

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY SONGADELE AMOS FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW**

MORGAN J

[1] This is an application for leave to apply for judicial review in respect of a decision to detain the applicant on 3 August 2007 and a further decision on 18 September 2007 to direct his removal to Nigeria. In the course of submissions the applicant also challenged a review of the decision to remove contained in a letter dated 29 September 2007 and I treat this application as a challenge to that decision also.

[2] The applicant is a Nigerian National. On 3 June 2007 he entered the United Kingdom on a valid six-month visitor's visa. On 3 August 2007 officers of the Border and Immigration Agency and PSNI attended at 31 Castlereagh St Belfast. As a result of material obtained at that address the officers then made their way across the street to 32 Castlereagh St, Belfast. That was an Internet cafe which was apparently owned by the applicant's brother-in-law.

[3] I gave the proposed respondents leave to put in an affidavit and exhibits. Mr McBriar, an immigration officer, said that as he entered the Internet cafe the applicant was sitting behind the cash till and that the applicant had in his possession a keyring containing keys both to his home at 9 Langtry Court, Belfast and the front door of the shop premises. The applicant appeared to be in charge of the shop. Mr McBriar exhibited a statement from Sergeant Boyd of PSNI who stated that he entered the premises at 32 Castlereagh St with Constable Crawford. He observed the applicant sitting behind a desk with the till open dealing with a male customer who was accompanied by a three-year-old child. He also noted that the applicant had his house keys and the shop keys on the same ring. A

notebook entry from Constable Crawford was also exhibited. He recorded Sergeant Boyd speaking to a male working at the premises whom he identified as the applicant. Constable Crawford spoke to another male with a child who tried to leave straight away. This man gave his name and address and said that he was a Zimbabwe National who was awaiting the outcome of an asylum application. He was allowed to proceed.

[4] On foot of these observations the applicant was arrested and cautioned for working in breach of his visitors visa contrary to section 24 (1) (b) (ii) of the Immigration Act 1991. He was taken to Musgrave Street Police Station where he was served with illegal entry and detention papers. On 18 September 2007 the applicant was served with a removal direction proposing his removal to Nigeria on 22 September 2007. On the same day solicitors for the applicant wrote to the Border and Immigration Agency denying the allegation that he was serving a customer and denying that the keys of the premises were in his possession at the time of his arrest. In a further letter dated 20 September 2007 the applicant's solicitors gave the following version of events:

(a) Our client denies that he was standing behind the cash register as alleged. We are instructed that at the time that immigration officers entered the shop that our client was sitting on a seat facing the door of the shop, with his back to the location of where the register is located. Our client was reading a newspaper and talking to another customer.

(b) Our client denies that he had the keys of the shop in his possession. We are instructed that the keys to the premises were sitting on a worktop and that the keys were not at any stage in our client's possession.

(c) Our client denies that he was giving any information about services to any customer. As stated above he instructs that he was talking to another customer.

(d) Whilst our client accepts that there was no employee in the shop, he instructs that this was due to the fact that the employee who had been working in the shop had left briefly to do some messages. We are instructed that the shop is owned by our client's brother-in-law and that in the circumstances the employee was content to leave the shop unattended while our client remained present. Our client denies any suggestion that he was "in charge" of the shop.

The applicant's solicitor also contended that on the material available to the Border and Immigration Agency the evidence was insufficient to justify the conclusion that the applicant was working in breach of his visa conditions. They pointed out that no steps had been taken to interview as an independent witness the alleged customer at the premises.

[5] The papers in this matter were reviewed by Mr Elwyn Soutter, an inspector in the Border and Immigration Agency who communicated the result of his review in a letter of 29 September 2007. He noted that the applicant's account did not tally with the account he had from 4 immigration and police officers who saw the applicant in the premises. He asserted that the following matters had been noted in respect of the applicant:

- (a) serving a customer before an officer entered the building;
- (b) had his house keys and the shop keys in the same ring;
- (c) had used the till;
- (d) had given information to customers;
- (e) had knowledge of shop services; and
- (f) was in charge of the shop.

Although there was a reference to the applicant being about to give a customer the price of various services available in the shop in a note made by Mr Mc Briar on 19 September 2007 no contemporaneous note made by any of the three persons whose notebooks I have seen contained such information. There was one immigration officer present whose notebook I have not seen.

[6] The applicant's grounding affidavit was lodged towards the end of the hearing. He denied working in the shop. He said that the shop was owned by his brother-in-law who had returned to Nigeria on business and he attended regularly to use the internet and socialise with his brother in law and customers. On occasion he was asked to assist in simple tasks by his brother in law or the employees but was not paid. On the day of the visit by police and immigration officers there had been an employee working in the cafe but she had left shortly before the officers arrived. She was also a Nigerian national. He had agreed to keep an eye on shop. He did not know what the arrangements were between his brother-in-law and the employees. He denied sitting behind the cash till. He said that he was sitting near it but facing away from it reading a newspaper. He was talking to a customer at the time. He denied that he opened the cash till or took money from a customer. Although he points out that Mr Mc Briar's affidavit does not mention that the till was open or that the applicant was serving a customer Mr Mc Briar's notes record that he saw the applicant operating the till. The applicant also denied that he had possession of a set of keys which contained his house keys and the shop keys on the same ring. He said there were keys in the shop but they belonged to the employee. He questioned how officers concluded that the keys were for his home. The affidavit making this point was lodged towards

the end of the hearing but in fact the notes of Mr Mc Briar disclose that at the shop the applicant had agreed that the officers could get his passport from his home and it is clear that they would have needed his home keys for that purpose.

[7] For the applicant Mr Flanagan BL did not pursue his submissions relating to article 6 of the European Convention on Human Rights recognising the clear jurisprudence indicating that article 6 was not engaged in respect of deportation decisions. He submitted, however, that in Khawaja v Home Office [1983] UKHL 8 the House of Lords had considered how the court should approach cases of this kind. That is found in paragraph 12 and 13 of the opinion of Lord Fraser and at paragraph 39 of the opinion of Lord Wilberforce. Both recognise that in exercising its supervisory jurisdiction the court had to be satisfied to the civil standard that in a case of this sort there had been a breach by way of working. He then turned to the Home Office Operation Enforcement Manual Chapter 10 which deals with the operational approach to working in breach of visa conditions reflecting in part the approach determined by the House of Lords. In particular he referred to in paragraph 10.6.4:

“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 statement by the employer implicating the suspect;

Documentary evidence such as pay slips, the offender's details on the pay roll, NI records, tax records, P45;

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.”

Although the letter from Mr Soutter dated 29 September 2007 indicates that the officers handled the case in accordance with the Operation Enforcement Manual it is arguable that none of the four matters set out in paragraph 10.6.4 were in fact satisfied in this case. Although in itself not a bar to deportation that may require some explanation on the part of the respondents as to why there was departure from the requirements of the Manual in this case.

[8] I consider, therefore, that the applicant has made out an arguable case with a realistic prospect of success concerning the review of the decision to remove contained in the letter of 29 September 2007 in respect of the issue concerning the Manual and I consider that this issue is so closely connected with the Khawaja issue that I should grant leave to apply for judicial review on both grounds. I refuse leave on the other grounds.