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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 MANJUR ALAM FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY AN IMMIGRATION OFFICER

GILLEN J

Application

[1] The applicant in this case, a Bangladeshi national, challenges the decision of 12 November 2007 by the Immigration Service that he was an illegal entrant to the United Kingdom as defined in section 33 of the Immigration Act 1971 ("the 1971 Act") and that he was liable to be detained and removed from the UK as a result. He also seeks an order of mandamus directing the cancellation of any endorsement on his passport that he an illegal entrant, that any records held by the United Kingdom Immigration Service should be deleted if they are to the effect that he is an illegal entrant and that his detention violated Article 5 of the European Convention Rights and Fundamental Freedoms. The parties agreed at the outset in this case that the only issue requiring determination was the question of illegal entry and removal. Since the applicant was no longer detained I did not need to consider the challenge to the lawfulness of his detention.

Background

[2] The applicant sought and obtained the appropriate leave to enter the United Kingdom as a visitor on 10 November 2007 on the basis of entry clearance in the form of a multiple entry visitor's visa valid until 10 October 2012. He was detained by Immigration Officers at Belfast on 12 November 2007 on his way to visit his sister in County Down and served with a determination that he is an illegal entrant liable to removal from the United Kingdom.

[3] The Immigration Service ("the respondent") contends that the applicant was properly deemed to be an illegal entrant because he had obtained his entry clearance and visa by deception. The facts upon which the respondent relied to ground the allegation of deception are as follows:-

(i) The applicant had on three previous visits to the United Kingdom claimed on his Visa Application Form (VAF) that he would stay in the United Kingdom for a period of four weeks but in fact has remained on each occasion for between four and five months. This did not render him an over stayer as it was within the period covered by the visa.

(ii) The applicant had completed a VAF on 7 October 2007 in which he stated that he intended to stay in the United Kingdom for a period of four weeks. He stated that he intended to arrive on 7 December 2007 and that the purpose of his trip was to visit Wales. In fact he arrived in Belfast on 12 November 2007 from London with a total sum of £50 in his possession having stated on his VAF that he would have £1,000 available. He arrived in Belfast without a return ticket to London. He did have a return ticket dated 30 April 2007 to Bangladesh.

(iii) The applicant was interviewed by Immigration Officers upon his arrival in Belfast and stated during interview under caution that he had told the Entry Clearance Officer in Dhaka that he would visit the United Kingdom for four weeks and did so expressly in order to obtain a visa. He also stated during interview that he would be staying with relatives in Belfast for three weeks which seems to be contradicted in the affidavit which he has filed in this matter. He added that he intended to stay in the United Kingdom for five months to travel around and apply for an employment permit.

(iv) The applicant had completed a landing card on arrival at London Heathrow stating that he would be staying at 83 Boleyn Road, London. Within 24 hours he had arrived in Belfast to commence a protracted stay in Comber with his brother in law. He had completed section 5 of the VAF form making no reference to relatives in Northern Ireland.

(v) The applicant avers at paragraph 41 of his affidavit in this matter that he intended to teach Bengali to his niece on an unpaid basis.

[4] A further matter, which proved to be highly contentious, was that a respondent immigration officer had interviewed the applicant's brother in law both at the airport in Belfast and over the telephone. It was the respondent's

case that the applicant's brother in law had told Immigration Officers at Belfast that the applicant had worked as a dishwasher in the Ganges restaurant in Newtownards on previous visits to Northern Ireland.

[5] It was thus the respondent's case that if the applicant had fully explained the true nature and duration of his visit to the Entry Clearance Officer at Dhaka, Bangladesh or if he had advised the Immigration Officer at London Heathrow of the alterations to his stated itinerary this would have prompted further enquiry, a review of his recent entry history and led to the refusal of entry. It was submitted that the disclosure of the applicant's true intention(which the respondent claimed was to work in the UK)was a material fact which would have led the entry clearance officer to refuse entry. If the applicant had been candid to either the Entry Clearance Officer or Immigration Officer the respondents submit that it is inevitable that this would have opened up a line of enquiry which would have influenced the decision as to whether or not he would be permitted entry.

