Neutral Citation No: [2023] NIKB 26 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12085** *ICOS No: 22/82236/01* *Delivered:* **02/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOEL DE DEUS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Richard McLean BL (instructed by Phoenix Law) for the Applicant
Rachel Best BL (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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ROONEY J

Introduction

[1] The applicant is Timor-Leste national, who first entered the jurisdiction of Northern Ireland on 9 September 2022 from Faro, Portugal. The applicant had made the trip from East Timor to Portugal. On arrival at Belfast International Airport, the applicant was spoken to by Border Force officials, detained and thereafter brought to Larne House Detention Centre on the same day.

[2] The applicant's primary language is Bahasa. On 9 September 2022, the applicant was interviewed on at least two occasions by immigration officers without the benefit of an interpreter. Following the interviews, a decision was made refusing the applicant leave to enter the UK as a genuine visitor.

[3] On 10 September 2022, judicial review proceedings were issued on behalf of the applicant to challenge the said decision, essentially on the basis that when assessing whether the applicant was a genuine visitor, the respondent had failed to provide the services of an appropriate interpreter.

[4] As a matter of urgency, the matter was listed before Horner LJ who made an order for interim relief, namely, that the applicant was not to be removed from this jurisdiction until an appropriate interpreter was made available during the interview(s) to determine the applicant's status as a genuine visitor.

[5] On 11 September 2022, the respondent issued the following response to the matters raised in the Pre-Action Protocol letter:

> "The Secretary of State has reviewed the decisions of 9 and 10 September 2022 to refuse your clients' permission to enter and have reconsidered the matter in light of the representations you have submitted.
>
> It has been decided that the appropriate response is to withdraw the decisions of 9 and 10 September 2022. Border Force has now scheduled further interviews that will be carried out on 13 September 2022 at Larne House using a Bahasa interpreter and Border Force will reassess their cases in line with the immigration rules."

[6] The judicial review proceedings were then dismissed by this Honourable Court on 12 September 2022 on foot of the Home Office's response as detailed above.

[7] On 13 September 2022 the applicant was interviewed by a Border Force official with the benefit of a Bahasa interpreter.

[8] Following the interview, the respondent issued a decision refusing the applicant leave to enter the United Kingdom as a genuine visitor. The decision will be considered in more detail below. In essence, the border official was not satisfied (i) that the applicant was seeking entry to the UK for the purpose of visiting friends/family; (ii) that he would not seek employment in the UK; and (iii) that it was not credible that the applicant would have come to the UK for a month with limited clothing and without a plan of things to do and see. Permission for the applicant to enter the UK under the Immigration Rules, Appendix V4.2 (a) and (d) was accordingly refused.

[9] Following the decision, a direction was issued that the applicant would be removed from this jurisdiction to Portugal on 16 September 2022. As a consequence, the applicant lodged judicial review proceedings challenging the said decision. Bail pending the decision of the High Court was granted. However, the applicant voluntarily left this jurisdiction on a flight to Faro, Portugal on Wednesday 28 September 2022. The applicant's passport was returned to him at Belfast International Airport prior to departure.

Grounds of challenge

[10] The applicant's grounds of challenge, as provided in the Order 53 statement include:

(a) illegality;

(b) failing to consider material facts/considerations;

(c) taking into consideration immaterial facts/considerations;

(d) procedural unfairness;

(e) irrationality, in that the decision was unreasonable in the *Wednesbury* sense in that no decision maker properly instructed on the law, could have made such a decision;

(f) substantive legitimate expectation;

(g) breaches of Article 6, Article 8 and Article 14 of the European Convention on Human Rights (ECHR);

(h) breach of the policy to include breach of the Immigration Rules, Appendix V.

The relief sought

[11] The applicant sought the following relief:

(i) an order of *certiorari* to quash the decision of the respondent;

(ii) a declaration that the said impugned decision was unlawful, ultra vires and of no force or effect;

(iii) a declaration that the decision by the proposed respondent was unreasonable or irrational;

(iv) a declaration that the decision to remove the applicant without full procedures having been followed was contrary to the applicant's rights under Article 6, Article 8 and Article 14 of the European Convention on Human Rights;

(v) an order of *mandamus* preventing the respondent from continuing to implement the policy of removing individuals without allowing an appropriate notice period between the decision to remove and subsequent removal;

(vi) such further or other relief as is this Honourable Court shall deem just; and

(vii) damages and costs.

