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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 NICUSOR BELMONT BLINDU FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT MADE ON 8 DECEMBER 2015, 11 DECEMBER 2015 AND IN OR AROUND 19 JULY 2015

COLTON J

Introduction

[1] Both the factual matrix giving rise to this judicial review and the legal proceedings arising therefrom are somewhat unusual and complex. The applicant is a Romanian National. He avers that, apart from some visits to Romania, he has resided in the United Kingdom since 2011 at an address at Farnham Road, Slough. He claims to have lived there with another Romanian National Lucia Roxana Brindusescu who has been variously described as the applicant's wife, common law wife, and partner.

[2] He was convicted of shoplifting offences in 2012 and 2013 in respect of which he received monetary penalties.

[3] On 8 October 2014 he was again convicted of a shoplifting offence and was sentenced to 16 weeks' imprisonment. A Deportation Order was not pursued as a consequence of these convictions.

[4] On 18 July 2015 he travelled from Romania to the United Kingdom where he was encountered by Immigration Authorities at London Heathrow airport. He was refused permission to enter the UK on public policy grounds and he was returned to Romania. I will return to the circumstances of this removal which are central to the dispute in this judicial review. The removal took place on 22 July 2015.

[5] On 8 December 2015 the applicant again encountered Border Control Officers at Belfast Ferry Terminal. His intention was to travel to England. The circumstances in which he came to travel to Belfast are contentious but it is not in dispute that he

arrived in Northern Ireland via the land border with the Republic of Ireland having originally travelled to Dublin from Romania. He was detained on 8 December 2015 and removal directions were issued on 11 December 2015 to take effect on 26 December 2015.

[6] The grounds for the removal were that the applicant had "deliberately circumvented UK border controls and entered the UK … following a previous refusal of admission."

[7] The removal notice went on to say:

> "… I am satisfied that if you had sought admission at the UK border then you would not have been entitled to be admitted to the UK under Regulation 19(1) or 19(1AB) of the Immigration European Economic Area Regulations 2006 (as amended).
>
> You are now liable to be removed from the United Kingdom under paragraphs 8 to 10A of Schedule 2 of the Immigration Act 1971 with reference to Regulation 24(4) of the Immigration (European Economic Area) Regulations 2006."

[8] The notice to the applicant setting out reasons for his detention dated 8 December 2015 was based on the following factors: "you have previously failed to comply with conditions of your stay, temporary admission or release" and "you have not produced satisfactory evidence of your lawful basis to be in the UK".

[9] On 15 December 2015, the applicant's solicitors faxed written representations to Immigration Enforcement NRC Glasgow. In particular the proposed respondent was advised that the applicant had a long-term partner who resided at Slough and that he was travelling to join her. His solicitors contended that he enjoyed an initial right of residence for 3 months commencing on 8 December 2015 pursuant to Regulation 13 of the Immigration (European Economic Area) Regulations. It was contended that his removal from the UK and his detention were unlawful. The proposed respondent was advised that if the applicant was not released, he would institute judicial review proceedings. There was no reply to this letter.

[10] On 17 December 2015, a pre-action protocol letter was sent to the respondent. There was no response to this letter.

[11] In the interim on 17 December 2015, a bail application was lodged on behalf of the applicant before the Immigration Asylum Chamber (First Tier Tribunal) sitting in Belfast. The bail application was listed for hearing on 22 December 2015. On 22 December 2015, an urgent application for leave to apply for judicial review was lodged before the High Court in Northern Ireland. The applicant was then

subsequently unconditionally released from Dungavel Immigration Removal Centre and the bail application was withdrawn. He has, since that date, resided with his partner at Farnham Road, Slough. The applicant was released from custody on 22 December 2015.

[12] On 21 December 2015, the applicant's solicitor wrote to the respondent seeking disclosure of a number of matters. There was no answer to this letter.

[13] A leave hearing took place on 28 April 2016.

[14] Leave was refused by Maguire J on the grounds of a lack of candour by the applicant in his application. The applicant appealed the refusal of leave and the Court of Appeal ultimately granted leave to the applicant and referred the matter back to be heard by a different judge.

[15] I am grateful to the counsel who appeared in this matter for their able written and oral submissions. Mr Ronan Lavery QC appeared with Ms Fionnuala Connolly on behalf of the applicant. Mr Philip Henry appeared on behalf of the respondent.