Proceedings to date

[6] Subsequence to his detention and service of illegal entry decision on 12 November 2007, the judicial review proceedings in this matter were filed on 16 November 2007. On that date Weatherup J granted a stay on his removal from the United Kingdom.

[7] On 27 November 2007 the application for judicial review was heard in front of Weatherup J and on 28 November 2007 leave was granted but the stay on his removal from the United Kingdom was lifted. Fresh removal directions were set for the 4 December 2007.

[8] On 30 November 2007 there was a further application by the applicant to amend his statement under Order 53 of the RSC and an application made for a stay on the removal. This application was refused by Weatherup J.

[9] On 3 December 2007 the Court of Appeal determined the appeal from the decision of Weatherup J and granted leave to amend the Order 53 statement and placed a stay on the removal of the applicant from the United Kingdom until the determination of the present proceedings.

[10] The Notice of Motion was served in this matter on 4 December 2007.

The Respondent's case

[11] Essentially the respondent's case is set out in the affidavit of Mr Garratt, an Immigration Officer at the Liverpool Immigration Service. The applicant had been stopped at Belfast International Airport following his arrival from London Stansted on 12 November 2007, and was interviewed under caution.

Mr Garrett, having considered the full content of the interview together with the other documentation produced namely his passport and visa application forms, declares in his affidavit of 6 February 2008 at paragraph 9 as follows:-

> "I considered that the Applicant should be served with papers as an illegal entrant having practised deception contrary to Section 26(1) of the Immigration Act 1971 and an offence under Section 24(1)A of the same Act. I considered that he was therefore an illegal entrant to the United Kingdom as defined by Section 33(1) of the Act. Specifically, I considered that the Applicant had practised verbal deception to the Entry Clearance Officer on his last visa application in Bangladesh and the Immigration Officer on his last entry to the United Kingdom on 10 November 2007. The Applicant had failed to disclose material facts, most importantly having worked illegally in the United Kingdom on previous visits (*my emphasis).* He had told the Entry Clearance Officer on 10 October 2007 that he intended to stay for a period of four weeks but had always intended to stay for a period of between 4-6 months. If the Immigration Officer had been made aware of all the information regarding illegal working on previous visits he would have been duty bound to refuse leave to enter the United Kingdom.
>
> 10. As the applicant was an illegal entrant to the United Kingdom he could be removed under powers contained in paragraph 8 of Schedule 2 of that Act. The Act further provides powers to detain any person to be removed and these are contained in paragraph 16(2) of Schedule 2."

Legal principles governing this case

[12] Section 33 of the 1971 Act provides that entry by deception occurs where the entrant:-

(i) makes or causes to be made a false representation contrary to Section 26(1)(c) of the Immigration Act 1971 and such deception is the effective means of entry;

(ii) enters the UK by means, including deception, contrary to Section 24A of the 1971 Act; or

(iii) enters or seeks to enter by means which include deception by another person.

[13] The leading authority in this matter is Reg v Home Secretary, Ex p. Khawaja [1984]1 AC 74 ("Khawaja"). This is a case which has regularly been referred to in immigration cases determined in Northern Ireland e.g. in the Northern Ireland Court of Appeal in In the matter of an Application by Paul Udu and ValentinNyenty (unreported CAMF5983)("Udu's "case).

[14] In Udu's case, Campbell LJ succinctly analysed the effect of Khawaja's case at paragraph 13 et seq as follows:-

> "(i) There is an onus on the immigration officers to prove by a preponderance of probability to the satisfaction of the court that leave to enter was obtained by deception.
> (ii) In judicial review it is the function of the courts, including an appellate court, to go beyond inquiring only if the immigration officer had reasonable grounds for his belief and to decide if the applicant is an illegal immigrant.
> (iii) A duty approximating to uberrima fides is not imposed on a person seeking entry.
> (iv) Deception may arise from silence as to a material fact in some circumstances."

