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Judgment: approved by the Court for handing down | *Delivered:* **23/03/07**
*(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 CHUKWUMA OKARO FOR JUDICIAL REVIEW

GILLEN J

[1] The applicant in this matter is a Nigerian citizen who entered the United Kingdom in or around March 2006 on a multiple entry visitor's visa valid until 2011. It is alleged that he is the owner of a business importing clothing and other goods from the United Kingdom and Europe to Nigeria. I have read his affidavit of 26 February 2007. In it he declares that he arrived in Belfast on 25 January 2007, that he was there interviewed by immigration officers and thereafter detained. The applicant was declared an illegal immigrant. I was informed that his detention was part of the immigration taskforce "Operation Gull" which is a joint Member State operation between the United Kingdom and the Republic of Ireland (ROI) to monitor movement of illegal immigrants between the two countries.

[2] Subsequently the applicant was served with a "Notice to a Person Liable To Removal" as a person in respect of whom removal directions may be given in accordance with paragraphs 8-10a of Schedule 2 of the Immigration Act 1971 as an illegal entrant as defined in s33(1) of the Act. The Notice was dated 25 February 2007. On the same date he has been served with a "Notice to Detainee: Reasons for Detention and Bail Rights". That document records that he should remain in detention because:

(a) "You are likely to abscond if given temporary admission or release".

(b) "Your removal from the United Kingdom is imminent".

(c) "You do not have enough close ties (eg family or friends) to make it likely that you will stay in one place".

(d) "You have used or attempted to use deception in a way that leads us to consider you may continue to deceive".

(e) "You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries".

[3] When the application for leave to bring judicial review proceedings came before me the relief sought was as follows:-

(a) A declaration that the decision of the Immigration Service dated 25 February 2007 detaining the applicant is unlawful.

(b) An Order of Certiorari quashing the decision.

(c) An Order of Mandamus compelling the respondent to review and revoke the said decision.

(d) An Order of Mandamus compelling the respondent to amend any of their records to show that he is not an illegal entrant.

(e) An Order of Mandamus compelling the respondent to amend any endorsement on the applicant's passport to show that he is not an illegal entrant.

[4] The grounds upon which he relied were that:

(a) There is no basis upon which it could be said that the applicant is an illegal entrant.

(b) The applicant has a valid multi-entry United Kingdom visa.

(c) No reasons have been given for the decision to detain the applicant other than the mere assertion that he is an illegal entrant.

(d) The decision to detain is accordingly ultra vires and Wednesbury unreasonable.

(e) The decision has been taken in breach of the applicant's rights pursuant to Article 5 of the European Convention on Human Rights.

(f) In the course of the leave hearing Mr Flannigan, who appeared on behalf of the applicant, sought leave to make two further amendments to the Order 53 statement. These were as follows:

> "(m) That the respondent had failed to consider its own policy document (Operation Enforcement Manual) Chapter 7 which is headed

"Chapter 7 – Service of Notice of Illegal Entry – Procedures" ("the policy") and failed to show that the Immigration Officer had exercised his discretion sufficiently or at all before deciding to determine the applicant as an illegal entrant".

[5] He sought leave to amend the grounds by adding:

> "(f) The applicant had a legitimate expectation that the policy hereinbefore referred to would be adhered to."

[6] In addition the applicant sought leave to seek the following additional relief:

> "(n) That the applicant had been refused the assistance and advice of a solicitor despite a number of requests".

[7] Despite the opposition of the proposed respondent, I granted leave to make the amendments on the basis that it was in the interests of justice that at this early stage an amendment should be made and to ensure that the proposed respondent was not prejudiced, I afforded an opportunity for further affidavits to be filed by the proposed respondent. I have already given an ex tempore judgment at the leave hearing wherein I set out my reasons for granting the leave to amend.