The relief sought

[16] In the amended Order 53 Statement the applicant seeks the following relief:

> "(a) An Order of *Certiorari* to bring up into this Honourable Court and quash a decision of the Home Secretary made on 8 December 2015 to detain the applicant.
>
> (b) A declaration that the decision to detain is unlawful, *ultra vires* and of no force or effect.
>
> (c) An Order of *Certiorari* to bring up into this Honourable Court and quash a decision of the Home Secretary made on 11 December 2015 to remove the applicant and issue removal directions.
>
> (d) A declaration that the decision to remove is unlawful, *ultra vires* and of no force or effect.
>
> (e) An Order of *Certiorari* to bring up into this Honourable Court and quash a decision of the Home Secretary in or around 19 July 2015 to remove the applicant from the United Kingdom (communicated to his solicitor on 7 March 2016).

(f) A declaration that the decision to remove the applicant made in or around 19 July 2015 was unlawful, *ultra vires* and of no force or effect …"

[17] In essence the applicant's arguments can be summarised as follows:

(a) The decisions to detain and remove the applicant in July 2015 were wrong in law because the respondent did not comply with domestic and EU law on procedural safeguards in respect of an expulsion decision;

(b) by 'domino' effect, the decisions to to detain and remove the applicant in December 2015 (which were based on the July 2015 decision) were wrong in law;

(c) in consequence the impugned decisions were unlawful under domestic law, EU law and were made in breach of the applicant's right to liberty under Article 5 ECHR.

The Legal Framework

[18] Article 20 of the Treaty on the Functioning of the European Union ("TFEU") provides that every person holding the nationality of a Member State shall be a citizen of the Union. A citizen of the EU enjoys a right to free movement and a right to reside freely in the territory of the Member States (Article 20(2)(a) TFEU). This fundamental right is exercised in accordance with the limits defined by the Treaties and measures adopted thereunder (Article 20 TFEU). In Flaneurs' Application [2011] NICA 72, the Court of Appeal in Northern Ireland outlined the legal framework (paragraphs [13]–[19]) on free movement of EU citizens and the circumstances when a Member State may derogate from this fundamental right. The court underlined that derogations to the fundamental principles of free movement must be interpreted restrictively.

[19] Council Directive 2004/38/EC provides for the rights of citizens of the European Union and their family members to move and reside freely within the territory of the Member States ("Citizens Directive"). Chapter II of the Citizens Directive provides for the rights of exit and entry. Article 6 expressly provides that a citizen of the European Union shall have a right of residence in the territory of another Member State for a period of up to 3 months without any conditions or any formalities other than the requirement to hold a valid identity card or passport (Bassey's Application [2011] NICA 67). Article 6 of the Citizens Directive is implemented in domestic law by the Immigration (European Economic Area) Regulations 2006 which have now been replaced by the 2016 Regulations which were not applicable to this case.

Regulation 11 provides that:

> "11.-(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State."

Regulation 13 provides that:

> "Initial right of residence
>
> 13.(1) An EEA National is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State."

Regulation 19 provides:

> "19.-(1) A person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21.
>
> …..
>
> (3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if –
>
> …
>
> (b) He would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21."

Regulation 21 provides in relation to a decision taken on grounds of public policy or public security that it must be in accordance with the following principles:

> "(a) The decision must comply with the principle of proportionality;

(b) The decision must be based exclusively on the personal conduct of the person concerned;

(c) The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) Matters isolated from particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) A person's previous criminal convictions do not in themselves justify the decision."

Consideration of the Arguments

[20] The fundamental issue in the dispute centres on whether or not the applicant was served with the appropriate notice of decision to refuse him entry to the UK in July 2015. After the applicant lodged his application for leave to apply for Judicial Review, the respondent served a document entitled "Refusal of Admission under European Community Law" (Form IS.82A EEA) which it was contended was served on the applicant on 19 July 2015. The document is a Home Office document and is headed "Notice of Immigration Decision".