[15] At paragraph 20 et seq the judge continued

> "(20) Lord Fraser in his speech in *Khawaja* considered the function of the courts when dealing with removal cases and he agreed with Lord Bridge and Lord Scarman "that an immigration officer is only entitled to order 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." This is a "precedent fact" that has to be established and on review the court has to decide if the entry was obtained by deception. This is the task not only of the High Court but also of an appellate court as was stated in *Khawaja.*
>
> (21) In *R v Secretary of State for the Home Department ex parte Al-Zahrany* [1995] Imm AR 510, a decision of the Court of Appeal in England and Wales, Stuart-Smith LJ (with whom Waite and Millett LJJ agreed) said:

> 'In my judgment in proffering a passport which contains a visa valid for the purpose of a visit to this country and to enable her to become a visitor to this country (and that being the leave to enter which she obtained) she [the applicant] is plainly making, albeit silently, a representation that that is the purpose of her visit'."

In *R (Zahide Awan) v Secretary of State for the Home Department [1996] Imm AR 354*, Buxton J, sitting at first instance, said:

> "In my judgment it was clearly incumbent on her to make the change of circumstances clear when she arrived in this country. The presentation of a passport or the presentation of an entry clearance visa that has been formulated on the basis that no longer persists or no longer represents the totality of a person's intentions or possibilities is and it is clearly held by the authorities to be an act of deception under the guidance given in Khawaja."

We agree that a representation may be implied from the silent presentation of a passport that the holder is seeking entry for the purpose for which the visa which has been obtained and no other."

[16] To these principles ,for the purposes of this case ,I add three other matters arising from Khawaja.

(a) on an application challenging the decision of an Immigration Officer the respondent should depose to the grounds on which the decision to detain and remove was made setting out the essential evidence taking into account and exhibiting documents necessary to enable the court to carry out their functions of review.

(b) the court should appraise the quality of the evidence and decide whether that justifies the conclusion reached.

(c) if the court is not satisfied with any part of the evidence it may remit the matter for reconsideration or by itself or receive further evidence. It should quash the detention order where the evidence was not such that the authority should have relied on it or where the evidence received does not justify the decisions reached by serious procedural irregularity(see Girvan J in Re Paul Udu and others (2005)NIQB 81 at paragraph 11).

[17] I digress at this stage to record that an example of the recognition of the heavy burden on the Respondents in such matters is found in the Home Office Operational Manual chapter 10. This deals with the operational approach to working with a breach of visa conditions . How high the bar is set in order to comply with the evidential burden of proof to sustain a claim of working in breach of visa conditions is clear from Paragraph 10.6.4 of chapter 10 as follows:-

> "10.6.4 – Working in Breach
>
> A person is liable to administrative removal under section 10 if found to be working in breach of a restriction or prohibition on employment. The breach must be of sufficient gravity to warrant such action.
>
> There must be firm and recent evidence (within 6 months) of working in breach including one of the following:
>
> > an admission under caution by the offender of working in breach;
> > a breach by the employer implicating the suspect;
> > documentary evidence such as pay slips, the offender's details on the payroll, NI records, tax records, P45s;
> > sight by the IO or by a police officer who gives a statement to that effect, of the offender working preferably on two or more separate occasions, or on one occasion over an extended period, or of wearing the employer's uniform.
>
> In practice, this should generally be backed up by other evidence. Statutory codes of practice (under the regulation of Investigatory Powers Act 2000) regulate the use of covert surveillance and covert human sources (informants), see 48.6".

I have to ask myself whether in principle any thing approaching this high evidential hurdle exists in this case.