[8] At the leave hearing I refused leave on all the grounds save that set out at amended ground "(m)" relating to the policy document. At the hearing I had before me the note of an interview between the applicant and an Immigration Officer Mr Harrison made at Belfast International Airport on 25 February 2007 when the applicant had entered Belfast from London. There had been a clear factual dispute between the account given by the Immigration Officer in that report and the applicant. I observed that judicial review is an unsuitable forum for resolving disputes of fact (see R v Chief Constable of Warwickshire Constabulary, ex parte Fitzpatrick [1999] 1 WLR 564 at 579d). However I had indicated that all the evidence before me on the factual dispute pointed towards Mr Harrison the Immigration Officer being truthful. I therefore concluded that it was unarguable that the applicant had asked for a solicitor during the interview and that the applicant had been given the reasons for his detention. I also determined that the applicant had signed the interview record in several places and on each page. I was satisfied that he was well aware that he had untruthfully filled in his UK visa application form by stating that his wife was in Nigeria whereas in fact she had been living in Ireland since 2003. In addition he had one child born in Ireland at the time he filled in his form whereas he stated specifically in that form that both his children had been born in Nigeria. Moreover his reasons

for being in Belfast were inherently implausible. He had no return ticket, he had no accommodation arranged and he had gifts for his children which he alleged he was going to mail in Belfast because it was cheaper to do that than in London. All of this indicated to me that this man had no intention of returning to London after a few days visiting Belfast as he claimed but was bent on entering the Republic of Ireland to visit his wife. The evidence from the Immigration Authorities was to the effect that upon contact with his wife she had unhesitatingly told the officials that the applicant was on his way to visit her. I had no doubt that he was deceitful in the explanation that he gave for his visit to Belfast. It was unarguable to suggest that it was unreasonable for the immigration authorities to have determined that he was an illegal entrant or that they had failed to give him the reasons for so deciding.

[9] The outstanding matter, and the issue upon which I granted leave, was the policy document referred to in 4(f) above. It is that document to which I now turn.

[10] **The Policy Document**

(1) At the leave hearing, the provenance of this document appeared to be shrouded in mystery and no material assistance was forthcoming from the proposed respondent. This may have been because the matter was a leave hearing and the proposed respondent, by the very nature of such proceedings, had had insufficient time to discuss the matter in depth with immigration officers who were not present in Belfast at the time. At the full hearing before me however Ms Connolly on behalf of the respondent accepted that the Operations Enforcement Manual is a living document which is frequently subjected to change and amendment but that at the time of the determination of the applicant's entry, the terms of that policy document as presented before me had applied.

(2) Where relevant, extracts from the policy document are as follows:

> "Following the judgement in the case Uluyol and Cakmak, and after taking legal advice, it was decided to introduce an additional procedure to be followed in all illegal entry cases.
>
> Notwithstanding the fact that a person has been identified as an illegal entrant, as defined in the Immigration Act 1971 (as amended), there is nevertheless discretion as to whether such a person is actually treated as an illegal entrant.
>
> The consideration of any additional factors, or representations, already forms part of the decision

making process followed by officers dealing with illegal entry cases. However, previously, this had not been demonstrably separated from the consideration of the illegal entry connection. The judgement referred to means that it is now necessary to do so and to record the fact that the discretion whether or not to serve the papers has been considered. Officers not only have to do it they have to be able to show they have done it.

The Two Stages

First and foremost, consideration has to be given to the question of whether the person is in fact an illegal entrant (see chapters 1–5 for further guidance). It is imperative that the facts are examined so as to determine whether the strength of the evidence is such that a contention of illegal entry is properly supported. If there are any doubts, then service of illegal entry notice should be deferred pending further enquiries. Once this consideration has been completed, the file should be noted to show the basis for concluding that the subject is an illegal entrant, including brief details of how and where the person came to notice (see example wording below).

Having concluded that someone is an illegal entrant, the next step is to consider whether it would be fair to the person in all the circumstances to treat them as an illegal entrant and to serve a notice of illegal entry on them. The key question when making this decision is whether the service of a notice of illegal entry would disadvantage the individual in question in some way.