The test for leave

[12] In *Re Morrow and Campbell's Application* [2001] NI 261, Kerr J (as he then was) stated that the relevant test was as follows:

> "On an application for leave to apply for judicial review, an applicant faces a modest hurdle. He need only raise an arguable case; or, as it is sometimes put, a case which is worthy of investigation."

[13] This test was recently confirmed in *Re Ni Chuinneagain's Application* [2022] NICA 56, wherein the Court of Appeal stated that an applicant is required to satisfy the court at the leave stage that there is an arguable case with the realistic prospect of success, and which is not subject to a discretionary bar such as delay.

The respondent's arguments

[14] Ms Rachel Best BL, on behalf of the respondent, makes the following submissions:

(a) Since the applicant has voluntarily left the jurisdiction, the application for judicial review is academic, namely, that no useful purpose can or will be served by these proceedings.

(b) On the facts as stated and on any analysis of the impugned decision, the applicant has failed to raise an arguable case and that the test for leave has not been satisfied.

(a) Whether the application is academic.

[15] The argument advanced by the respondent is that since the applicant has now voluntarily left the UK, these judicial proceedings, practically speaking, are now academic. It is argued that immigration bail was granted to the applicant pending the decision of this court, but rather than remaining and waiting for the outcome of the judicial review proceedings, his passport was returned to him, and he took a flight to Faro, Portugal. In his affidavit dated 28 October 2022, the applicant stated he was residing in Portugal as a temporary measure.

[16] Ms Best BL, in support of this argument, refers the court to the principles in *R (Salem) v Secretary of State for the Home Department* [1999] 1 AC 450 in which Lord Steyn stated at p. 456-7:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should

> not be heard unless there is a good reason in the public interest for doing so as, for example, (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[17] In this jurisdiction, the authors of *Judicial Review in Northern Ireland: A Practitioner's Guide* (SLS 2007) at parag 5.27 state that the issue is whether "the result of the proceedings can have no practical effect or serve no useful purpose between the parties."

[18] In essence, the argument advanced by the respondent is that this application no longer serves a practical purpose. The respondent states that the applicant has not breached immigration laws. Whilst it is correct that the applicant was refused entry to the UK as a visitor on this occasion, the respondent submits that there is nothing to prevent the applicant from making another application in the future. The respondent claims that there is no impediment to the applicant reapplying for a visitor's visa in the future and that each application will be reviewed on its own merits.

[19] Mr McLean BL, on behalf of the applicant, opposes the argument that the matter is academic. Firstly, the applicant maintains that he had booked to return to Portugal on 10 October 2022 and only brought forward his flight to leave this jurisdiction on 28 September 2022 because he was fearful that immigration had retained his passport. Secondly, and particularly pertinent to the judicial review proceedings, the impugned decision will form part of his immigration records and inevitably be highlighted as a black mark against future immigration assessments and decisions. The applicant further submits that the impugned decision may be interpreted as an example of *deception* on his part. The applicant refers to the Immigration Rules (Appendix V 4.2), and the Home Office Visit Guidance (version 11.0) dated 6 October 2021 at p. 22 and states that in its determination, the respondent may take into consideration whether:

> "The applicant, their sponsor (if they are visiting a friend or relative) or other immediate family member has, or has attempted to, deceive the Home Office in a previous application for entry clearance, permission or stay."

[20] The applicant further argues that pursuant to paragraph 9.8.1 of the Immigration Rules, the decision maker must refuse entry, clearance or permission to enter if, inter alia, the applicant has previously breached immigration laws.

[21] In response to this latter argument the respondent states that the applicant is not considered to have breached any immigration law. Accordingly, paragraph 9.8.1

of the Immigration Rules is not relevant. Simply put, the respondent reaffirmed that there was no impediment to the applicant making a further application for a visitor's visa in the future. It is also reaffirmed that each application will be reviewed on its own merits.

