal from the United Kingdom of persons refused leave to enter or remaining unlawfully."

Schedule 2 then sets out "administrative provisions as to control on entry etc." The paragraphs contained in Schedule 2 set out various powers for instance paragraphs 2, 2A and 3 deal with the examination of persons. Paragraph 4 sets out the duties on examinees to furnish information on documents. Paragraphs 8 and 9 deal with the removal of persons refused leave to enter an illegal entrance. Paragraph 16 gives powers of detention of persons liable to examination or removal.

[37] In contrast to the administrative powers Part III of the Immigration Act 1971 deals with criminal proceedings. A series of and a wide range of offences are set out together with investigatory powers such as arrest and search. I consider that there are two parallel but distinct criminal and administrative powers contained in the Immigration Act 1971. There are administrative powers of arrest, search, entry and seizure etc with a view to detaining a person subject to immigration control and removing him from the United Kingdom. There are criminal powers of arrest, entry, search and seizure etc in respect of specified criminal offences. Those two types of powers are given to immigration officers for two completely different purposes. Criminal powers are intended to enable immigration officers to apprehend criminals and bring them to justice. Administrative powers are intended to enable immigration officers to remove those who have no right to be in the United Kingdom.

Whether Article 6 of the Convention is engaged in respect of administrative powers.

[38] Administrative decisions in respect of immigration control do not involve the determination of civil rights or obligations within Article 6 of the Convention see *Maaouai v France* [2001] 33 EHRR 42 at paragraphs 33-39). Nor do such decisions involve the determination of a criminal charge see *Maaouai v France*, *Ullah* [2003] EWHC 679 (Admin) per Maurice Kay J at paragraph 14; *West v Parole Board* [2005] UKHL 1 per Lord Bingham at

paragraphs 38-41; and *Walsh v Assets Recovery Agency* [2005] NI 383 at paragraph 27.

The administrative powers to examine and to detain pending examination

[39] The respondent in this case contends that the examination of the applicant was on a voluntary basis and without recourse to any power contained in the Immigration Act 1971. However Mr Maguire contended, and I hold, subject to the question as to whether the power is exercisable away from the port of entry, that there was in fact an administrative power to examine the applicant under paragraph 2(A) of Schedule 2 of the Immigration Act 1971. Paragraphs 2A(1) and (2) of Schedule 2 of the Immigration Act 1971 provide:

> "2A.-(1) This paragraph applies to a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival.
>
> (2) He may be examined by an immigration officer for the purpose of establishing-
>
> (a) …
>
> (b) Whether that leave was obtained as a result of false information given by him or his failure to disclose material facts; or
>
> (c) …"

The applicant, a visa national, was granted a visitor's visa with conditions attached to it. Accordingly the applicant was a person with leave to enter, see Rule 25 of the Immigration Rules and Articles 2 and 3 of the Immigration (Leave to Enter and Remain) Order 2000. The applicant falls within paragraph 2A(1) and (2)(b) of Schedule 2 of the Immigration Act 1971. Mr Garratt had power to examine the applicant if there were circumstances which gave rise to a doubt as to whether he was entitled to be in the United Kingdom.

[40] It was contended by the respondent that the administrative power to examine would have by implication a limited power to detain for the purpose of the examination. This was not disputed by Ms Higgins on behalf of the applicant but the matter was not fully argued before me. I note that there is a power to detain in paragraph 16(1), 16(1)(A) and 16(1)(B) to Schedule 2 of the Immigration Act 1971 pending examination.

The threshold for the exercise of the power to examine and detain pending examination

[41] The threshold to be met prior to the operation of the administrative powers to examine and thus to detain pending examination is, in the words of Lord Justice Glidewell in *Badjinder Singh v Hammond*, "some information in (the immigration officers) possession which causes him to enquire" or in the words of Lord Wilberforce "circumstances which give rise to doubt whether he is entitled to be here or not".