If you conclude that it would not, stop at that stage and record your conclusion on the file. If you conclude that prejudice would be caused for some reason, you need to go on to consider whether or not there are any countervailing reasons why it is nevertheless fair and appropriate to serve papers. In doing so, you will obviously need to take account of any information and or representations available. … **The fact that service of illegal entry papers may disadvantage this subject in some**

> **way does not automatically mean that they should not be served if you conclude that it is appropriate to do so.** Again, the reasons for the decision need to be recorded on the file. It is **vital** that there is a written record showing that we have considered exercising discretion not to serve the notice and that this issue has been addressed separately from the question of whether or not the subject is an illegal entrant. **The authority to serve illegal entry notices rests with a CIO and this will be the appropriate grade to deal with this additional issue."**
>
> "Suggested Wording
>
> I have considered all the information available to me and I am satisfied that (name) is an illegal entrant as defined in section 33(1) of the Immigration Act 1971 on the basis that (detail how and where the person was discovered and/or the basis for concluding that the person was an illegal entrant).
>
> I have also considered whether it is appropriate to treat (name) as an illegal entrant and, having taken into account all of the facts available to me now, I am satisfied that … … ."

[4] **The Evidence**

(1) Understandably the applicant was unable to provide any affidavit evidence as to whether or not the discretion exercised in the policy had been exercised.

(2) I did have before me two affidavits from John Harrison of the Liverpool Immigration Service. In his affidavit of 5 March "2006" (which I assume should read "2007"), he deposed to the situation which existed after the conclusion of the interview with the applicant at Belfast International Airport in the following terms:

> "9. Following the interview under caution, I referred the case to Chief Immigration Officer Peter Bradshaw and advised that Mr Okaro had used deception in his statements to the On-entry Immigration Officer at London Stansted in relation to his failure to declare his true intentions for

> travel to the UK. I advised Mr Bradshaw that on the basis of his statements in interview there were reasonable grounds to suspect that Mr Okaro had also made misrepresentations on his visa application form.
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> 10. Both myself and CIO Bradshaw considered that the applicant should be served with papers as an illegal entrant having practised verbal deception contrary to section 26(1) of the Immigration Act 1971 and an offence under section 24(1)A of the same Act. We concurred that the Applicant was an illegal entrant as defined within section 33(1) of the Immigration Act 1971. Following that conversation, Chief Immigration Officer Bradshaw authorised the removal and detention of the applicant."

[5] That affidavit is therefore silent on the question of the exercise of the discretion and on the making of any notes relevant to the exercise of that discretion.

[6] In a further affidavit dated 5 March "2006" (which again I assume should read "2007"), the following was stated:-

> "2. Following the interview under caution with the Applicant, I referred the Applicant's case to Chief Immigration Officer Peter Bradshaw, who was also based at the airport for Operation Gull. I advised CIO Bradshaw that the applicant had used deception in his statements to the On-entry Immigration Officer at London Heathrow in relation to his failure to declare his true intentions for travel to the United Kingdom. I fully briefed CIO Bradshaw about the content of the interview with the applicant.
>
> 3. At the conclusion of our discussion, both myself and CIO Bradshaw considered that the applicant should be served with papers as an illegal entrant having practised verbal deception contrary to section 26(1) of the Immigration Act 1971 and an offence under section 24(1)A of the same Act. We concurred that the applicant was an illegal entrant as defined within section 33(1) of the Immigration Act 1971. Following that

> conversation, CIO Bradshaw authorised the removal and detention of the applicant. All discretionary areas were considered by CIO Bradshaw and myself in accordance Home Office policy."

[7] I was also furnished with an affidavit from Peter Bradshaw of the Liverpool Immigration Service who declared that he was the Chief Immigration Officer and had carriage of this case. His affidavit is dated 5 March 2006 and again I assume that this should be a reference to 2007. In the course of his affidavit he described Operation Gull and continued as follows:

> "4. During the course of the Operation, the Applicant's case was referred to me by Mr John Harrison, Immigration Officer. Mr Harrison fully briefed me about his encounter with the Applicant and about the content of his interview under caution. Mr Harrison advised me that the applicant had used deception in his statements to the On-entry Immigration Officer at London Heathrow airport in relation to his failure to declare his true intentions for travel to the United Kingdom. At the conclusion of the discussion I considered that the Applicant should be served with papers as an illegal entrant having practised verbal deception contrary to section 26(1) of the Immigration Act 1971 and an offence under section 24(1)A of the same Act. We concurred that the Applicant was an illegal entrant as defined within section 33(1) of the Immigration Act 1971.
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> 5. Following the briefing by Mr Harrison, and following careful consideration of the case, I authorised the removal and detention of the Applicant on the basis that he was an illegal entrant, having practised deception. As Chief Immigration Officer, I took into account all discretionary areas in compliance with Home Office policy. In this particular case, it was not appropriate to exercise discretion in favour of the applicant."