[21] It is addressed to the applicant and includes the following text:

"You have sought admission to the United Kingdom under EC Law in accordance with Regulation 11 of the Immigration (European Economic Area) Regulations 2006 on the grounds that you are a Romanian national. However, I am satisfied that your exclusion is justified on grounds of public policy in light of your criminal convictions in the United Kingdom, in 2012, 2013 and 2014 for theft and shoplifting. I am also satisfied that there is significant propensity on your part to reoffend should you be granted admission to the United Kingdom. In respect of your personal circumstances, you have claimed that your wife, Lucia-Roxana Brindusescu, is currently in the United Kingdom, however our enquiries have revealed that she is the EEA sponsor and the unmarried partner of Mr Faiz Merran and you have also failed to provide any evidence of a subsisting relationship. I am satisfied that you are therefore not currently exercising Treaty rights in the United Kingdom and reaffirms my opinion that your

> exclusion, on the grounds of public policy, is just and proportionate.
>
> I therefore refuse your admission to the United Kingdom in accordance with Regulation 19."

The final part of the Notice provides the following:

> "The contents of this Notice have been explained to you in English/_____ in such a way that you are able to comprehend its contents and the implications for you by me/_____."

There is then a blank line which appears to be for the purposes of a signature from the recipient and also "immigration officer", again combined with the blank line presumably for signature by an officer.

The form is dated 19 July 2015.

The form is not signed by either the applicant or an immigration officer.

[22] The applicant disputes that he ever received this document or a copy of this document.

[23] At the hearing before me Mr Henry produced further documentation which indicates that the actual decision-making process in July 2015 was more complicated than appeared at first glance.

[24] It appears that an officer from the Border Force at Heathrow Airport reviewed the initial decision to refuse the applicant entry. In an email from Pharnjit Singh Bhachu to various Border Force officers he refers to the original decision which was based on the past criminal convictions. He points out that when the decision was made it was decided that the passenger should not be interviewed "PNC had confirmed the convictions and as such, there was evidence to show that there was a significant propensity on passenger's part to reoffend." It was also pointed out that because the applicant had indicated that he had a contagious virus (Hepatitis C) it was decided not to interview him.

[25] Following the refusal, because the applicant indicated he had a family in the UK and he would be making further representations on that basis, the initial removal directions were cancelled and he was moved to a detention centre. He was then interviewed after which Mr Bhachu "authorised the decision to refuse the passenger admission to be remade with confirmation that we have considered the passenger's circumstances and still consider it to be proportionate for him to be removed from the United Kingdom for reasons in the original decision." It was anticipated that the applicant would be moved back to the detention centre and "the refusal notice can be completed in the morning".

[26] This background is confirmed in more detail in the print out of the case notes which were considered at the hearing. Significantly there is a "HO Minute Sheet" on 19 July 2015 prepared by a Keith Benton.

[27] He refers to the original decision to refuse admission due to his past criminal convictions. He was concerned that the failure to actually interview the applicant indicated that the respondent had not demonstrated compliance with Regulation 21(5) and (6). In particular he referred to Regulation 21(5) which states:

> "Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraph of this Regulation, be taken in accordance with the following principles –
>
> (a) The decision must comply with the principle of proportionality;
>
> …
>
> (c) The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> …
>
> (e) A person's previous criminal convictions do not in themselves justify the decision.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

[28] He indicated that he was concerned about the principles espoused above. He stated that, "I am not convinced that the lower threshold is made out in this case in any event." This concern reflects the considerations referred to by the Court of Appeal in the Flaneurs' Application case.

[29] It was clearly this concern that led to the interview to which I have referred.

[30] I was provided with copies of the interview notes at the hearing which are summarised in the email from Mr Bhachu in the following way:

> "It has also been established that since the passenger voluntarily departed after serving his sentence, he has returned to the United Kingdom on at least one occasion and was granted admission. The passenger claims that he is a worker (self-employed painter) but he is paid cash in hand so he has not paid any tax on his earnings. He has no evidence of the work he has claimed to have done so for the purpose of him being 'qualified' as a worker is deemed marginal. The passenger also has a daughter here who is over the age of 18 and currently pregnant. She lives with her husband in the same premises as the passenger but in a different room. She is not dependent on the passenger. In relation to the passenger's claimed partner, she is also a Romanian national – no (sic) provided her documents today (CIS) Home Office has confirmed that she is the unmarried partner of a Pakistani national. EEA application is still pending on CID. The passenger claimed that this woman was his wife but she referred to him as Mr Blindu, as opposed to the (sic) her actual husband who she referred to by first name. The claimed partner confirmed that she was still married to the Pakistani national, but they were separated. There is no note to this effect on our records. It is believed that the passenger is also involved in abuse or fraudulent activity to obtain European Economic Area (EEA) Rights of Residence in the UK. He knows he is not able to show he is a qualified person, so he is trying to say he is the partner of a person who is exercising Treaty rights."

