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Judgment: approved by the Court for handing down | *Delivered:* **09/12/2005**

(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 SHADIAT IDRIS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY THE CHIEF IMMIGRATION OFFICER

DEENY J

[1] The applicant is a Nigerian citizen who was born on 10 May 1966 and normally resides in Nigeria with her husband and four children. She entered the United Kingdom via Heathrow Airport on 14 November 2005. She did so on foot of a visitors' visa granted to her in Abuja, Nigeria and valid from 30 September 2005 until 30 March 2006. On 19 November 2005 she travelled to Belfast International Airport. She was then questioned by immigration officers as part of a policy known as "Operation Gull" to monitor the movement of illegal immigrants within the United Kingdom and Republic of Ireland. As a result of her answers to the immigration officer on that occasion the Chief Immigration Officer, Mr Peter Bradshaw, concluded that she was an illegal immigrant in that she had obtained entry to the United Kingdom by deception. He further concluded that she should be detained on several grounds including that removal from the United Kingdom was imminent. The applicant seeks to challenge his decision by way of judicial review.

[2] Although this was an application for leave I in fact heard full argument and discussion of the facts at a hearing on Tuesday 29 November 2005. The respondent did not object to the applicant advancing her case on the basis of a draft affidavit prepared by Ms Barbara Muldoon, Immigration Practitioner, on the applicant's instructions but which had not been sworn. Equally well

the applicant did not object to the respondent relying on written material, including a record of interviews with the applicant and another person, visa application forms and a copy of a letter found on her possession when detained. It thus seemed in the public interest to address this matter more extensively than would normally be the case at a leave hearing.

[3] Mr Flanagan, who appeared for the applicant, candidly admitted that her intention was to seek an order from the High Court releasing her on bail as a relief under the judicial review proceedings if leave was granted. In response to an inquiry from the court that there must be statutory remedies which the applicant had not exhausted, I was informed that this was indeed the case. I was advised that she would have an appeal to the Asylum and Immigration Tribunal but that no such appeal against her detention had been lodged. I was also informed that she could apply to the Chief Immigration Officer himself for bail. A preliminary inquiry about that had been made but no application. The response to the preliminary inquiry had been that two sureties in the sum of £5,000 and other requirements would be sought by the immigration officer if bail was to be granted. I observe that, all other things apart, similar sureties would have been, in all likelihood, required by the High Court if the court were ever to grant the lady bail in the circumstances.

[4] I was further informed that it is possible to appeal to the immigration judge of the Asylum and Immigration Tribunal on a twice weekly basis for bail but that no such application had been made. Although no authority was cited to me it does seem to me that it is inappropriate to bring proceedings such as these when specific statutory remedies have not been availed of. That offends against a cardinal principle of the rules of the court in judicial review. I find it as a ground for rejecting this application, which I do. I am fortified in that conclusion by the decision of the Court of Appeal in England in Regina v Secretary of State for the Home Department ex.p. Swatti [1986] 1 W.L.R. 477. All three judges (Sir John Donaldson L.R., Stephen Brown and Parker L. JJ) include in their judgments as a ground for refusing the applicant's renewed application for leave to bring judicial review proceedings in the immigration context, the view that the court had to take account of alternative remedies available to the applicant, and where there was an appeal procedure the judicial review jurisdiction was exercisable only in exceptional circumstances. I do not consider the instant case one of exceptional circumstances. (See also DeSmith Wolff and Jowell's Principles of Judicial Review at 14-007).

[5] At the conclusion of the oral hearing I did indicate that I considered it extremely unlikely that I would grant leave in this case. I did so to enable the applicant to consider availing of the possibility of returning to her home in Nigeria voluntarily if she so wished. Given that she had informed the immigration officer that she had come to the United Kingdom on a week's visit to a relative and that she had a business and four children at home, this seemed not an unlikely possibility. Of course, that is a matter for her.

[6] When the applicant arrived at Heathrow Airport on 14 November it was to visit the United Kingdom. It is not contended that she informed the immigration officers there that she intended to go to the Republic of Ireland. However on 19 February both she and a gentlemen who awaited her at Belfast International Airport, Mr Ayogeji Ogunkayode, said that he was collecting her to bring her to Dublin. This was not disputed on her behalf. Although a number of other matters emerged at this hearing this remains the central fact.

[7] My attention was drawn to the relevant case law in regard to this field including Khawaja v Secretary of State for the Home Department [1984] 1AC 74; In Re Gerald Obidipe [2004] NIQB 77 and In Re Paul Udu and Others (Girvan J 2005, Unreported). In Khawaja the House of Lords laid down the guiding principles to be applied. These are succinctly summarised by Girvan J in Re Paul Udu at para. 11 of his judgment which I quote:

> "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."

[8] The position therefore is that the applicant here only has to show that she has an arguable case that the Chief Immigration Officer was not justified to the high degree of probability required in concluding that she was an illegal immigrant by virtue of her deception on entry to the United Kingdom. It was common case, as indicated above, that her silence could amount to deception in all the circumstances, particularly here where combined with her actual actions while in the United Kingdom and a surrounding series of deceptions and inconsistencies on her part. I should say that Mr Flanagan laid considerable stress on the fact that there was a common travel area between the United Kingdom and the Republic of Ireland. He cited McDonald's Immigration Law and Practice, 5th Edition at p. 144 for the principle that a person does not normally require leave to be in another part of the common travel area. He submitted that any exceptions were irrelevant. However he could not and did not dispute that if a person from abroad had the intention to visit the Republic of Ireland before coming to these islands they should obtain a visa from the Irish authorities for so doing. It is undisputed that the applicant did not do this.

