

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Sevinc's (Ahmet) Application [2011] NIQB 99

IN THE MATTER OF AN APPLICATION BY
AHMET SEVINC
FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant is a 25 year old Turkish National who, by his amended Order 53 Statement, seeks, inter alia, orders quashing the decisions of the United Kingdom Border Agency that he is an illegal entrant, to detain and remove him and declarations that these decisions are unreasonable, irrational and unlawful.

Grounds on which Relief Claimed

[2] The grounds upon which relief was sought were stated in the following terms in the amended Order 53 Statement:

“(a) The respondent has failed to establish that the applicant is an illegal entrant to the requisite standard as provided for by the House of Lords in *Khawaja v Secretary of State for the Home Department* [1984] AC 74.

(b) The respondent has failed to provide sufficient reasons for the illegal entrant decision contrary to

the principles of natural justice and procedural fairness.

(c) The removal decision was made contrary to the applicant's right to family life under Article 8 ECHR.

(d) The detention decision was made contrary to the applicant's right to liberty under Article 6 ECHR.

(e) The failure of the respondent to issue removal directions was unreasonable, irrational and unlawful.

(f) By failing to serve the applicant with removal directions the respondent has acted contrary to Article 30 of Council Directive 2004/38/EC (the Citizens Directive) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

(g) By failing to serve the applicant with removal directions the respondent has acted contrary its own policy, namely Section 1, paragraph 6 of Chapter 8 of the European Casework Instructions entitled 'Enforcement Action taken against EEA nationals and family members'.

(h) By making the impugned decisions, the respondent has acted contrary to the applicant's fundamental rights as protected under Community law as the family member of an EU national.

(i) The impugned decisions were made in breach of the Applicant's rights under Section 6 of the Human Rights Act 2002."

Background

[3] The applicant was detained by the Immigration Authorities on 25 October 2009 on arrival at Belfast International Airport from London Gatwick during the course of *Operation Gul* duties. It became clear that there were issues regarding the status of his marriage and it was established the marriage had broken down. It was further established that this was known to the applicant at the time of his arrival back into the UK from Turkey. The Immigration Authorities therefore were satisfied that the applicant exercised deception when he arrived at London Gatwick by his silence combined with the presentation of his visa in circumstances where the basis upon which that visa had been granted no longer

applied. The Immigration Authorities were satisfied that the applicant was an illegal entrant and should therefore be detained and removed.

[4] The applicant's wife is from Northern Ireland. They met in Marmaris Turkey in 2006 when he was working in a bar and she was on holiday. They entered into a relationship and eventually married on 11 February 2009. After the marriage his wife returned to Northern Ireland but the applicant remained in Turkey to apply for a settlement visa which he obtained one month later. His wife booked a flight for him and he travelled to Northern Ireland 2 May 2009.

[5] On arrival to Northern Ireland the applicant got a job at 'Auntie Annes' a pretzel store in Castlecourt Shopping Centre Belfast. He worked there from 21 May 2009 until 12 September 2009 when he left to travel to Turkey to see his family. His boss told him that his job would be available for him again.

[6] The applicant left Turkey to return to Northern Ireland on 25 October 2009 travelling via London Gatwick. On arrival at Belfast International Airport he was detained by Immigration Officers and interviewed on the basis that he had deceived Immigration Officers at Gatwick about his marriage. At the end of the interview the applicant was asked to sign a document. His claimed understanding was that if he did not sign the document he would face further detention.

[7] The applicant avers in his affidavit:

"7. ... I did have some arguments with my wife about financial issues. We argued about credit card bills and since my father's death I have been asked by my family to send back money to my family but my wife had concerns about this as we were not even able to meet our credit card bills and living expenses. When I was in Turkey she emailed me and suggested that the marriage could be over. She did not give me any reason for this. I tried to contact her about this as I was very shocked but I did not receive any response. I decided that I would return home and speak to my wife about this. I did not feel at any stage that the marriage could be over. As far as I am concerned, I love my wife and I would not have left my own family in Turkey to live with her in Northern Ireland if I did not love her.

8. I did not say anything to the on-entry officer at Gatwick about my marriage because I did not consider that it was over. ... I was not asked any questions about this by the on-entry officer."

[8] The applicant's wife swore an affidavit in which she averred:

"5. After I was released from hospital having had surgery in July 2009 the relationship, which had already been under strain, completely broke down and he argued constantly.

6. I asked him to leave at that stage (July) and eventually then about six weeks later on 14th September 2009 he did so. At that point I had told the applicant that the marriage was *completely over* and that I wanted to formalise this by *divorce*.

...

9. While the applicant was in Turkey we also communicated on occasion by way of instant offline messaging. I *repeatedly* told the applicant by this means *that the marriage was over*, however there is no record of this and indeed I am not aware of any means of recording same."