[31] From this it is clear that the respondent also interviewed Ms Brinduescu. Her interview notes confirm that she claimed that she had been with the applicant for about 8 years and that she had lived in the UK for 3 years at the address to which the applicant referred. She confirmed that her daughter and her husband also lived at the premises. She indicated that she worked as a cleaner. In relation to Mr Merran, she said that she had arguments with her husband and then had a boyfriend but that she was back together with her husband (the applicant). She indicated that her English wasn't good, that the relations with Mr Merran occurred last October and ended in April. She described this as "an affair". She said that he wanted to marry her but "he was not for me". She indicated that she had participated in "a Muslim prayer". As indicated, after this interview Mr Bhachu authorised the decision to refuse admission. Apparently he had finished matters at 20.00 hours and instructed

"the passenger to be removed back to the detention centre and the refusal notice can be completed in the morning. An action has been set up to that effect."

[32] It seems that on the following day a border officer named Hecham Tarik, assumed responsibility for the case and proceeded to produce an amended IS.82A EEA Notice. This appears to be identical to the notice which was provided for the leave hearing save that when it comes to the section for the signatures there is a line through the space for the applicant and it is signed by the immigration officer, Tarik. Although his minute indicated that he had prepared an amended notice dated 21 July 2015, the Notice of decision remains dated 19 July 2015.

[33] This amended IS.82A EEA "was faxed to Colnbrook requesting they be served on Mr Blindu."

[34] In terms of the actual service of this Notice, all the respondent can say is that "there is a note on the respondent's records indicating that the amended Notice was left with the night manager of the said centre for service upon the applicant."

[35] I acknowledge that a judicial review court is not well placed to resolve factual disputes. I am, however, not persuaded that the notification of decision was actually served on the applicant. I acknowledge that there is no requirement for the applicant to sign such a form but the absence of any signature on the first purported document troubles me. The whole point of the provision of a signature must surely be to avoid the type of dispute that has arisen in this case. I can well envisage that a person in the applicant's position might not want to sign such a form but if that arises it should be duly noted. As for the second amended Notice of Determination which was produced, again there is no signature from the applicant. On the issue of service the best the respondent can say is that there is a note to the effect that this fundamental notice was left with "the night manager" of the detention centre for service upon the applicant. Put simply, there is no evidence before this Court that the respondent served either of the 19 July documents on the applicant.

[36] In coming to this conclusion I am not blind to the dishonesty alleged against the applicant which I conclude is well founded.

[37] This primarily relates to his conduct in attempting to re-enter the United Kingdom on 8 December 2015. In the first affidavit in this matter sworn on his behalf by his solicitor, it is averred that "the applicant says on 8 December 2015, he was travelling back to the United Kingdom to see his family."

[38] In his own affidavit served in support of the leave application, he indicated that he travelled to Dublin on 8 December 2015 to meet with friends that he had been in contact with on Facebook. When he arrived in Dublin he claims that he tried to contact his friends but they did not respond to any of his messages and he then decided to travel to Belfast to fly to England. The interview notes from the officer who detained him in Belfast record that when asked why he had travelled through Dublin he said, "Because I might have problems at Heathrow." This is challenged

by the applicant. Significantly there is no mention in the interview notes that he had travelled through Dublin because he wanted to meet friends.

[39] Mr Henry said that the Court should be slow to come to the conclusion that the Notice had not been served on the applicant in July 2015 in light of these inconsistencies which he says point to clear dishonesty. The only inference is that he was seeking to avoid immigration controls and that when he was refused admission in July 2015, he was fully aware of the reasons for that refusal. Mr Henry also points to the inconsistencies of the evidence of his alleged partner.

[40] I accept that there must be serious concerns about the truthfulness of the applicant. I have come to the conclusion that it is probable he deliberately attempted to enter the UK via the Dublin/Northern Ireland route because of what had happened when he was detained in Heathrow in July 2015 and, given his experience, this is perhaps unsurprising.