[22] During legal argument in respect of the above issues, at the instigation of the court, the respondent was invited to provide reassurance for the applicant that the respondent's decision to refuse entry will not prevent or act as a detriment or black mark in the event that the applicant makes a future application.

[23] The respondent's response to the court's request was as follows;

> "The previous refusal will not *necessarily* be taken as a detriment. Each application will be determined on its own merits. The applicant(s) will still need to satisfy officers that they qualify for entry as a visitor under the Immigration Rules (Appendix 4 - 2(a) - (d)). The fact that there has been a previous refusal is logged on the system, it is not an automatic bar to prevent the applicant(s) entering the United Kingdom. Border Force officials can only refuse entry on the basis that they are not satisfied that the applicant(s) are not genuine visitors, and the burden of proof remains on the applicant(s) to do this."

[24] Unsurprisingly, Mr McLean BL was not prepared to accept that the above statement would provide any or any adequate reassurance to the applicant in the event of future applications to enter this jurisdiction as a genuine visitor. The use of the phrase that the "previous refusal will not necessarily be taken as a detriment" was demonstrably vague and imprecise and essentially provided no safeguards for the applicant for future applications.

[25] Having carefully considered the above submissions in respect of this issue, it is my decision that the proceedings are not academic. The decision to refuse entry to the applicant as a genuine visitor will be recorded on the applicant's immigration records. The decision will directly affect the applicant's rights in the event that he makes a further application to enter the United Kingdom as a visitor. Accordingly, I reject the submission that the result of the proceedings could have no practical effect or serve no useful purpose between the parties.

(b) Whether an arguable case has been made

[26] In respect of this applicant, the impugned decision dated 14 September 2022 stated as follows:

> "You have asked for permission to enter the United Kingdom as a visitor for one month, but I am not satisfied

that you are genuinely seeking entry as a visitor for the limited period as stated by you.
You have stated in interview that you are to visit your cousin, Luis Pereira Deus, a Timor Leste born national who has obtained Portuguese nationality residing in Dungannon, Northern Ireland.

You stated that you started planning just to "visit your family and friends and that's all."

You stated that your brother had paid for the inbound and return ticket.

You stated that you have £1,000 in cash and do not have any savings. You state that your occupation involves "building ropes" in Timor Leste where you are paid a monthly salary of 200 USD (sic). This money is used to support yourself and your wife, children and father in Timor Leste.

You have brought limited clothing with you for claimed short visit, as your brother said he will buy you some clothes whilst you are in the UK.

I am not satisfied that you are a genuine visitor.

You have admitted that you will not be getting paid whilst you are in the UK from your employer. You have also admitted that you do not have any savings. On this basis I am not satisfied that you will not seek employment whilst in the UK, given you have a family Timor Leste that relies on your family support. You have stated that your family member who you are here to visit will be working for most of your visit.

I do not find it credible that you would come to the UK for a month and not have any plans of things you wish to see and do, having travelled a long way. I am not satisfied that you will leave the UK at the time stated, or not breach the immigration conditions of a visitor whilst you are here. You are, therefore, refused entry to the United Kingdom under paragraph V4.2(a) and (d)."

[27] At the leave hearing on 1 December 2022, I directed the respondent to produce all documentation relating to interviews by the Border Force with the applicant. The leave hearing was adjourned pending receipt of the said documents.

[28] Following a review of the documentation provided by the respondent, it appears that the applicant was interviewed at least twice on 9 September 2022 and once on the 13 September 2022. Case notes and three HO minute sheets were also provided by the respondent.

[29] The first minute sheet, completed by a Border Official, provides that the applicant arrived at Belfast International Airport on 9 September 2022 at approximately 17.30 on a flight from Faro. The applicant claimed that the purpose of the trip was to visit his brother. It was noted that the applicant was travelling with his brother. After the visit, he planned to return to Portugal and then to East Timor. The applicant had a return ticket to Portugal and held funds of US$860 and €200. He also had a debit card.

[30] The minute sheet specifically states as follows:

> "Because of language difficulties, inconsistencies in the passenger's initial desk interview an IS81 was issued at 17.30 to enable further enquiries to be made."