[18] There was an issue in the instant case as to what amounts to an effective deception. I remind myself that the binding authority of Khawaja is crystallised in the words of Lord Bridge at p 118 E where he said:-

> "If the fraud was a contravention of section 26(1)(c) of the Act, the provisions of which I have already quoted, and if the fraud was the effective means of obtaining leave to enter – in other words if, but for the fraud, leave to enter would not have been granted – then the contravention of Act and the obtaining of leave to enter were two inseparable elements of the single process of entry and it must inevitably follow that the entry itself was "in breach of the Act"".

[19] In R v. Secretary of State for the Home Department ex p Jayakody (1982) 1 WLR 405("Jayakody") the Court of Appeal held that the fraud must be decisive *(my emphasis)* of the application i.e. in all probability the leave would have been refused but for the deception. Thus in that case failure to tell an Immigration Officer that a spouse was resident in the UK might not be decisive of the grant or refusal of leave to enter.

[20] Subsequent authorities however have clearly diluted the effect of the assertions in Jayakody. In Durojaiye v. Secretary of State for the Home Department (1991) Imm AR 307 the court posed a different test in the following terms:-

> "The fact is that the question which the Home Office asked Mr Durojaiye was, what his hours of attendance had been; and that was the question which he answered. Plainly his answer was material in the sense that it was likely to influence their decision whether to find that he was qualified . . . If his answer had been "I have attended for less than 15 hours per week, but I have studied at home as my course required", it is likely . . . that more questions would have been asked and further enquiries made."

The test therefore was one of materiality in the sense that it was likely to influence the decision.

[21] In R v. Secretary of State for the Home Department, ex p Ming (1994) Imm AR 216 Laws J held that the representation was material if, on the revelation of the truth, "at the very least further enquiries were to be made".

[22] In the instant case Mr McGleenan, who appeared on behalf of the respondent, relied on Kaur v. Secretary of State for the Home Department (1998) Imm AR 1("Kaur's case"). This was an appeal against refusal of leave to enter on the ground that material facts were not disclosed for the purpose of obtaining a visa. Dealing with Jayakody's case, Ward LJ said at page 8:-

> "I agree that the time has come when we should put that test to rest. It seems to me quite inconsistent with a line of authority which has received approval in this court and above. I refer to the decision of the House of Lords in R v. Home Secretary ex parte Bugdaycay (1987) 1 AC 514. There Lord Bridge at page 525 stated he could not improve on the reasoning of Neill LJ in the course below when he said:-
>
> > 'In my judgment it is impermissible to extend the concept of material facts so as to allow an intending entrant to seek leave to enter for a particular purpose on the basis of a statement of particular facts and then later, on admitting that the purpose had been misrepresented and the facts had been misstated, to contend that he was not an illegal entrant because if he had told a different story and had put forward a different reason for his visit he might well have been given leave'."

[23] Mr Stockman, who appeared on behalf of the applicant, urged that I should continue to adopt the approach laid down in Jayakody on the basis that it was, like the present case, an instance of illegal entry which carried with it criminal sanctions whereas Kaur's case was an instance where leave to enter was being refused or revoked leading to a refusal of entry to the UK.

[24] I consider that the proper approach to be adopted in such cases is that advocated by Mr Ian Macdonald QC in his textbook "Macdonald's *Immigration Law and Practice* 6th Edition" where he frames the test in these terms at para 16.21:-

> "However, Khawaja is still binding authority, and, by bedding Jayakody, the court in Kaur cannot have intended to substitute "mere materiality" for 'effective means' as the proper test for establishing the causal connection between the deception practised and the leave to enter granted by the Immigration Officer. That would be too much of a watering down. What is clear, however, is that the wording of the section 24A offence, inserted into the 1A 1971 in 1999, endorses the view put forward in Khawaja that the deception employed need only have been one of the factors leading to the grant of leave to enter, an effective but not necessarily decisive one."

[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.