[9] The applicant was interviewed by John Harrison of UK Border Agency. At paras 8-11 of his affidavit he avers:

"8. During the course of the said interview the applicant reiterated that he and his wife had had marital difficulties of a financial nature and that as a result they had decided to be apart. The applicant further confirmed that while he was in Turkey on 5th October 2009 his wife informed him that she wished to *end* the marriage relationship. The applicant further confirmed that *his wife was not expecting him back* in Northern Ireland that day, that he wished to surprise her and talk to her about their relationship. The applicant further outlined that he *did not have keys* to their home address.

9. I asked the applicant whether when he arrived in London Gatwick that morning he saw an Immigration Officer. He confirmed that he did and in answer to my question as to what he told that Officer was the *purpose* for his travel to the United Kingdom *he said that it was to go back home to his wife*. He confirmed that he did *not* tell the Immigration Officer that [1] the marriage relationship was no longer subsisting, [2] that his wife had changed her telephone number, and [3] had told him that she wished to end the marriage. [Emphasis and parenthesis added]

10. I therefore contend that had, some or all of these facts been made available to the Immigration Officer at London Gatwick it is my belief that leave to enter would have been refused as the applicant's marriage relationship was no longer subsisting and it is submitted that each of the parties of the marriage did not intend to live permanently with the other as required of the applicant under para 281 of the Immigration Rules.

11. At 13:15 hours I referred the case to Chief Immigration Officer Peter Bradshaw. I stated that the applicant had failed to disclose material facts to the Immigration Officer at London Gatwick. I understand that there is no duty of candour on the applicant 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. CIO Bradshaw authorised that the applicant be served papers as an illegal entrant having practised deception contrary to Section 26(1)(c) of the Immigration Act 1971."

[10] The applicant was detained at Antrim Police Station. He was served with illegal entrant papers and detention papers on 25 October 2009. The applicant was advised by his solicitor that he was to be removed on 29 October 2009. He did not receive any written notification about the removal directions.

Statutory Framework

[11] By Section 24A(1)(a) of the Immigration Act 1971 (*“the 1971 Act ”*), a person who is not a British citizen commits an offence if *“... by means which include deception by him ”*, he obtains or seeks to obtain leave to enter or remain in the United Kingdom ...”

[12] By Section 26(1)(c)¹, a person shall be guilty of a summary offence if, upon examination by an Immigration Officer under Schedule 2, *“... he makes or causes to be made to an Immigration Officer or other person lawfully acting in the execution of [a relevant enactment] a return, statement or representation which he knows to be false or does not believe to be true.”*

[13] Paras 281 and 283 of the Immigration Rules provide:

“281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:

(i) (a)(i) the applicant is married to or the civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement;

...

or

—(b)(i) the applicant is married to or the civil partner of a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom

¹“26 General offences in connection with administration of Act.

(1)A person shall be guilty of an offence punishable on summary conviction with a fine of not more than [F1[F2level 5] on the standard scale] or with imprisonment for not more than six months, or with both, in any of the following cases—

(a)if, without reasonable excuse, he refuses or fails to submit to examination under Schedule 2 to this Act;

(b)if, without reasonable excuse, he refuses or fails to furnish or produce any information in his possession, or any documents in his possession or control, which he is on an examination under that Schedule required to furnish or produce;

(c)if on any such examination or otherwise he makes or causes to be made to an immigration officer or other person lawfully acting in the execution of [F3a relevant enactment] a return, statement or representation which he knows to be false or does not believe to be true;

...”

for the purposes of settlement and the parties were married or formed a civil partnership at least 4 years ago, since which time they have been living together outside the United Kingdom; and

—(b)(ii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application; and

...

(ii) the parties to the marriage or civil partnership have met; and

(iii) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity...

283. Leave to enter the United Kingdom as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 281 is met."

Issue

[14] It was agreed by both parties that the core issue in this case is whether the applicant practised deception when he arrived at London Gatwick airport on 25 October 2009. The basis for the illegal entrant decision is that the applicant was silent in his statements to the on-entry immigration officer as to material facts in that he failed to declare that his marriage relationship is no longer subsisting and his wife communicated to him that the relationship was ended.

Applicable Legal Principles

[15] The applicant referred the Court to *Khawaja v Secretary of State for the Home Department* [1984] AC 74. The respondent took no issue with the applicant's reliance on the principles contained therein.

[16] The House in *Khawaja* considered the true meaning of the expression "illegal entrant" in the 1971 Act. Lord Bridge concluded [p. 117]:

"My Lords, in my opinion, the question whether a person who has obtained leave to enter by fraud has entered in breach of the Act is purely one of construction. If the fraud was a contravention of Section 26(1)(c) ... and if that fraud was the effective means of obtaining leave to enter - in other words if, but for the fraud, leave to enter would not have been granted - then the contravention of the Act and the obtaining of leave to enter were the two inseparable elements of the single process of entry and it must inevitably follow that the entry itself was in breach of the Act. It is on this simple ground and subject to the limitations that it implies that I would rest my conclusion that those who obtain leave to enter fraudulently have rightly been treated as illegal entrants."

[17] The Appellate committee was unanimous in this conclusion: see for example, Lord Fraser [p. 95] and per Lord Scarman [p.106].

