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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Razak's Application (Omar Abdul) [2009] NIQB 41

AN APPLICATION FOR JUDICIAL REVIEW BY OMAR ABDUL RAZAK

WEATHERUP J

[1] This is an application for judicial review of a decision of the immigration authorities of 12 October 2008 that the applicant was an illegal entrant and liable to removal from the United Kingdom. Mr McTaggart appeared for the applicant and Mr Coll for the respondent.

[2] The applicant's affidavit states that he is a Syrian national, married with one daughter, has a business that deals in trucks and truck parts with a factory in Sudan and the family members are resident in Dubai. He obtained a visa for the UK from the British authorities in Khartoum that was valid for six months from December 2006 to June 2007. The visa was stated to be for the purpose of visiting and business and during the course of that visa he entered the UK on two occasions. The applicant applied for and obtained a second visa which was valid from November 2007 to November 2009. This visa, unlike the first, stated that it was for the purpose of visiting and did not state that it was issued for the purpose of business. The applicant contends that the limited nature of the second visa was a mistake occasioned by the agency that completed the application on his behalf. The application was accompanied by various business records supplied by the applicant, which suggests that the applicant's business was considered by the applicant and by the agency to have been relevant to the application.

[3] During visits to the UK in 2007 on the first visa the applicant had developed business contacts with an Anthony McGeough who operated as McGeough Trucks and Spares Limited. The company collected vehicle parts and the applicant purchased these vehicle parts and then arranged for them to be shipped from Dublin to the Middle East for the purposes of the

applicant's business. The applicant in his affidavit states that he did not have a visa for the Republic of Ireland as he had no reason to go there, the yard in which he was trading with Mr McGeough was in Northern Ireland and during his visits to Mr McGeough for the purposes of this business he had been told that he was in Northern Ireland.

[4] Before his recent entry to the UK in 2008 the applicant spoke with Mr McGeough about what parts he would require during his forthcoming trip and these were to be gathered up by Mr McGeough and then the applicant would visit the yard, inspect the parts, agree to purchase what he needed and arrange for them to be shipped out. He was advised by Mr McGeough that he did not need a visa for the Republic as he would remain in Northern Ireland and that a UK visa would suffice.

[5] The applicant arrived at London Heathrow on 11 October 2008 on a flight from Damascus. He spent the night at an hotel and travelled to Belfast the next day, 12 October. When he arrived in Belfast he was stopped by immigration officers and he showed them documents that related to McGeough Trucks and Spares Limited, with the company's business address at Mountpleasant, Dundalk, County Louth. The production of these documents alerted the immigration authorities to the prospect that the application was using his visitor's visa to travel to the Republic. The applicant states he was unaware of the arrangement of the McGeough company lands or that, as he now knows, the lands straddle the border and the company's business address is in the Republic. The applicant was asked by immigration officers whether he was travelling to the Republic and he said 'no'. He was asked whether he was travelling to McGeough's yard and he said 'yes'. He was asked if he was going to the yard in Dundalk and he said 'yes'. The applicant contends that in providing those answers he did not realise that Dundalk was in the Republic, but that he only ever intended to visit McGeough's yard, which he believed was in Northern Ireland.

[6] An Arabic interpreter was arranged as the applicant has limited English. The applicant was interviewed by immigration officials, with the interpreter on the telephone. Notes were taken of the interview by an immigration officer. The applicant confirmed during interview that he had been in Dundalk, by which it is claimed he meant McGeough's yard, on two previous visits. At the end of the interview the applicant signed the bottom of each page as requested but states that the notes were not read back to him in Arabic so he could not verify their contents and he would not have been able to read the English text. I refer below to the evidence of the immigration officer on this point.