[42] In this case the respondent contends that the circumstances that give rise to doubt are that the applicant arrived in the United Kingdom on 27 April 2007, travelled to Scotland on 28 April 2007 and to Northern Ireland on 29 April 2007 with no return ticket to London and no accommodation in Belfast ostensibly because the shops in Belfast were less expensive for clothes together with the proffering of a Republic of Ireland telephone number. That this on its own gives rise to doubt and definitely does so in combination with the immigration officer's knowledge, underlying the whole of Operation Gull, that there is a route of illegal entry into the Republic of Ireland through Northern Ireland and into the United Kingdom through the Republic of Ireland. That accordingly the threshold has been met and Mr Garratt would have had the power to examine the applicant and to detain pending examination under Schedule 2 of the Immigration Act 1971. The power to examine and detain pending examination on the facts of this case being for the proper purposes of the legislation and being exercised in good faith. I accept those contentions.

Whether the administrative powers to examine and detain pending examination are confined to the port of entry.

[43] Ms Higgins, on behalf of the applicant, contended that the powers contained in paragraphs 2 and 3 of Schedule 2 of the Immigration Act 1971 were only exercisable at the port of entry. However Lord Wilberforce in *Khawaja v Secretary of State* [1983] 1 All ER 765 at page 774 letter d stated:

> "It is, I think, helpful to test the above analysis by considering what actually happens in 'illegal entrant' cases. 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 1971 Act (s 4 and Sch 2, paras 2 and 3)*. Inquiry 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." (emphasis added)

It appears from that passage that Lord Wilberforce envisaged that those powers are also exercisable in respect of a person *found in this country* and accordingly they are not confined to the port of entry. Lord Justice Glidewell in *Badjinder Singh v Hammond* [1987] 1 WLR 283 held that under the provisions of Section 4(2)(e) and paragraph 2(1) of Schedule 2 to the Immigration Act 1971 an immigration officer might conduct an examination at a place outside the port of entry and subsequent to the person's entry into the United Kingdom provided that 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. I conclude that the powers contained in paragraphs 2 and 3 of Schedule 2 of the Immigration Act 1971 are exercisable away from the port of entry.

Police and Criminal Evidence (Northern Ireland) Order 1989 and information as to right to legal advice

[44] It was contended on behalf of the applicant that prior to the interview on 29 April 2007 he ought to have been, but was not, advised that he was entitled to access to legal advice. The 2000 edition of Code of Practice C headed "Code of Practice for Detention, Treatment and Questioning of Persons by Police Officers" issued under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 applies to people in police detention after midnight on 28 February 2007. Paragraph 6.1 of that code provides:

> "All detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone."

Paragraph 6.5 provides:

> "A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice."

[45] The applicant was to be interviewed by an immigration officer rather than by a police officer but by virtue of Article 66(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989 an immigration officer is to have regard to any relevant provision of the code if he is charged with a duty of investigating offences or charging offenders. Article 66(8) is in the following terms:

> "Persons other than police officers who are charged with a duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code."

Accordingly if on the facts of this case the immigration officer, Mr Garratt, was charged with a duty of investigating an offence or charging an offender then he is obliged by statute to have regard to the Code of Practice issued under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989. The statutory obligation to have regard to the provisions of the code becomes a question of fact, namely was Mr Garratt, when interviewing the applicant, charged with a duty of investigating an offence. If he was solely taking administrative action under his administrative powers then the code would not apply.

[46] Ms Higgins, on behalf of the applicant, contends that Mr Garratt was charged with a duty of investigating an offence. She submits that there is a body of evidence to suggest that the applicant was suspected of a criminal offence and that he could have been prosecuted for such an offence. In his first affidavit Mr Garratt deposed that after the interview he recommended to the chief investigating officer, Peter Bradshaw, that the applicant was "an illegal entrant on the grounds that he had practised verbal deception which is an offence under Section 24(1)(a) of the Immigration Act". Furthermore that in Mr Garratt's typed memorandum of his encounter with the applicant he stated that he was satisfied that the applicant is an illegal entrant on the grounds that he has practised verbal deception which is an offence under Section 24(A)(1)(a) … of the Immigration Act 1971. In addition that the stamp applied by Peter Bradshaw to record that he had considered the discretionary areas referred to "offender type". Finally there is no evidence of any clear statement to the applicant prior to the interview that the purpose of the interview was purely administrative and did not involve the potential for criminal proceedings.