[8] **The Applicant's Case**

(1) Mr Flannigan, who appeared on behalf of the applicant, submitted that there was no evidence before the court to suggest that the respondents had

considered or applied the policy instructions set out in Chapter 7. He submitted that there were no details of the policy which the respondents aver they did consider and apply.

(2) The issue of the notices referred to in paragraph 2 above had already prejudiced the applicant in extinguishing his visa valid until 2011 and his leave to enter the UK in the future. Moreover given the personal circumstances of the applicant it is likely that these notices will also prejudice and affect any future business prospects he may have.

(3) The applicant had a legitimate expectation that this policy document would be implemented and that the discretion would be exercised consistently and fairly. Whilst counsel recognised that he faced a difficulty in that there was a positive assertion from both Mr Harrison and Mr Bradshaw that the discretion had been exercised in compliance with Home Office policy and therefore the policy document before me, nonetheless he asserted that there was a clear breach of the policy in that no attempt was made by either deponent to claim that the written record had been made to the effect that they had considered exercising the discretion and that the issue had been addressed separately from the question of whether or not the subject was an illegal entrant. It was counsel's submission therefore that there was a clear breach of the policy.

The Respondent's Case

[9] Ms Connolly, who appeared on behalf of the respondent, acknowledged that a note had not been made of the exercise of the discretion in compliance with the terms of the policy. However she said there was now clear evidence that the discretion had been exercised. This policy document was not to be treated as a statute but to be given a broad and purposive construction. The aim of the note-taking is simply to add strength to the evidence that the discretion has been exercised. In this case there was absolutely no evidence emanating from the applicant that the discretion had not been exercised and so accordingly any further evidence in the form of a note was unnecessary in light of the unchallenged evidence of the Immigration Officers that the discretion had been properly exercised. Ms Connolly drew attention to the vast number of decisions that are made by Immigration Officers and the difficulties of complying with note-taking in every instance on every issue.

Conclusions

[10] I have come to the conclusion that the respondent in this matter has not failed to consider its own policy document and has not failed to show that the Immigration Officers exercised their discretion sufficiently or at all before deciding to determine the application. In consequence I have determined that

the application must be dismissed. I have to come to that conclusion for the following reasons:

(1) I accept the submission of Ms Connolly that there is no evidence whatsoever to contradict the assertion of the Immigration Officers that they did comply with the policy document insofar as they did exercise the appropriate discretion in compliance with Home Office policy. The evidence of Bradshaw and Harrison is unchallenged in this regard.

(2) The genesis of the policy document is the decision of Gage J in The Queen on the application of Uluyol and Cakmak v an Immigration Officer No: CO/1960/00, an unreported judgment delivered on 3 November 2000. That case arose out of an application for judicial review by two applicants who sought to challenge a decision by an Immigration Officer that they be treated as illegal entrants to the United Kingdom. Having entered the country via the freight only port of Immingham in Lincolnshire, they were served with notices headed "Notice to an Illegal Entrant" on 25 February 2000. The case involved consideration of in the first place, whether the applicants were illegal entrants, and secondly, if they were, whether an Immigration Officer had a discretion to treat them otherwise than as illegal entrants and, if so, how was that discretion to be exercised. Having found that the applicants on entry to the United Kingdom were illegal entrants, the respondents conceded that there was no statutory requirement to serve a notice to an illegal entrant and there existed a policy document which indicated that it was not a blanket prohibition. At paragraph 41 Gage J said:

> "Not without a little hesitation, I am persuaded that even if, as I have held, the applicants are illegal entrants an Immigration Officer has a discretion as to whether to treat them as illegal entrants. If there was no discretion I can see no need for any policy to be formulated. In addition, it seems to me illogical for there to be a discretion not to treat breaches of temporary admission conditions as bringing about a change of status but to have no discretion to treat illegal entrants differently at the stage of entry to the United Kingdom."