[9] The facts that emerge from the documents told very strongly against the applicant. She admitted, as did Mr Ogunkyode, that they had spoken on the telephone before leaving Nigeria and agreed that she would come and visit him in Ireland. She had therefore that prior intention before visiting these islands. She chose to do so by flying to Belfast not Dublin. Mr Ogunkyode had purchased the ticket and she said she did not realise that it was of significance. This seems disingenuous in the circumstances. The documents show that her husband is a businessman in Nigeria who claims no less than four addresses for his business and the ownership of some property. She says that he travels widely. In her possession when detained was a letter to the very visa section of the Department of Justice in the Republic of Ireland to whom she ought to have applied if she wanted to proceed to that country. The letter did not relate to her but her possession of it must infer some knowledge of the need for visas when visiting Dublin. Furthermore the man she was visiting had himself been declared an illegal immigrant in the United Kingdom who would be well aware of the position. When asked, at question 40 of her interview, about the lawfulness or otherwise of this man's presence, she said "Yes I have heard he is living in Ireland legally." This was precisely correct. He had acquired the right to live in the Republic of Ireland but not in the United Kingdom (from which he was removed on 19 November). Taken together, one must conclude she would have known that the Republic of Ireland was a different jurisdiction with different citizenship and immigration laws from those of the United Kingdom.

[10] Her difficulties far from end there. In her application form completed in Nigeria she described herself as a housewife. But in her interview with the immigration service on 19 November she said her occupation was "underwear sales". However her Order 53 Statement claims that she "owns and runs a small shop selling leather goods". Clearly these three propositions are inconsistent and cast further doubt on her credibility.

[11] In her original visa form she is asked whether she has any family or close friends in the United Kingdom. She ticks the box "yes" and names CY Green as a cousin. He is said in her husband's application to be a United Kingdom citizen. However in her Order 53 Statement she describes at length that her desire to visit the United Kingdom was to visit her sister-in-law's husband Femmy Fugite. She claims that he is lawfully resident in the United Kingdom since 1997 having married a Belgium citizen. In that statement she makes no reference to any other relative in London. However in her interview with the Immigration Service on 19 November she makes no reference to Mr Fugite or to Mr Green but says that she was staying in London with a cousin Niyi at 138 Capice Road. Again, there are significant inconsistencies damaging to her credibility.

[12] She claims that her uncle obtained her visa for her in Nigeria but counsel pointed out that the handwriting on her visa application form and that of her well-travelled husband seemed to be identical. However the signature on her form was also closely similar with that on her marriage certificate. It appears that she and her husband, not her uncle, obtained the visa.

[13] At question 5 she told the Immigration Service that she had told the visa officer that she was coming to the United Kingdom to visit "my cousin Ayo". This was the gentleman who was meeting her at Belfast International Airport. Clearly that was inconsistent with her other statements. What was worse is that when "Ayo" was interviewed at Belfast International Airport upon the applicant's arrival, he named the applicant but described her not as his cousin as "my sister-in-law's friend". I observe, although it is not crucial, that she told the Immigration Service that she was only coming to the United Kingdom for one week. No evidence was available that she had acquired a return ticket from Ireland to London to complete a visit in anything like that time. On the contrary the ticket on which she travelled to Belfast was bought only two days after she arrived in the United Kingdom.

[14] I note that there was some uncertainty about her degree of fluency in English, although this did not prevent her Order 53 Statement or draft affidavit but these conflicts in her various accounts cannot be explained away by linguistic difficulties, if they exist.

[15] She attempted to make a second case in her Order 53 Statement that she was "dependent on regular financial contributions from Femmy Fugite." In light of the matters set out above this seems inherently unlikely but Ms Fionnuala Connolly for the respondent also pointed out that the details of her husband's income and property as set out in his visa application form would clearly show that they were not in any need of dependence on Mr Fugite. One notes that she had her own business as well, although she claims she has only "mixed success". Taking these matters together it seems clear to me that the intention of this lady was not to pay a purely social visit to the United Kingdom but to go to Ireland to be with the man whom she claimed was a cousin although he said she was merely a friend of his sister-in-law. I consider therefore the Chief Immigration Officer was justified in the conclusion that he reached to the degree of required, for the probability reasons set out above, although those are not exhaustive of the evasions and inconsistencies of the applicant herein. I observe that these arrive from a relatively slim body of information to date.

[16] Counsel did not press the claim that she was a dependent relative of Mr Femmy Fugite. As indicated it seems most unlikely. There was no evidence before me that Mr Fugite has made any payments to the applicant of any kind or that he was in a position to do so. Rather than there being evidence of destitution on behalf of the applicant she expressly claimed that she had one thousand dollars, presumably US, for her trip to the United Kingdom. I also observed that this claim made out in her Order 53 Statement sits very uneasily with her principal claim that she was merely visiting relatives in Britain and Ireland for personal reasons. Inevitably it points rather in the opposite direction. However clearly no arguable case has been made out under that rubric.

[17] I make one further finding. Even if I am wrong in thinking that the applicant has not made the case that she has a triable issue on this point it would be appropriate to reject her application within the exercise of my discretion, as I do. As the present Lord Chief Justice observed more than once when a judicial review judge, there is no point in granting leave to applications which are doomed to failure. Given the complete lack of credibility of the applicant I could not see myself granting relief in the circumstances arising from this case.