[26] I have concluded in this case that the evidence placed before the court on behalf of the respondent, though raising a case of suspicion and doubt, was not sufficient to make good a case of deception as the effective means of obtaining leave to enter. For the removal of doubt I make it clear that had I characterised the test to be applied in terms deriving purely from Kaur's case, namely whether or not the deception was material in the sense that it was likely to influence the decision, I would have still have come to the same conclusion namely that the quality of the evidence before me was not sufficient to justify that conclusion.

[27] I have concluded from the affidavit of Mr Garratt to which I have earlier referred in paragraph 11 of this judgment that the most important non disclosure of material facts upon which he relied was that the applicant had been working illegally in the United Kingdom on previous visits (see paragraph 9 of his affidavit). Although Mr McGleenan relied on a number of other deceptions which he claimed were free standing, most of them fed into this central proposition e.g. his staying for a period of months instead of the asserted four weeks, his lack of funds, etc. Insofar as the applicant had denied that he had worked illegally or at all on previous visits, the evidence upon which the respondent's relied was largely that of his brother in law Mr Shohid.

[28] I find the quality of the evidence tendered by the Immigration Officers about the conversations with Mr Shohid to be profoundly unsatisfactory. It bears careful analysis as follows:-

(a) Mr Bradshaw, the Chief Immigration Officer at Liverpool Immigration Officer at Liverpool Immigration Service, in his affidavit of 6 February 2007 at paragraph 4 declares:-

> "While I was in the arrivals area of Belfast International Airport a man approached the applicant. I asked him to step to one side and asked his permission to ask some questions. The man identified himself as Abdul Shohid. He stated that he was a brother in law of the applicant. He stated that he owned a restaurant in Comber. He stated that this was a take away restaurant called the Akash at 24 Mill Street, Comber. He stated that the applicant was going to stay with him for a few months. I

> asked Mr Shohid if the applicant would be working in his restaurant at any time during his visit. He stated that the applicant had previously worked as dish washer in the Ganges restaurant in Newtownards on previous visits but he was unsure of his intentions on this occasion. It should be noted that Mr Shohid later reaffirmed this information in a conversation with IO Garratt."

It is noteworthy that at paragraph 6 Mr Bradshaw echoed the view of Mr Garratt that great importance was placed on the admissions made by Mr Shohid in leading the Immigration Officers to the conclusion that the applicant was misusing his Visit Visa. At paragraph 6 Mr Bradshaw declared:-

> "In light of the interview notes, the pattern of travel evident within the applicant's passport, and *most importantly(my emphasis)*the admissions made by Mr Shohid to both IO Garratt relating to previous unlawful employment within the United Kingdom it was clear to me that the applicant was misusing his UK Visit Visa. He had failed to disclose material facts to both the Entry Clearance Officer in Sylhet on 10 October 2007 and the Immigration Officer at London Heathrow on 10 November 2007, i.e. that he taken unlawful employment on personal visits. Had he done so he would have been refused a Visa/Leave to enter the United Kingdom. I was satisfied therefore that the applicant had committed an offence under section 26(1)(c) of the Immigration Act 1971 and that as a result of this offence, the applicant was rendered an illegal entrant by virtue of section 33(1) of the Immigration Act 1971."

Hence the importance of the conversation with Mr Shohid again surfaced. It was clearly a central plank in the respondent's case.

[29] As I have already indicated, Mr Garratt subsequently telephoned Mr Shohid by telephone and he declared in paragraph 7 of his affidavit that Mr Shohid had confirmed that the applicant had worked as a dish washer in the Ganges restaurant on his previous visit to the United Kingdom.

[30] I was therefore deeply concerned to observe in the interview notes of the exchange between Mr Garratt and the applicant at Belfast International airport the following extract:-

> "Your brother in law attended the airport today and has stated that you have worked in the UK in various restaurants. Is this correct?
>
> Answer: This is not correct."

