Judicial review – immigration – whether applicants illegal entrants - whether applicants guilty of deception – whether duty of candour - whether failure to give information deception – legality of detention.

Neutral Citation no. [2005] NIQB 81

Ref:	**GIRC5368**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	26/09/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

IN THE MATTER OF APPLICATIONS BY PAUL UDU, VALENTINE NYENTY AND RICHARD OZIEGBE HARRISON FOR JUDICIAL REVIEW

____

JUDGMENT

GIRVAN J

[1] These three judicial review applications in which Paul Udu, Valentine Nyenty and Richard Harrison are the applicants were heard together and raised common issues of law though the facts of the situation in each case is somewhat different. Mr Lavery QC and Mr Ronan Lavery appeared on behalf of the applicants. Mr McCloskey QC and Miss Connolly appeared on behalf of the Immigration Service. In each case the applicant challenged a decision to detain the applicant made by the Immigration Authorities which concluded that each applicant was an illegal entrant by virtue of verbal deception and silence as to material facts. Each of the applicants has since returned to their homes in Africa and bring these proceedings to establish the unlawfulness of their respective detentions. The investigations made by the Immigration Authorities leading to the detention of the applicants were part and parcel of an operation known as Operation Gull carried out by the Immigration authorities in Belfast in June 2004.

[2] Paul Udu is a banking official from Lagos, Nigeria. He was a regular visitor to the United Kingdom visiting the United Kingdom on business, for vacation and to visit relatives. His brother is a doctor, apparently at consultancy level, in the United Kingdom. In early 2003 he applied for and obtained a two year multiple entry visa to the United Kingdom. According to his affidavit he renewed his visa as a matter of routine as he travelled very

frequently to the United Kingdom. He did not have to personally present himself at the British High Commission to have his visa renewed. He also held a multiple entry visa to the United States of America. He is a married man with three children. His wife also held a valid two year multiple entry visa to the United Kingdom. He asserted in his affidavit that his wife lived in Nigeria. They have two sons, the youngest seven months old who was born in the United States and holds a US passport. The other son is two years old and was born in Dublin. His daughter is six years old and was born in Nigeria.

[3] The applicant asserts in his affidavit that his wife travelled to Dallas in the United States in February 2004 where the youngest child was born. She was there until May 2004. He claims that in June he arranged to holiday in the United Kingdom and in Los Angeles. On his way back through the United Kingdom he was going to pick up his family. He would then return to Nigeria. This flight was booked for 22 July. He said that his wife called from the United Kingdom in early June and informed him that she was proceeding to Dublin to sort out a few issues regarding their older son who was born there. His affidavits went on to state:

> "I will now set out the reasons why I came to Belfast and details of my subsequent arrest. My wife travelled to Dallas, Texas USA in February and had a baby while she was there. She was there until May so that the baby would be strong enough to travel. Meanwhile I got a four week vacation from the office commencing 24 June, so I made travel arrangements for a holiday to both the UK and Los Angeles USA and then on my way back pick up my family from the UK and return home to Nigeria. Our flight to Nigeria was booked for 22 July. Meanwhile my wife called from the UK in early June to inform me that she was proceeding to Dublin to sort out a few issues regarding my two year old son. She travelled to Dublin in early June I arrived in London on 25 June and was booked to travel to LA on 3 July. When I arrived in the UK I realised I had to give some cash to my wife to do some shopping and tidy up other stuff regarding travel arrangements ie obtaining a Nigerian visa for the newborn baby who was travelling on a US passport. We decided that she would meet me in Belfast specifically at the Rainshaw (sic) Hotel, for me to hand over cash and a few other gift items. I also collected her address in Dublin just in case she failed to make it

> to Belfast. I then intended to travel to Dublin if she was unable to make it."

When he arrived at Belfast Airport he was arrested by immigration officials who accused him of being on his way to Ireland to claim asylum. Following interrogation he was served with detention papers and put into Maghaberry Prison and detained there for three nights. The applicant described this experience as nightmarish and harrowing. He was then transferred to another detention centre in Belfast where he spent another four days until he was released.