[47] The respondent accepts that, subject to questions about standard of proof, what was being investigated, namely deception, could also have led to a criminal investigation. However the respondent contends that the purpose of the interview and whether it was administrative enforcement or with a view to criminal proceedings is the purpose of the person conducting the interview. That in this case that is the purpose of Mr Garratt. That in this case there is evidence from Elwyn Souter, immigration officer, and Mr Garratt that the purpose was purely administrative. Elwyn Souter, Immigration Inspector and Regional Manager responsible for operational enforcement by United Kingdom Border and Immigration Agency staff throughout Northern Ireland, has deposed that the applicant's case was an administrative enforcement case. It is apparent that 98% of cases under Operation Gull involve the enforcement of administrative powers by

immigration officers and not criminal powers. The respondent submits that I should accept Mr Garratt's assertion that the purpose of the applicant's interview under caution was solely to ascertain the applicant's immigration status.

[48] I accept the distinction based on the purpose of the action being taken. I consider that this is consistent with Strasbourg jurisprudence. In *Zamir v United Kingdom* 5 EHRR 242 the European Commission of Human Rights declared a complaint relating to Article 6 inadmissible. In that case the applicant, who was removed as an illegal entrant on the basis of deception, alleged that he was effectively charged with a criminal offence since the finding that he was an illegal entrant was tantamount to an allegation of criminal conduct covered by Section 24(1)(a) of the Immigration Act 1971. The Commission was of the opinion that this was an administrative process and accordingly Article 6 was not applicable. I conclude that the potential for a criminal investigation does not mean that such an investigation was in fact being conducted. The purpose of the Police and Criminal Evidence (Northern Ireland) Order 1989 is to create protection for individuals who are under investigation for criminal offences. If the purpose of the individual conducting the interview was administrative enforcement then Article 66(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989 does not require that person to have regard to any relevant provisions of the code.

[49] The purpose of an interview and whether its purpose is administrative enforcement or with a view to criminal proceedings is best evidenced if the purpose is declared to the interviewee prior to the interview, that declaration is recorded and signed by both the interviewer and interviewee. That was not done in this case but I am prepared to and do accept Mr Garratt's evidence that his purpose in interviewing the applicant under caution was solely to ascertain the applicant's immigration status. I construe the references by Mr Garratt and Mr Bradshaw to criminal offences as further evidence of a slipshod approach to these cases by the Immigration Service. It is clear from the rest of the evidence that neither Mr Garratt nor Mr Bradshaw were recommending a criminal prosecution. On the facts of this case there was no criminal investigation. I consider that the practice of the Immigration Service is deficient in that the interviewing officer does not clearly state to the interviewee prior to the interview that the interview is solely in relation to immigration status and not in relation to the potential commission of any criminal offence. If the Immigration Service wish to conduct interviews which could in theory, though overwhelming not in practice, give rise to criminal proceedings then there should be a clear and unequivocal statement made to the interviewee at the start of the interview. As I have accepted Mr Garratt's assertion that the purposes of the applicant's interview under caution was solely to ascertain the applicant's immigration status then Article 66(a) of the Police and Criminal Evidence (Northern Ireland) Order 1989 did not require that Mr Garratt should have regard to the code.

[50] Sections 8 and 9 of the PACE Codes of Practice C apply by virtue of section 145 of the Immigration and Asylum Act 1999 taken in conjunction with schedule 1 to the Immigration (PACE Codes of Practice) Direction 2000 and the entry in respect of powers exercisable under paragraph 17(1) of schedule 2 to the Immigration Act 1971. No breach of those section have been alleged.