[31] It is quite clear that this is not what Mr Shohid was alleged to have told either Mr Garratt or Mr Bradshaw . I do not understand why it was asserted to the applicant by Mr Garratt that this was the case. On the contrary, if Mr Garratt and Mr Bradshaw are to be believed, Mr Shohid had specifically stated that he had worked in the Ganges restaurant in Newtownards. Couched in these terms it was not only misleading but irreconcilable with what the Immigration Officers were actually saying Mr Shohid had said.

[32] Had that been the only error on the part of the Immigration Officers it could perhaps have been explicable as a slip of the tongue. However the inconsistencies did not end there. I had before me documents headed "Immigration Factual Summary". This is a document not often seen or relied upon in immigration cases in Northern Ireland. I assume this is because it derives from a Practice Direction supplementing Part 54 of the Civil Procedure Rules applicable in England and Wales. Certainly it has all the hallmarks of a useful document crystallising the factual case of the Immigration authorities. One such document in this case purported to come from Zoe Campbell of the Belfast Enforcement Office with a date on the Factual Summary bearing 28 November 2007. Another such document purported to come from John Andrew Garratt at the Belfast Enforcement Office with again a date of Factual Summary bearing 28 November 2007. Ms Campbell's summary includes the following paragraph:-

> "The Border and Immigration Agency are satisfied that the subject is an illegal entrant on the grounds of verbal deception. It is believed that the subject does not work in Bangladesh as a teacher but is using his Visit Visa to work in the UK. The subject's brother in law confirmed that the subject had been working in Ganges restaurant as a dish washer on his previous visit to the UK. Please see above.
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> This argument is further supported by the substantial periods of stay in the UK up to 4 and 6 months at a time, by the lack of money that the subject has had in his possession and the discrepancies found within the subject's visa application forms."

[33] This entry is significant not only in terms of the history given, but again emphasises that the key to the decision to declare the applicant an

illegal entrant was the allegation that he was using his Visit Visa to work in the UK for which a key component was the evidence of the brother in law Mr Shohid. The points made e.g. length of stay, lack of money, etc were in support of that central proposition.

[34] In contrast to the document emanating from Ms Campbell, the Immigration Factual Summary on the same date from Mr Garratt included the following:-

> "The Border and Immigration Agency are satisfied that the subject is an illegal entrant on the grounds of verbal deception. It is believed that the subject does not work in Bangladesh as a teacher but is using his Visit Visa to work in the UK. The subject's brother in law confirmed that the subject had been working in his restaurant on his previous visit to the UK. Please see above."

[35] The rest of the Immigration Factual Summary follows the format of that Ms Campbell. This version is clearly irreconcilable with that of Ms Campbell and asserts something that is positively untrue. There is no evidence that Mr Shohid confirmed that the applicant had been working in his restaurant on his previous visit to the UK. At best the Immigration case was that Mr Shohid had said he was working in a different restaurant in Newtownards.

[36] The mystery of the accounts allegedly given to the Immigration authorities deepens further in a document headed "Bail application – Liverpool, details which were apparently given by Zoe Campbell." In the course of that document, under a heading "Bail Summary", the following appears:-

> "This subject arrived in the UK on 10/11/2007 and flew to Belfast on a one way ticket. His return ticket to Bangladesh was dated 30/04/2008. When asked what funds he possessed in order to sustain himself the subject was only able to present £50.
>
> The subject's brother in law was also at the airport to collect the subject. This individual when questioned by a Chief Immigration Officer said that he owned the Akash Indian take away at 24 Mill Street, Comber. He confirmed that the subject worked at this establishment as a dish washer on his previous visit 17/02/2007/07/07/2007.

> In light of the above facts it is strongly believed that the subject was travelling to Northern Ireland when encountered on 12/11/2007 to take up illegal employment and not to visit the UK as was the purpose of his Visa."