[31] The HO minute sheet further states that the Border Force Officer, Mr Bleakley, commenced a sponsor interview at 17.30. The sponsor was identified as the applicant's brother, Luis Pereira Deus. As far as I can ascertain, no handwritten notes have been provided relating to this interview. The typed minute also appears to be incomplete in that nothing has been recorded with regard to the response given by the applicant's brother as to whether he was taking any holiday leave.

[32] An interview was commenced with the applicant at 21:51 hours. No interpreter was made available. As specified in the HO minute sheet referred to above, the Border Force were already aware that there were language difficulties. During this interview, it was recorded that the applicant worked in construction and was on paid leave. It was also noted that he had a salary of US 1,050 and had US$2,000 in Timor Leste. He lived in Timor Leste with his father, wife and children. He indicated that he was intending to live with his brother.

[33] Another interview was carried out on 9 September 2022 at 18.12. Again, this interview was conducted without the benefit of an interpreter. Based on interviews with the applicant, a decision was made to refuse the applicant entry to the UK on the basis that the Border Official was not satisfied that the purpose was to visit his brother. It was also stated that the Border Officer did not believe the applicant had sufficient funds to support himself whilst in the UK and there was a strong possibility he would look for work whilst in the UK.

[34] When judicial review proceedings were instigated on 10 September 2022, interim relief was granted by Horner LJ that the applicant was not to be removed from this jurisdiction until an interpreter had been made available and was present

during an interview with the applicant. Correctly, in my view, the Secretary of State withdrew the decision of 9 September 2022 and scheduled a further interview with the applicant using a Bahasa interpreter on 13 September 2022, expressing stating that on that date the Border Force would reassess his case in line with immigration rules.

[35] At this stage, and subject to further submissions by the respondent, it is my view that the respondent is not entitled to rely on any details obtained from the applicant arising out of the interviews on 9 September 2022 without the benefit of a Bahasa interpreter. Accordingly, the respondent's decision dated 14 September 2022 should have been based on details obtained from the applicant during the subsequent interview on 13 September 2022.

[36] Having carefully considered the answers provided by the applicant during the interview on 13 September 2022, I am not satisfied that the respondent's decision dated 14 September 2022 is based solely on the information given by the applicant on this date. Firstly, the impugned decision states that during the interview, the applicant stated that he entered this jurisdiction to visit his cousin. Clearly this is incorrect. The applicant clearly stated that his intention was to visit his family and he would stay with his brother in Dungannon. He identified his brother (as opposed to his cousin) as Luis Pereira Deus. I accept the possibility that this was a typographical error, but the decision must be taken at face value.

[37] Secondly, it is stated in the impugned decision that the applicant's occupation in Timor Leste was building ropes and that he was paid a monthly salary of US$200. It is also stated that the money was used to support himself, his wife, his children and father in Timor Leste. At no stage during the interview on 13 September was the applicant asked how his earnings were used and to name the persons he supported.

[38] Thirdly, the impugned decision states that the applicant admitted that he would not be getting paid whilst he was in the UK and that he did not have any savings. This information, if it exists, did not emanate from the interview on 13 September.

[39] Fourthly, the applicant is alleged to have stated that the family member he was visiting would be working during this period. Again, this information, if it exists, was not volunteered by the applicant during the said interview.

[40] Fifthly, it is stated in the impugned decision that the Border Official did not find it credible that the applicant would come to the UK for a month without having "any plans of things he wished to see or do, having travelled such a long way." Again, this information does not result from questions and answers made during the course of the said interview.

[41] It is significant that during the interview on 13 September 2022, the applicant denied that he was planning to work or stay in the UK. The respondent was also aware that the applicant had a return ticket to Portugal on 10 October 2022.

[42] The above highlighted issues raise an arguable case that the impugned decision is not based on information obtained from the applicant during the interview on 13 September 2022 in the presence of an interpreter. The impugned decision remains open to challenge based on procedural unfairness and irrationality.

Conclusion

[43] By reason of the foregoing, I grant the applicant's application for leave to apply for judicial review.

[44] I am persuaded that the matter in issue between the parties is not academic. For the reasons given, the applicant can establish an arguable case on which there is a reasonable prospect of success in accordance with the test to be applied by the Court of Appeal in *Ni Chuinneagain's Application* [2022] NICA 56, (at para 42).