[41] The central point, however, is that the service of the Notice of Decision is not a mere technicality. It is a fundamental document setting out the basis for an immigration decision and informing the recipient of various appeal rights. In this regard I note that the applicant in the course of the appeal proceedings in this review applied to the IAC (FTT) seeking an extension to file a late notice of appeal to challenge the decision made in July 2015. This application was refused. The Notice itself contains a requirement that the contents of the Notice be explained to the recipient, "in such a way that you are able to comprehend its contents and the implications for you." Given the importance of such a document, one would expect the respondent to be in a position to establish clearly that it had been served on the applicant, something it has manifestly failed to do. The obligation to serve the document is obvious but in any event any failure to do so is contrary to Regulation 4 of the Immigration (Notices) Regulations 2003. In addition, the failure to serve a Notice is contrary to Article 30 of the Council Directive **2004/58/EC** and therefore in breach of EU Law. Article 30 provides in mandatory terms:

> "Notification of Decisions
>
> 1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
>
> 2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based unless this is contrary to the interests of State security.
>
> 3. The notification shall specify court or administrative authority with which the person concerned may lodge an appeal, the time limit for the

> appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

[42] In Rutili v The Minister for Interior (1975) ECR 1219, the Court of Justice of the European Union ("CJEU") held that the procedural safeguard, now protected under Article 30, meant giving the immigrant a "precise and comprehensive statement of the grounds for the decision" to enable him or her to take effective steps to prepare a defence.

[43] The importance of the procedural safeguards in Council Directive 2004/38/EC was underlined by Gillen J in Mbebe's Application [2008] NIQB 108 at paragraph 60 where he said,

> "[60] It seems to me that *prima facie* therefore she has enjoyed the benefit of a right conferred by the Directive and the 2006 Regulations. A Member State of the EEC may of course terminate or withdraw that right in the case of abuse of rights or fraud such as a marriage of convenience. In other words if information comes to light that reveals that the right conferred by the Directive has been achieved by fraud, such as a marriage of convenience, then that *prima facie* right may be withdrawn under Article 35 of the Directive. However such a measure must be proportionate and must be subject to the procedural safeguards set out in Articles 30 and 31."

[44] I am satisfied that the omission on the part of the respondent to establish service of the Notice of Decision on the applicant renders his expulsion in July 2015 unlawful under both EU Law and domestic law.

[45] Equally it is clear that the decision to detain and seek to remove the applicant in December 2015 was premised on the refusal of admission in July 2015. Mr Henry submits that it would have been open to the respondent to refuse entry on the same public policy grounds as those which led to the refusal in July.

[46] However this was not the basis upon which the decision was made. Because of the previous refusal the Border Office came to the conclusion that the applicant was attempting to circumvent border controls. Notwithstanding any deception on the part of the applicant the respondent was bound to carry out a proper examination of the situation to properly address the question whether the applicant had an entitlement to enter the United Kingdom.

[47] When the applicant presented himself at Belfast Port in December 2015, he had an initial right of residence for a period of 3 months pursuant to Article 6 of the Citizens Directive. He was deprived of that entitlement unlawfully.

[48] Article 5 ECHR requires that detention conforms with the substantive or procedural rules of national law. A detention which is unlawful in domestic law will necessarily be unlawful under the ECHR (R v Governor of Brockhill Prison ex parte Evans (No.2) [2000] 3WLR 843, per Lord Hope**)**. In the circumstances I have come to the conclusion that his detention was not lawful and that he was deprived of his liberty between 8 and 22 December 2015 in a manner which was not prescribed by law.

[49] I have an underlying concern that in respect of the decision made in July 2015 the respondent has not complied with its obligation under Regulation 21(b) that "the decision must be based exclusively on the personal conduct of the person concerned". There is a danger that the decision-maker in forming an adverse view of the account provided by Ms Brinduescu has allowed this to influence the decision to refuse entry to the applicant. I acknowledge that in respect of a person who is resident in the UK the respondent is obliged under Regulation 21(6) of the Regulations to take account of such considerations as the person's family circumstances. Furthermore, the applicant made representations to the respondent on the basis that he had a family in the UK. In those circumstances it was appropriate for the respondent to investigate that assertion. Having done so however, it is essential that any misconduct on behalf of Ms Brinduescu should not count against the applicant in consideration of the decision to refuse him entry.

[50] I do not propose to make any decision based on this concern. Had this been potentially determinative of the matter I would have sought further affidavits from the respondent on this issue.

[51] Accordingly the court orders as follows:

(a) The decision to remove the applicant in July 2015 shall be quashed.

(b) The decision to detain the applicant on 8 December 2015 shall be quashed.

(c) The decision to remove the applicant and to issue removal directions on 11 December 2015 shall be quashed.

(d) The applicant's detention between 8 and 22 December 2015 was unlawful.