[37] I was profoundly concerned by these inaccurate descriptions of the case being made by the Immigration authorities. These inaccuracies carried a particular seriousness since I was informed that the documents containing them amount to bail summaries which are put before the AIT who determine issues of bail. These are therefore very important documents which can determine the liberty of an applicant and are not to be lightly approached or completed. I pause to observe that I consider these contrasting and misleading accounts warrant onward reference to those in the highest echelons of the Immigration Service when this case is over .

[38] It has often been observed that judicial review is unsuitable for resolving disputes of fact. Although it may well be appropriate in certain instances, in essence judicial review is not a fact finding exercise. This is a species of litigation in which the court exercises a supervisory jurisdiction and does not substitute its opinion for that of the decision maker. On the other hand, the court will not close its eyes to fundamental contradictions and discrepancies within the respondent's case particularly where, as in this instance, per Khawaja, the status of legal entrant is a precedent fact to be established and the burden of justifying the legality of the decision is on the respondents. No explanation whatsoever has been tendered in the affidavits from Mr Bradshaw or Mr Garratt or, for that matter, from Ms Campbell explaining these discrepancies.

[39] Given these discrepancies , I cannot ignore the facts outlined by Mr Shohid in his affidavit of 16 November 2007 where, dealing with the meeting with the Immigration Officers at the airport, he averred at paragraphs 18 seq as follows:-

> "18. I saw the applicant and shook his hand but I was told by a man to stay away from him. I was then told that a Chief Immigration Officer wanted to have a word with me.
>
> 19. I was taken a few yards away and I was asked if I would mind answering a few questions. I said, "OK". I was asked about my relationship to the applicant. I was asked if I owned a take away. I said, "Yes". I was asked about the length of the applicant's visit and I said, "A few months".

> 20. The Immigration Officer then said to me that the applicant had told him that he worked in my take away and that he sent money home to Bangladesh. I was taken aback by these statements. The applicant has never worked in my take away. As indicated above, we would sometimes give him money, but I was not aware of him sending money home. I said quite clearly to the Immigration Office that the applicant had never worked in my take away and that he had not sent money home to my knowledge."

[40] This assertion by Mr Shohid has echoes with the assertion mentioned above at paragraph 25 by the Immigration Officer to the applicant that his brother in law had said that he had worked in the UK in various restaurants.

[41] Mr Shohid in the affidavit continued at paragraph 21 as follows:-

> "21. I believed at this time that the Immigration Officer was giving me a truthful account of what the applicant had said to him. I volunteered the comment that if he had said that he worked I didn't know when. I indicated that I had relatives who owned the Ganges restaurant and that he sometimes used to visit them. I know that he went to visit sometimes to the restaurants or sometimes to the houses of these relatives.
>
> 22. It was then put to me by the Immigration Officer that if the applicant had worked, what was he doing? As stated above, I had no knowledge of the applicant working anywhere in the United Kingdom and I was completely surprised by the statement that the applicant had told the Immigration Officer that he had worked. I know the applicant and I know the catering industry. As far as I am aware, the applicant has never worked in the catering business. The applicant is what I call a soft worker, and is someone not experienced in hard work. I did not see the applicant as someone qualified to work in a kitchen. I ventured the view that if the applicant had said that he had worked, then may be he worked washing dishes, but that I don't know."

[42] I find the discrepancies in the documentation of the Immigration Officers so inconsistent and irreconcilable that I am unable to place any reliance on what they assert as the basis of the conversation with Mr Shohid. At best the approach of the Immigration Officers in this case has been far too casual and slipshod without due regard to the importance of the standard of proof required in order to form the conclusion that someone is an illegal entrant and to the importance of the liberty of the subject in such matters. Suffice to say that the respondent in this case has not reached the appropriate standard of proof in circumstances where the degree of probability required is proportionate to the nature and gravity of the issue. In cases involving grave issues of liberty the degree of probability required is high and the respondents have not reached that in this instance. Having appraised the quality of the evidence before me, the conclusion reached that this man was an illegal entrant is not justified in my opinion.