[4] Peter Bradshaw, the Chief Immigration Officer at Liverpool Immigration Service who had carriage of the applicants' cases, described Operation Gull which was authorised by the Home Office as a UK Immigration Service led operation with co-operation being provided by the Republic of Ireland authorities. During the operation all passengers arriving at Belfast Airport from other UK airports were invited to answer questions about their immigration status in the United Kingdom. According to Peter Bradshaw's affidavit the applicant acknowledged that he planned to see his wife and children in the Republic of Ireland before travelling on to the United States. He admitted that his baggage primarily contained provisions for his family in the Republic. He admitted that his wife and children were currently in the Republic having withdrawn an asylum claim in favour of an Irish born citizen application. In his interview with the Immigration Authority the applicant was asked about his wife's status in the Republic and said she had a baby there and applied for asylum as she was not safe. Asked when she applied for asylum he said "some time last month, some 60 days ago". An answer is recorded as "she applied then when the baby was born, and then withdrew it and has applied." It is hard to understand what these recorded answers mean. It might suggest that the wife had applied for asylum when the child was born, withdrew it and had reapplied recently. He accepted in interview that he would have completed an application form for his visa. He claimed that his wife was in Nigeria when he applied for the visa. She had dropped her claim for asylum at that stage. Asked whether he told the Immigration Authority that his family had gone to the Republic since he obtained his visa he said he was not asked. Challenged as to why he did not tell the authorities that he was coming to see his family he said he was not asked.

[5] Valentine Nyenty is a telecom engineer from Cameroon holding a well-paid job with a Cameroon national employer. He applied for a visitor's visa which was issued and was valid from 19 May - 19 November 2004. The purpose for applying for the visa was training at Mitel Training Centre at Caldecot, Wales from 21 – 25 June. This was his visa to the United Kingdom. He arrived in the United Kingdom on 20 June. He attended his first course on 21 and 22 June and a second course was on 23 – 25 June. He decided to visit

Belfast. According to his affidavit two days before he travelled to the United Kingdom some friends of his who have families in Dublin pleaded with him to carry some African foodstuff to post when in the United Kingdom. He brought the foodstuff with him along with some letters. When he arrived at Belfast Airport he was interrogated and his luggage searched. An envelope was found to contain two passports. He claims that he was unaware of that. He had touched the envelopes and had made sure that there were no metallic objects or drugs. He claimed that in the area he came from they had a church diary which is approximately the same size as the passports. In his interview he was asked what he planned to do in Belfast and said he was due to have a look round. He had seen Belfast on the TV. He was a Presbyterian and it was a nice place with nice people. It was also the Summer Solstice. In his affidavit he said he had heard a lot about Belfast and often seen it on the television. He wanted to go to a modest city with an interesting history. Challenged that he was planning to go to the Republic to see his friends and deliver the foodstuffs he was carrying he said he was going to post it. He was too busy to post it in Belfast. He was carrying 1,500 Euros in his possession.

[6] The applicant was detained in Maghaberry and subsequently in a detention centre. He described the detention as the worst experience he had ever had in his life.

[7] Richard Oziegbe Harrison is a Nigerian. He is a businessman in communications/sales and services of computer systems. He owns a company called Bluefly Investment Ltd which employs some 28 people. He is married to a lawyer. He applied for and obtained a six month multiple visiting visa. He flew from Nigeria on 5 June 2004 and arrived in Heathrow on 6 June 2004. He said that he was due to leave the United Kingdom on 3 July 2004. After spending three weeks of his one month holiday in London he said that he decided to visit and deliver a parcel to a family friend in Belfast. He brought a return air ticket from Easyjet to fly to Belfast on 28 June 2004 to return to London on 26 June 2004. He told immigration officers that his friend was called Yomi and that Mr Yomi was going to meet him at the airport. Mr Yomi did not turn up at the airport.

[8] Unlike in the case of Udu and Nyenty the Immigration Authorities had been able to produce the form filled in by Harrison in his application for a visa. In his form he gave "vacation" as the purpose of his visit to the UK. In relation to all the places where he would be staying in the United Kingdom he stated at 3a Collie Road located in London SE19 1HA. The template of his interview with the Immigration Officer on 27 May 2004 records him as telling the officer that he planned to be in the United Kingdom for a vacation and he wanted to see Buckingham Palace and the London Eye. He said his wife had just finished law school and had just got into the Bar in Nigeria. During his interview with Immigration Authorities in Belfast he said that he was staying at the house of his wife's sister at an address in West Kensington (which was