Legitimate expectation based on the respondent's policy and right to legal advice

[51] There is a further route by which the applicant contends that he was entitled to legal advice prior to the interview. The applicant asserts a legitimate expectation that the PACE Codes of Practice including the right to legal advice will be applied based upon the respondent's own published operation enforcement manual. If a public body publishes material which indicates in substance how it intends to deal with a matter then in general terms a failure to deal with the matter in the manner which has been indicated without any good reason for departing from that policy will usually give rise to a legitimate expectation enforceable by way of judicial review. In this case the applicant relies upon Chapter 50 of the respondent's operation enforcement manual which is headed "Applicability of PACE Codes to (Immigration Officers)". It states that immigration officers in Northern Ireland are required to have regard to any relevant provision of the PACE Codes of Practice when investigating an offence. I have held that the purpose of the interview being conducted by Mr Garratt was administrative and was not for the purpose of investigating an offence. Accordingly the PACE Codes of Practice do not apply under this aspect of Chapter 50. However Chapter 50 also states that once a person has been served with papers and is detained under the Immigration Act powers Sections 8 and 9 of PACE Codes of Practice C applies. No breach of those sections of the code have been alleged.

Legitimate expectation that the form of caution prior to interview would have included a statement that the applicant was free to leave at any time.

[52] The applicant contends that if the sole purpose of the interview was with a view to securing his administrative removal then that he had a legitimate expectation based on the respondents policy document EPU 05/06 that a "caution + 2" would be used. That if he had been told in clear terms that he was free to leave at any time he would have left. Accordingly none of the questions would have been answered during the interview and there would have been no evidence that he was an illegal entrant.

[53] The respondent's policy document EPU 05/06 states:

> "1. <u>Introduction</u>

> This notice is to provide instruction to all arrest trained officers in the use of cautions and caution +2 interviews when conducting enforcement visits. The notice is intended to serve as both a reminder and a new instruction to operational staff.
>
> 2. When to use/appropriate cases
>
> (i) **Caution**. If an (immigration officer) has a reasonable suspicion that an offence has been committed then an arrest under the relevant criminal power of arrest, followed by a caution would be appropriate. This would include deception cases and other cases of suspected criminality. …
>
> (ii) **Caution +2**. When responses to initial questions regarding a person's (i) identity; (ii) nationality; (iii) status in the UK leads the (immigration officer) to suspect that the person may be liable to detention under paragraph 16(2) of Schedule 2 as someone in respect of whom removal directions may be given. When the sole purpose for asking a person questions is with a view to securing their administrative removal and there is no intention or possibility that a criminal prosecution will be pursued. …"

[54] Mr Maguire on behalf of the respondent conceded that the policy document had not been carefully prepared. This was a case of deception and accordingly on one construction the caution ought to have been given as opposed to the "caution + 2." However I construe the policy in accordance with the basic division between administrative powers and criminal investigations. The caution is to be used in criminal investigations. The purpose of the interview was not in respect of suspected criminality. In this case which involved administrative enforcement there was a legitimate expectation that a "caution + 2" would have been given to the applicant prior to interview. I hold that a part of that caution was not given in that the applicant was not told, in clear terms, that he was "free to leave at any time." To instead say, as Mr Garratt said, that he was relying on the applicant's full cooperation at all times does not convey the full effect of one part of the "caution + 2" namely that the applicant was free to leave at any time.

[55] The applicant's evidence was that if he had been told in terms that he was free to leave that he would have left. This would have had the consequence that the evidence contained in the interview notes would not

have been obtained. I do not accept the applicant's evidence that he would have left. He had cooperated at all stages of the process up to this point. He was told by Mr Garratt that he wished to have his further co-operation. The applicant did not make any enquiries as to whether he was free to leave and this is to be seen in the context of a person whose demeanour in the witness box was of a person who if appropriate would challenge and enquire. I also take into account the fact that the assertion that the applicant would have left if he had been advised that he was free to leave only appears in his third affidavit. As I have indicated I do not accept the applicant's evidence on this point.