[18] The second point established in *Khawaja* is that the status of illegal entrant is precedent fact which must be established [p. 96]:

"The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort ... On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the 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 which has to be established. It is not enough that the immigration

officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond enquiring only whether he had reasonable grounds for his belief."

[19] On the issue of **standard of proof**, Lord Fraser continued:

"With regard to the standard of proof I agree with ... Lord Scarman that for the reasons explained by him, the appropriate standard is that which applies generally in civil proceedings namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be belief."

[20] Lord Scarman, addressing the first of these questions, stated that "... where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied" [p. 109]. Regarding burden and standard of proof, he stated [p. 113]:

"Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices: but the degree of probability must be such that the court is satisfied."

[21] On this issue, Lord Wilberforce expressed himself thus [p. 123]:

"... the civil standard of proof by a preponderance of probability will suffice, always provided that, in view of the gravity of the charge of fraud which has to be made out and of the consequences which will follow if it is, the court should not be satisfied with anything less than probability of a high degree."

[22] The alleged deception must be *material* in the sense that it is a factor which precipitated the decision granting leave to enter. For example in *Kaur v*

Secretary of State for the Home Department [1998] Imm Ar1. the CA held that the test of materiality is whether the deception "... was likely to influence the decision [per Ward U, p. 9].

[23] Following on from the decision of *Khawaja* Weatherup J in *Re Razak* [2009] NIQB 41 set out a number of propositions in relation to obtaining entry by deception. These were:

"[12] ...

i. The immigration authorities do have authority to detain and remove a visa holder if that person is an illegal entrant.

ii. The immigration authorities have to satisfy the Court to a high degree of probability that the applicant is an illegal entrant, that is the status of illegal entrant is a precedent fact to removal.

iii. The applicant may become an illegal entrant by being guilty of deception in the application for a visa or the information furnished on entry to the UK.

iv. The deception must be effective in securing entry to the UK.

v. There is no duty of candour on the part of an applicant. However, the authorities must not be misled on material facts that are effective in securing entry, whether on the visa application or in communication with the immigration officials and whether by what is said or by conduct or by silence coupled with conduct.

vi. In the light of the decision of the Court of Appeal in Northern Ireland in Udu and Nyentys Applications [2007] NICA 48, where a visa is obtained on specified grounds and the applicant intends to enter the UK for alternative or additional reasons, there is a duty to disclose the full grounds for entry and it amounts to deception to impliedly represent that there has been no change of circumstances to the specified grounds of entry by

producing the visa for the specified purpose and not stating the true purpose.”

[24] The applicant argues that the respondent has failed to establish to the requisite standard that the applicant was an illegal entrant. It was contended that the interview under caution did not support the conclusion reached by Mr Harrison. The applicant also contended that it was clear from the interview that the applicant has honestly communicated to the immigration officer what he knows about his wife’s views at that stage about their marriage but it is also clear that as far as he is concerned, he does not want the marriage to end. The applicant emphasised that a matter of days before travelling back to Northern Ireland, the applicant received a birthday card from his wife to Turkey which, it is submitted, indicates a high level of affection and attachment to her husband.

[25] The respondent contended that the applicant misled the authorities on material facts which were effective in securing entry failing to disclose: that the marriage relationship was no longer subsisting; that she had told the applicant that the marriage was completely over; wanted to formalise this by divorce; that she had repeatedly told him that the marriage was over; that she was not expecting him back in Northern Ireland (that day); he did not have the keys to their home address. The respondent also claimed that it was significant that the applicant’s wife had taken out a Non-Molestation Order against him post his return to Northern Ireland. The respondent contended that in the light of these matters the Court ought to be satisfied to the *Khawaja* standard that the applicant misled the Immigration Authorities as to material facts which were effective in securing his entry.

Conclusion

[26] As noted at para 14 above the core issue is whether the applicant practised deception when he arrived at London Gatwick airport on 25 October 2009 and that the basis for the illegal entrant decision is that the applicant was silent in his statements to the on-entry immigration officer as to material facts in that he failed to declare that his marriage relationship is no longer subsisting and his wife communicated to him that the relationship was ended.

[27] It is entirely possible that the applicant did not believe or did not want to believe that his marriage was over and that he was returning to Northern Ireland intent on discussing his marital problems with his wife in order to try and work things out. His job was also being kept open for him. She had sent him a loving greeting card whilst he was in Turkey. He may as he maintains have wanted to return to his wife with the intention of saving his marriage which had not formally ended. I cannot exclude that he may not have wanted to offer such

personal information voluntarily to the Immigration Officer until he was sure that the marriage was in fact over after having spoken directly with his wife. There is no duty of candour on the part of an applicant and I am not satisfied that his failure to disclose was intended to mislead. It is also possible that the applicant believed that until divorce proceedings were finalized he would be entitled to remain under the terms of his visa granted on his marriage.

[28] Accordingly the Court is not satisfied to the *Khawaja* standard that the applicant misled the Immigration Authorities in relation to any material facts which were effective in securing entry to the UK.