different from the address he had given in the visa application). He initially maintained that the wife was back home in Nigeria having decided to go back and study microbiology. He insisted that he did not intend to go to the Republic of Ireland, had never discussed going to the Republic with anybody and claimed that his wife's name was Kate Alieto. He was challenged that her true name was Rita Ehniomode the name she used for her visa. He was asked whether he entered the United Kingdom with Rita on 5 October 2004 but said Rita was back in Nigeria. When challenged that he and his wife had entered the UK on 5 June he would make no comment and likewise when asked about the whereabouts of his son Richard. Asked whether it was always his intention to gain his visa so as to enter the United Kingdom and then go on to Ireland for his wife to be able to have an Irish born child and whether his wife had had a newborn child two weeks previously in the Republic of Ireland he would make no comment. He subsequently stated that he entered the United Kingdom on 5 June 2004 with Rita his partner. Later he verbally admitted that he had indeed entered the United Kingdom with his wife Rita who was eight months pregnant; that Rita had travelled onto the Republic of Ireland where she gave birth between 5 and 24 June. He had denied the whereabouts of his wife and child due to his fear of them being deported from Ireland. In his belongings were found baby clothes, presents addressed to the child and greetings cards of congratulations for Rita and the baby on the birth.

[9] Inquiries with the Republic of Ireland Immigration Authorities confirmed that the applicant's wife had travelled to the Republic of Ireland where she claimed asylum on 10 June 2004. She gave birth to Alexander on 21 June 2004. Harrison claimed that he was to be met at Belfast International Airport by Mr Yomi Odumuru but the address he gave for this man did not exist.

Decision of the Chief Immigration Officer

[10] Mr Bradshaw concluded that although each of the applicants entered the United Kingdom with a valid visa they were rendered illegal entrants. When making their visa applications they were silent about material facts that were capable of mounting to deception. Furthermore he was satisfied that the applicants practised verbal deception when interviewed by an Immigration Officer on arrival in the United Kingdom. All the applicants had the intention of travelling onto the Republic of Ireland, a journey for which none of the applicants possessed the necessary mandatory visa. In relation to Paul Udu he had failed to disclose the fact that his wife had applied for asylum in the Republic of Ireland in September 2002. He failed to disclose that he intended to use his visa for the purpose entering the Republic to deliver items to his wife and family. In relation to the interview of the accused he failed to disclose to the Immigration Authorities that he intended to travel to Northern Ireland, that he intended to enter the Republic of Ireland unlawfully, that he

had a wife and children in the Republic and that his wife had withdrawn an asylum claim in favour of an Irish born child application. In the case of Valentine Nyenty he failed to disclose the fact that he intended to use his visa for the purpose of entering the Republic to deliver items to asylum seekers in the Republic. In his arrival interview he failed to disclose to the Immigration Authorities that he intended to travel to Northern Ireland; failed to disclose that he intended to unlawfully cross the land border to the Republic; failed to disclose his intention to deliver items to asylum seekers in the Republic. Mr Bradshaw came to similar conclusions in relation to Richard Oziegbe Harrison. He concluded that had the Immigration Officers been advised of the material facts which were not disclosed they would have been bound to refuse entry to the applicants and the applicants would have been removed to their country of origin. This is because the applicant's visas were primarily for entry to the United Kingdom as either a visitor or for specific training and not as a means of entry to the Republic. The misrepresentations were therefore material matters affected the decision to enter the United Kingdom. As a consequence they were rendered illegal entrants. Accordingly he was empowered to remove them from the United Kingdom in exercise of powers under paragraph 9(1) of Schedule 2 to the Immigration Act and to give directions as to their removal under paragraph 8(1)(c)(i) of Schedule 2. He was empowered to detain the applicants by virtue of paragraph 16(2) of the Schedule. He was satisfied that if given temporary admission to the United Kingdom they would abscond and would not comply with their imminent removal directions.

Relevant Legal Principles

[11] In Khawaja v Secretary of State for the Home Department [1984] 1AC 74 the House of Lords laid down the guiding principles to be applied in cases where there is a challenge to a decision by an immigration officer that an entrant to the United Kingdom is an illegal entrant and that he should be detained pending expulsion. While the initial onus is on the applicant where the exercise of executive discretion interferes with the liberty or property rights of individuals the burden of justifying the legality of the decision is on the Executive. An Immigration Officer is only entitled to order a detention and removal of a person who had entered the country by virtue of an ex facie valid permission if the person is an illegal entrant. That is a precedent fact to be established. It is not enough that the Immigration Officer reasonably believes that he is an illegal entrant if the evidence does not justify his belief. The appropriate standard of proof is the civil standard, the degree of probability being proportionate to the nature and gravity of the issue. In cases involving grave issues of liberty the degree of probability required would be high. In that case the respondent's decision was based on a finding that the applicant obtained his entry visa by deception and the respondent must make that finding good. The Act does not impose on a person applying for leave to enter a duty of candour approximating to utmost good faith.