[56] In view of the fact that it was the respondent's policy that the full "caution + 2" be administered and that the statement that a person is free to leave is for his protection, I consider that there was a legitimate expectation on behalf of the applicant that that part of the caution would be administered. I am prepared to grant a declaration to the effect that the full "caution + 2" should have been, but was not, given. However I do not consider that any further remedy is appropriate in that the applicant would have remained and would have answered the same questions.

[57] The proposition on behalf of the applicant was that if I had held that the applicant would have left prior to the interview then I should ignore all the answers given by the applicant during the course of that interview. The question of exclusion of evidence in criminal proceedings has been reviewed recently by the Court of Appeal in *R v Bothwell* [2008] NICA 7. However in this administrative case where the applicant has agreed in cross-examination with the truth and accuracy of an overwhelming proportion of the questions and answers given during the course of the interview and where I am satisfied that he did in fact say that he was travelling to Dublin and I would have not have excluded the evidence in arriving at a decision under the test in *Khawaja* as to whether the applicant was or was not an illegal entrant.

[58] I also take into account in deciding on the appropriate relief that Mr Garratt did have powers under Schedule 2 of the Immigration Act 1971 to question the applicant and to detain for questioning. Accordingly if the applicant had in fact commenced to leave upon his being told that he was free to leave Mr Garratt could have used his powers under Schedule 2. The same questions could have been asked and the same answers obtained under Schedule 2 of the Immigration Act 1971.

Illegal entrant

[59] On the basis of the evidence I am satisfied to the required standard that the applicant 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 also presented that visa on arrival at Gatwick Airport and he did not disclose his real intentions.

Article 5 of the European Convention on Human Rights

[60] The applicant was deprived of his liberty within Article 5(1)(f) of the European Convention on Human Rights. This provides for the lawful detention of a person against whom action is being taken with a view to deportation. Administrative removal is a step prescribed by law under Schedule 2 to the Immigration Act 1971. Article 5(4) of the European Convention on Human Rights provides that everyone who is deprived of his liberty by detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. In this case the applicant had open to him the ability to mount an application for habeas corpus and for judicial review in the High Court. Both those procedures would enable the legality of his detention speedily to be decided by a court and his release ordered if the detention was not lawful. I do not consider that the requirements of Article 5 have been infringed in this case.

The 72 hour interval

[61] It is alleged that the respondent acted unlawfully in not ensuring that a period of 72 hours separated the serving of removal directions from the time of removal. However in the case the applicant's signed form IS101 indicating that it was his desire that removal should occur as soon as possible. In those circumstances no illegality would have arisen if the applicant had been removed within 72 hours. In any event it is clear on the facts that the applicant was not removed within 72 hours of the service of the removal papers.

Procedural fairness

[62] The applicant makes the case that he was treated in a procedurally unfair manner by the respondent. I do not consider that this has been made out on the facts of this case. The applicant had a conversation and interview with an immigration officer and accordingly had a full opportunity to put forward anything of relevance to his case. No impediment was placed in his way in explaining his actions or on commenting on them. At the end of the formal interview the whole of the interview notes were read back to the applicant. The applicant was free to offer further comment if he so wished. The applicant had the opportunity to contact a solicitor when he arrived in Antrim Police Station and he did so. There is no suggestion that following this any additional information was provided to the immigration officers. I do not consider that there was any procedural unfairness in this case. I

consider that this case is very similar to the case of *An Application by Chukwuma Charles Okaro for Judicial Review* [2008] NICA 3 and I refer in particular to paragraph [8] of the judgment of Lord Justice Girvan and paragraph [19] of the judgment of Lord Justice Campbell.