[43] Mr McGleenan valiantly sought to argue that there were a number of other free standing deceptions which the applicant had made in this case which, relying on the Kaur test, would have opened up a line of enquiry leading to refusal by the Visa granting officer. In this context he drew my attention to ex parte Awan (1996) Imm AR 354 where a change of plan with regard to a visit altered after the grant of a visa and before the arrival at the United Kingdom was sufficient to constitute a deception. Buxton J said:-

> "In my judgment it was clearly incumbent on her to make that change of circumstances clear when she arrived in this country. The presentation of a passport or the presentation of an Entry Clearance Visa, that has been formulated on a basis that no longer subsists, or no longer represents the totality of a person's intentions or possibilities is, and is clearly held by the authorities to be, an act of deception under the guidance given in Khawaja."

[44] I am not satisfied that, absent the evidence of Mr Shohid, the remaining matters relied on amount to the effective means of obtaining leaving to enter whether under the Jayakody or Kaur test. Although the applicant had indicated that he was intending to go to London and then to Wales for a period of four weeks, the fact of the matter was that it was perfectly clear to any official at the time of entry clearance that he had stayed longer than he originally intended on previous occasions but within the six month limit afforded to such entrance. Clearly the Entry Clearance Officer did not regard the past history as a matter that required further enquiries in the absence of any other evidence. Had it been a factor which even on the Kaur test would have opened up a line of enquiry, it is difficult to understand why this was not pursued in view of the information already before the Entrance Clearance Officer about his previous history. Moreover a decision

to visit a brother in law in Belfast and a decision not to go to Wales seems to me to be an inconsequential difference in the absence of other evidence that the change of plan was deliberately geared towards a deceitful intent to work illegally. There is a clear contrast with the factual matrix in Awan's case where there was evidence that the applicant had no intention to leave within six months before entering the United Kingdom. There is no evidence of such intention in this case in my view.

[45] Similarly, the absence of a return ticket from Belfast when he only had £50 in his possession is not sufficient to persuade me that this is a free standing effective deception. Tickets can be bought cheaply from Belfast back to London and he still did have an open ticket to return to his home in Bangladesh for April 2008. I do not believe this to be sufficient evidence of an effective deception. Similarly the assertion that he would be staying with relatives in Belfast for three weeks, his intention to stay in the United Kingdom according to the interview for five months to travel around and apply for an Employment Permit, his swift arrival in Belfast after stating on his landing card on arrival at London Heathrow that he would be staying at an address in London, the failure to refer to his many relatives in Northern Ireland and the rather technical point that he states in his affidavit at paragraph 41 that he intends to teach his niece Bengali, are all matters which might have carried weight had the respondent been able to rely on the alleged assertions made by Mr Shohid. In the absence of this court being able to rely on the evidence of the conversation with Mr Shohid, I do not consider that these other matters are sufficiently material to satisfy this court to the appropriate level that this man had practised an effective deception or was an illegal entrant bent on working illegally in Northern Ireland.

[46] Accordingly, largely because the evidence of the respondent Immigration Officers is so replete with unsatisfactory aspects and in my view fatally flawed, I have come to the conclusion that I must accede to the applicant's claim in this matter and quash the decision by the Immigration Officers notified to the applicant on 12 November 2007 to the effect that he is an illegal entrant to the United Kingdom. It seems to me that this is the core relief sought by the applicant at paragraph 2(a) of the statement filed pursuant to the Rules of the Supreme Court (NI) 1980 Order 53 Rule 3(2)(a). However I will hear counsel on whether or not it is necessary in these circumstances to make a ruling on the relief sought at paragraphs 2(b) and (c) with reference to the endorsements on the applicant's passport and any records held in the United Kingdom by the Immigration Service. I will invite counsel also to address me on the issue of costs.