Deception may arise from silence as to material fact in some circumstances. 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 an exhibiting document sufficiently fully to enable the court to carry out their functions of review. The court should appraise the quality of the evidence and decide whether that justifies the conclusion reached. If the court is not satisfied with any part of the evidence it may remit the matter for reconsideration or itself 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. As stated earlier, silence as to a material fact coupled with conduct can amount to deception or fraud. The concept of deception arising from silence is cautiously expressed in Khawaja. Lord Frazer stated that "of course, deception may arise from silence as to a material fact in some circumstances." Lord Scarman stated that silence "can of course constitute a representation of fact, it depends on conduct and circumstances." He went on to state:

> "It is certainly an entrant's duty to answer truthfully the questions put to him and to provide such information as is required of him. But the Act goes no further. He may or may not know what facts are material. The Immigration Officer does or ought to know of matters relevant to the decision he has to make. Immigration control is no doubt an important safeguard for our society. Parliament has entrusted the control to immigration officers and the Secretary of State. To allow officers to rely on an entrant honouring a duty of positive candour by which is meant a duty to volunteer relevant information would seem perhaps a disingenuous approach to the administration of control; some might argue that it is conducive to slack rather than sensitive administration … The 1971 Act does impose a duty not to deceive the immigration officer. It makes no express provision for any higher or more comprehensive duty; nor is it possible in my view to imply any such duty."

In the actual case of Khawaja the appellant on arrival in the United Kingdom told the Immigration Officer that he was visiting the United Kingdom for one week to see a cousin and that he would return to Brussels. He showed the officer his return ticket. The fact was that this was not his true intention at all. He entered the United Kingdom with a woman who had a right to reside in

the United Kingdom with whom he had already gone through a bigamous ceremony of marriage and whom he intended to marry in the United Kingdom. He did so after the date when he said he was going to leave the United Kingdom. As Lord Bridge pointed out he had told a blatant lie. There was an omission to make reference to his intention to marry or his connection with the other female entrant. These were material omissions but what told against him was the dishonest way he had expressed himself about his intentions to leave.

[12] In the case of Harrison the evidence which led to the impugned decisions justifies the conclusion that the applicant had obtained his visa on entry to the United Kingdom by deception. The inference to be drawn from the material before the Chief Immigration Officer was that Harrison and his wife jointly entered the UK with a view to his wife going to Ireland to have her baby in order that the child would benefit from the Irish law that conferred a right of citizenship on the child born in Ireland; that the wife with the co-operation of her husband using entry into the United Kingdom merely as a means to get into Ireland without an Irish visa; that Harrison planned to move from England to Belfast with the intention of going across the border into the Republic; that he was using the permission to enter the United Kingdom as a visitor as a means of getting round Irish immigration requirements, describing in his visa application the purpose of his visit to the United Kingdom as a vacation. When considered with his ulterior plan this was deceptive. By giving the impression to Immigration Officers at the point of entry that he intended to sightsee in London he was being deceptive since that was a minor part of his plans while visiting the United Kingdom; by omitting any reference to going to Belfast he was giving a misleading picture of his true intentions when entering the United Kingdom; by giving only one address in his visa application he again was being deceptive as to his true intentions. That address was not in fact the address where he actually stayed. By telling the Immigration Officer that his wife had just finished law school and had just got into the Bar in Nigeria he was giving misleading information, the inference being that he wanted to divert attention away from his wife's true intentions and plans. The subsequent dishonest conduct of the applicant during his initial interview provides evidence to support his deceptive intentions. The conclusions of the Immigration Officer were accordingly correct.

[13] The cases against Udu and Nyenty are based on material non-disclosure of information as to their true intentions. The Crown, however, did not adduce the visa application forms or rely on any particular question and answer at the point of entry. The questions and answers in the interviews of Udu and Nyenty in Belfast did not elicit evidence that the applicants had said anything that was directly deceptive or anything that was rendered deceptive by an omission to state something which made misleading what he had actually said when applying for his visa or when entering the United

Kingdom. In effect for the Crown cases to succeed against these applicants the Crown has to rely on a duty to disclose information, a duty which in the light of Khawaja is not cast on the appellant. It was open to the Immigration Authorities to elicit information from the applicants which if honestly supplied would have entitled the authorities to refuse entry or if answered dishonestly, or misleadingly by virtue of silence or omission about material facts, would have allowed the authorities to treat them as illegal entrants. In these cases the evidence to justify the detention and removal of the applicants on the ground of deception was lacking. Accordingly, the applicants Udu and Nyenty must succeed in their applications.

[14] I shall hear counsel on the issue of the appropriate form of relief to be granted.