Reasons

[63] Mr Maguire conceded that this was a case in which under domestic law the respondent had an obligation to give reasons to the applicant for his detention. I find that the totality of the encounter between the applicant and Mr Garratt must have left the applicant in no doubt that he was considered by the respondent as an illegal entrant on the basis that he had committed deception. That the deception involved his failure to disclose that he intended to travel to the Republic of Ireland in circumstances where he did not have a visa for that country and he had not declared this on arrival at Gatwick Airport to the immigration officer. There was no obligation on the immigration officer to explain the legal mechanisms by which this made the applicant an illegal entrant. However it is necessary to go to the totality of the encounter to find the material upon which it is asserted that the applicant had committed a deception. The forms served on the applicant would not have been sufficient to identify to him the actual deception which it was asserted he had committed. They assert deception. They do not condescend to any particulars of the deception. If this case depended on the forms alone I would have considered them inadequate but those forms combined with the totality of the encounter between the applicant and Mr Garratt in the event left the applicant with an understanding of the reasons why he was declared an illegal entrant.

[64] On a similar factual basis I do not consider that there was any breach of Article 5(2) of the European Convention on Human Rights. In *Dikme v Turkey* (2000) ECHR 366 the European Court of Human Rights considered an alleged breach of Article 5(2) of the Convention. It stated:

> "53. The relevant principles governing the interpretation and application of art 5(2) in comparable cases were set out in *Fox, Campbell and Hartley v UK* at para 40):
>
> > 'Paragraph 2 of art 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by art 5: by virtue of para 2 any person arrested must be told,

> in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with para 4 ... Whilst this information must be conveyed 'promptly' (in French: '*dans le plus court delai*'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.'
>
> In that case the Court found, in the light of the facts, that the applicants had been informed during their interrogation (a few hours after their arrest) of the reasons why they had been arrested. It consequently held that the requirements of art 5(2) were satisfied (ibid, at paras 41-43).
>
> 54. In the instant case the Court notes that the reason for the first applicant's arrest was that he produced false papers during an identity check by the police. It considers that, having regard to the criminal and intentional nature of that act, the first applicant cannot maintain that he did not understand why he was arrested and taken to the local police station at 7.30 am on 10 February 1992 (see para 12 above).
>
> The same applies to the reasons why the first applicant had to wait at the police station and was taken into police custody at the branch, where he was allegedly interrogated by officers intent on making him disclose his true identity (see para 12 above)."

Applying that test I hold that the applicant knew the essential legal and factual grounds for his detention. That he was considered an illegal entrant. That it was considered that he had committed deception in that he had failed to disclose his intention to travel to the Republic of Ireland in circumstances where he did not have a visa for that country and he had not declared this on arrival at Gatwick Airport.

[65] If I had found that there was a failure to give reasons and that there had been a breach of Article 5(2) of the European Convention on Human Rights I consider that just satisfaction would have been a declaration without any compensation, see paragraph 89 of the judgment to the Grand Chamber in *Saadi v United Kingdom* (Application No. 13229/03) 29 January 2008.

The period 7.00 a.m. to 7.30 a.m.

[66] The respondent makes the case that the applicant was not detained until the forms were served on him. The applicant makes the case that in reality he was detained at approximately 7.00 a.m. after the initial questioning when Mr Garratt indicated that he would like to ask him further questions. I have accepted Mr Garratt's evidence that he told the applicant that he was not under arrest but that he would like his cooperation. The applicant was cooperative and stood to one side until Mr Garratt had an opportunity to speak further to him. I reject the contention that the applicant was in fact detained.

[67] The respondent had power to examine the applicant and to detain for the purposes of examination. That power could have been used in this case by Mr Garratt. Accordingly if the applicant did not stay voluntarily between 7.00 a.m. and 7.30 a.m. and he was in fact detained then that earlier detention may well not in fact have lead to any damage to the applicant.

Conclusion

[68] I grant a declaration that the full "caution + 2" should have been, but was not, given to the applicant. I am not satisfied that the applicant has established any of his other grounds for Judicial Review.