

Judicial review – immigration – whether applicant illegal entrant – whether entered UK by deception – whether decision justified on evidence.

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

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2004 No. 129

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY GERALD OLUKUNLE
OBIDIPE FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF A DECISION BY THE IMMIGRATION OFFICER

GIRVAN J

[1] The applicant Gerald Olukunle Obidipe is a Nigerian national who entered the United Kingdom on 19 June 2004. He was granted entry clearance into the United Kingdom in the form of a visitor's visa which is valid from 31 May 2004 to 30 November 2004. This visa was granted on appeal, his initial application having been unsuccessful. Conditions of the visa were that he did not work in the United Kingdom and did not have recourse to public funds. The applicant was a student at the University of Lagos where he obtained a BSc Degree in Insurance. He lived with his father in Lagos. His mother Josephine Olufunmilola Obidipe resides in Dublin where she made an unsuccessful claim for asylum. In his affidavit the applicant stated that he had more than one motive for applying for a visa for the United Kingdom. He wanted to experience travel in Europe on completion of his studies. He wanted to see various relatives living in the United Kingdom including cousins whom he had never met and he wanted to see his mother for the first time in six years. He says in his affidavit that he had no clear plan about when or where he would see his mother. He thought it would possibly be in London or possibly in the Republic of Ireland. He did not apply for or hold a

visa to enter the Republic of Ireland and in his affidavit stated that as he had no relatives in the Republic of Ireland who could support him he would not have been likely to succeed in obtaining an Irish visa.

[2] On 24 June 2004 he travelled to Belfast International Airport on an Easyjet flight. He was picked up by immigration officers at Belfast Airport. Immigration officials were on duty at the airport as part of an enforcement operation named "Operation Gull" the purpose of which was to monitor the movement of illegal immigrants within the United Kingdom with particular focus on those travelling illegally between the United Kingdom and the Republic of Ireland and vice versa. The officials noted that the applicant's baggage referred to a Dublin address which on investigation was revealed to be the address of the applicant's mother.

[3] According to the affidavit of Graham Roberts, an immigration officer, the applicant was interviewed under caution. The view taken by Mr Roberts was that the applicant in his application for a UK visa on 15 January 2003 stated that his mother was in Nigeria. This was not in fact expressly the case as Mr McCloskey QC on behalf of the immigration authorities conceded. Mr Roberts noted that in his appeal against the refusal to issue a visa the applicant stated on 1 May 2003 that "all of his family were in Nigeria." In his written representations in support of his appeal the applicant did say inter alia that "I got all my friends and family from childhood here in Nigeria." The applicant's documents however did state that he was proposing to stay with his uncle and he would be paying for the return ticket. It also claimed that the ticket to Nigeria had been paid for by his parents and others. According to Mr Robert's affidavit the applicant admitted that he told the visa issuing officer that he intended to stay in the United Kingdom for a number of months. His answer was "they did ask me I guess I said a couple of months." The applicant said it was his intention to see his mother and that he did not give the visa officer this information. Mr Roberts also stated that the applicant's baggage contained a hand written note which suggested that he intended to remain outside Nigeria for a considerable period. These notes are difficult to decipher and difficult to interpret. The applicant said that they were notes for his discussions "with God." The applicant was not shown the document or asked to explain its contents.

[4] Peter Bradshaw the Chief Immigration Officer at Liverpool Immigration Service who was on duty at Belfast International Airport on 24 June 2004 was briefed by Mr Roberts about the investigation relating to the applicant. It was Mr Bradshaw who made the decision that the applicant had made misrepresentations amounting to material deception to both the visa issuing officer and immigration officer who admitted the applicant on 19 June 2004 to the United Kingdom. He was satisfied the applicant made or caused to be made to an immigration officer or other person lawfully acting in the execution of a relevant enactment a return statement of representation which

he knew to be false and did not believe to be true. In the result he concluded that the applicant was an illegal entrant by virtue of section 33(1) of the Immigration Act 1971. The applicant was served with a form IS 151A, a notice liable to removal. It indicated he was liable to detention and that the immigration officer proposed to give directions for his removal from the United Kingdom. In paragraph 14 of the affidavit he stated that he considered that the applicant had used or attempted to use deception to enter the United Kingdom and that he had done this in order to facilitate illegal entry to the Republic of Ireland. He was satisfied that if given temporary admission to the United Kingdom the applicant would abscond and would not comply with the imminent removal directions and he authorised the detention of the applicant who was served with the form IN91R which fully explained the reasons for his detention and bail rights.

[5] In paragraph 18 of the affidavit Mr Bradshaw stated:

“The content of the interview with the Applicant clearly indicated that the Applicant had **failed to disclose material facts to the Visa Issuing Officer when applying for a United Kingdom visa**. I understand that there was no duty of candour on the Applicant of the Visa Issuing Officer. However, according to the judgment of the House of Lords in *Khawaja v Secretary of State for the Home Department* silence as to material facts is capable of amounting to deception so as to render a person who had gained leave to enter by such deception an illegal entrant.”

[6] He concluded that the applicant when making his visa application was silent about material facts that were capable of amounting to deception. The material facts relied on were:

- (i) when applying for his visa the applicant failed to disclose the fact that his mother had made an asylum application in September 1999;
- (ii) the applicant failed to disclose the fact he intended to misuse his visa for the purpose of entering the Republic of Ireland to visit his mother.

He considered that the applicant practised verbal deception when interviewed by an immigration officer on arrival in the United Kingdom. He intended to travel on to the Republic of Ireland. The applicant was silent as to material factors that were capable of amounting to deception. He failed to disclose to the immigration officer that he intended to travel to Northern Ireland and failed to disclose that his mother was a failed asylum seeker. The applicant's visa was purely for entry to the United Kingdom as a visitor and not as a means of entry to the Republic of Ireland.