At paragraph 44 the Judge went on to say:

> "Before exercising the discretion to treat them as illegal entrants, it seems to me that they ought to have been given an opportunity to explain why they were here and what their intentions were. It is tempting to think that if they had been given the

> opportunity to explain and state their intentions, the decision of the Immigration Officer would have been the same.
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> 45. But I conclude that this is not necessarily so. In the circumstances, in my judgment, the discretion was not properly exercised. The decision to serve illegal entrant notices was flawed and the notices must be quashed."

I pause to observe that there is a clear distinction between this case and the instant matter. The distinction is that I have found that the discretion was exercised in the instant case. I find nothing in this case to indicate that failure to keep a note of the exercise of that discretion somehow negatives the finding that a discretion was made.

(3) It is clear that the policy admonition that notes should be kept of the exercise of the discretion was breached in this instance. However it is important to appreciate that this is a policy document and is therefore quite different from for example an act of Parliament. I dealt with this issue In the Matter of an Application by Astrit Zekaj for Judicial Review [2007] NIQB 13. At paragraph [5](1), referring to construction of policy documents, I said:

> "I consider that the approach to be taken is that adopted by Auld J in R v Secretary of State for the Home Department, ex parte Engin Ozminnos (1994) Imm AR 287 at 292 where he said:
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> > `The internal policy document against which the exercise of this discretion is to be measured, is not a statutory document. It is not to be subjected to fine analysis so as to interpret it in the way one would a statute.'
>
> Similarly in R v Secretary of State for the Home Department ex parte Pearson (1998) AC 539 to 576 Lord Browne-Wilkinson said at 576H:
>
> > `….. It is not right to adopt such a technical approach to statements made by a Minister in Parliament relating to policy matters. If judicial review of executive action is to preserve its legitimacy and utility, it

> is essential that a statement of administrative policy should not be construed as though settled by Parliamentary counsel but should be given effect for what they are, viz. administrative announcements setting out in layman's language and in broad terms the policies which are to be followed'."

I regard this document to be a guidance to Immigration Officers in order to ensure they comply with the decision of Gage J. The administrative law significance of misinterpreting voluntarily adopted rules or guidelines depends on the context in which the misinterpretation or mistake occurs. (See Chiu v Minister of Immigration [1994] 1 LRC 433 New Zealand Court of Appeal 443 d-f as referred to in Fordham Judicial Review Handbook 4th Edition at paragraph 6.2.9). Clearly in many cases misinterpretation will vitiate a decision upon the ground that it constitutes an error of law producing unreasonableness in the administrative legal sense or frustrating a legitimate expectation. Consistency and avoidance of arbitrariness are basic principles of good administration. Decision-makers cannot ignore policy with impunity. (See R v Secretary of State for the Home Department, ex parte Urmaza [1996] COD 479. I have no doubt that the Immigration Officers ought to have proper regard to the policy guidance set out in this document. However I do not consider that it was intended to be absolutely binding in the context of note-taking. I conclude that this was a document which indicated good practice and a useful aide-memoire to officials as to the steps they should take so as to best ensure their evidence would be accepted a court setting. It did not impose any legally binding obligation to comply with every single guidance contained therein. Obviously, failure to comply with the note-taking exercise, may make for difficulties for an Immigration Officer persuading a court that the exercise of the discretion has occurred. Indeed had there been some positive evidence in this case to the effect that the discretion was not exercised or some other reason to believe that it may not have taken place, then the absence of the notes would clearly have been an important evidential factor. However that is not the case and I am satisfied that the discretion was exercised. Hence the absence of notes in this instance has less impact than might be the case in other circumstances.

[11] I have concluded therefore that the court should be slow to frustrate the purpose of this policy, which is simply to ensure that a discretion is exercised by Immigration Officers in compliance with the decision in Uluyol and Chakmak v an Immigration Officer. Once I am satisfied that that has been done, as in this instance, I do not consider that the failure to comply with the admonition to make a note should vitiate that purpose.

[12] I pause to observe however that the respondent in this case should be aware that this is a fact specific finding and I do not rule out the real possibility that there will be other instances where the failure to comply with the notemaking admonition in this policy document could prove crucial in a court's determination depending upon the context in which it is set. This is a policy therefore which Immigration Officers would do well to become familiar with and take it into account in the procedures which they adopt.

[13] In all the circumstances therefore I have come to the conclusion that this application must be dismissed.