[7] In *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 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 has 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 this case the respondent's decision is based on a finding that the applicant obtained his entry visa by deception and the respondent must make that finding good. Mr McCloskey QC accepted that the immigration officer had to be satisfied that there was an actual intent to deceive on the part of the applicant. 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 and exhibiting documents 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, in this case that the applicant obtained entry by fraud or deception. 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 as the authority should have relied on it or where the evidence received does not justify the decision reached or decisions reached by a serious procedural irregularity.

[8] In *Kaur v Secretary of State* [1998] Imm A R 1 the appellant appealed against the refusal of an immigration officer to grant him leave to enter the United Kingdom. The appellant held a visa to enter the United Kingdom. The immigration officer concluded that material facts had not been disclosed in the visa application. The Court of Appeal concluded that the relevant rule required the disclosure of facts judged to be material whether the materiality was known to the applicant or not to be material. The facts do not have to be decisive for the grant of an entry clearance. It was only necessary that such facts were likely to influence the decision. The court considered that *Khawaja* does not apply when considering a visa and the effect of rule 17. The present

case, however is not a rule 17 case but is a case of a person who actually entered the United Kingdom pursuant to a visa and whom the respondent considers should be treated as an illegal entrant who gained entry to the country by deception. The deception in illegal entry cases may involve representations made to the immigration officer at the port of entry and to an entry clearance officer at an overseas port. Knowledge of falsehood is a key element (see generally McDonald's Immigration Law in Practice 5th edition at para 16.17 which goes on to point out that the deception may take a variety of forms. It may involve landing cards filled out on the plane, answers given to questions by an immigration officer or entry clearance officer or medical inspector as well as a host of representations which the court have implied from mere presentation of a passport and representations by conduct).

[9] The applicant obtained a multiple entry visa to enter the United Kingdom. This would have entitled him to visit any part of the United Kingdom while it was valid. The respondent's case proceeds on the basis of a finding of intent to deceive because the applicant intends to move illegally from the United Kingdom through Northern Ireland into the Republic; he failed to disclose his true intention either when he applied for the visa or when he entered the United Kingdom and he failed to disclose that his mother was a failed asylum seeker in the Republic of Ireland and he intended to visit her there. Mr Bradshaw concluded that the immigration officer would have no alternative but to so act as the applicant's visa was purely for entry to the United Kingdom as a visitor and not as a means of entry to the Republic of Ireland. The applicant's case is that he had no intention of abusing his position to enter the United Kingdom. It would have been open to the immigration officer on entry to ascertain whether he intended to leave the United Kingdom to enter another EU state and whether he had a visa to do so but he was asked no such questions. If he lied in response to those questions clearly he would clearly have been guilty of deception. The applicant's written statement presented to the appeal against the refusal of a visa stated erroneously that he had all his friends and family from childhood in Nigeria. The implication of the document was that he was going to stay with an "uncle" suggesting that the statement was making clear that not all the members of his family from childhood were in Nigeria. His parents and a couple of other relatives would pay for his ticket to the United Kingdom. In deciding whether these statements were misleading and intentionally deceptive it is necessary to have regard to all the circumstances of the case. It is now known that his mother (with his father his nearest next of kin) was not in Nigeria it is apparent that within a matter of days of arriving in the United Kingdom he flew to Belfast with luggage with a forwarding address to the Republic of Ireland. Therefore the suggestion that he would be "staying" with his uncle was somewhat misleading as was his statement to the immigration officer at the point of entry that he would be there for a couple of months. The applicant argues that staying with a relative did not preclude the possibility of travelling around the country, the uncle's address being a

base. Again one must view the point in the overall context of the case and the course of conduct followed by the applicant. The reference to his parents and a couple of relatives paying for his ticket implied that his mother and father contributed when in fact it seems highly unlikely that his mother would have done so. She lives in Dublin as a failed asylum seeker. The overall impression from his statement was that his mother was in Nigeria when she was not. This was a material misrepresentation, again the question being whether he intended thereby to deceive. In his first affidavit the applicant said that it was not clear to him when he made the application where and how he would meet his mother. He did not know, if she would travel to London to see him or he would go to the Republic of Ireland to see her. It was highly unlikely that his mother would ever have intended to travel to the British mainland having no visa and being a failed asylum seeker within the Republic. The allegedly vague intention of meeting somewhere is an unconvincing picture, particularly bearing in mind their admitted regular telephone contact. His short stay in London before he had travelled to Belfast with luggage addressed to Dublin indicates that he very probably had already planned for some time to travel to the Republic. While it is possible that he considered that if he obtained a visa in the United Kingdom he could slip into the Republic of Ireland conveniently without a visa and then travel back to the United Kingdom and that he would not therefore infringe the UK entrance clearance requirements, it seems much more likely that when he made these applications he knowingly concealed from the authorities the circumstances of his true intentions in relation to his visit to the United Kingdom. It is very probable that he expressed himself in the way in which he did to cover up the fact that he knew he going to leave the United Kingdom to see his mother in the Republic and that she was a failed asylum seeker. Having regard to the clear impression that the applicant in his first affidavit sought to give a wholly unconvincing version of his plans to meet up with his mother, the lack of frankness in that affidavit lends a high degree of weight to the view that the information given to the visa authorities was intentionally misleading to divert attention away from the true position about his mother and his true intentions when he got to the United Kingdom. The conclusion that the applicant entered the country by deception reached by the respondents accordingly was justified. The deception employed need only have been one of the factors leading to the grant of the visa and permission to enter the country as is borne out by the authorities discussed in McDonald.

[10] In the result I dismiss the application for judicial review.