[7] The applicant was taken to Banbridge Police Station and kept there for two nights. At the police station it transpired that he had in his possession €22,500 which he stated he was carrying for business purposes. On 15 October

2008 in Musgrave Street Police Station, Belfast, the cash was seized under the Proceeds of Crime Act. The crime concerned was stated to be that as an illegal entrant the applicant's proposed use of the money for business purposes was for an unlawful purpose as he had no legal immigration status. There are proceedings in Belfast Magistrates' Court in relation to the cash, which proceedings have been adjourned pending the outcome of this judicial review. The applicant gave what he described as a civil interview about the cash seizure in Musgrave Street in which he explained his circumstances. He was given temporary release on 15 October 2008 and stayed at addresses around Jonesborough arranged through Mr McGeough, before leaving Northern Ireland. He has been unable to return to the UK because of the finding that he had been an illegal entrant.

[8] An affidavit was filed by Anthony McGeough who described the business that the company runs at Jonesborough. The lands on which the company does business straddle the border and ordnance survey maps and a print out from Google Earth show the area. These were marked to show the yard where the applicant attended in order to do his business as being within Northern Ireland. For business purposes the firm's address is in Dundalk. Mr McGeough confirms that he first met the applicant in March 2007 when he came to Jonesborough. A large amount of goods was shipped out to the Middle East for the applicant and he returned in June 2007 and shipped a large amount of goods to Dubai. Copies of relevant documents were exhibited. Mr McGeough confirmed that the applicant stayed in Jonesborough and that when he was visiting the yard he did not visit the Republic and there was no need for him to go the Republic. Mr McGeough also confirms that he had advised the applicant that he did not need a visa for the Republic as he would remain in Northern Ireland. He also confirmed that he was aware that there was heavy immigration monitoring by the Garda in the Republic and he had been aware of this when he had advised the applicant about his visa requirements.

[9] Mr McGeough describes how he received a telephone call on 12 October 2008 from an immigration officer who had obtained his number from the applicant. He was asked about his office in Dundalk but states that he corrected the immigration officer and explained that the business was near Newry and that the business was in Northern Ireland. Mr McGeough later visited the applicant at Banbridge Police Station and eventually secured his temporary release and provided accommodation for him for some days until he left Northern Ireland.

[10] The respondent filed an affidavit from Mr Garrett, an immigration officer who describes how he had contacted the applicant at Belfast Airport. He states that the applicant could speak minimal English but he did reply to questions that it was his intention to travel to Dundalk on business in connection with the buying and selling of truck parts and he provided

documentation from the McGeough company which gave the Dundalk address. The applicant was asked how much money he had and at that stage he produced £800. He was then interviewed with the assistance of the Arabic interpreter on the telephone and he was asked what had happened when he arrived at Heathrow and he stated that he had informed the immigration officer "I have come to buy parts". He admitted that he did not tell the immigration officer that he was travelling to Dundalk. Mr Garrett states that at the conclusion of the interview the applicant read through the record of questions and answers with the telephone interpreter and signed each of the answers to the questions as recorded on the interview record sheet.

[11] The immigration officers decided that the applicant was an illegal entrant as he had entered the UK by deception in that he had not disclosed his true purpose, which was considered to be that he was going to travel to the Republic. The standard form 'Notice to a Person Liable to Removal' was issued to the applicant stating that he was a person in respect of whom removal directions may be given under the Immigration Act 1971 as an illegal entrant. The reason for the decision was stated to be that –

"You failed to notify the immigration officer yesterday at Heathrow of the prior arrangements made on 25/9/08 with Anthony McGeough to travel illegally to the Republic of Ireland to buy truck parts for your business."

Mr Garrett described how at Banbridge Police Station the applicant admitted that he had €22,500. On 14 January 2005 Mr Garrett obtained the applicant's visa application which stated that he was attending the UK as a tourist.

[12] I have had occasion to look at the position in relation to illegal entrants most recently in Chhetri's Application [2009] NIQB 23 and I there set out the approach to illegal entry by deception after the decision of the House of Lords in Khawaja v. Secretary of State for the Home Department. A number of propositions in relation to obtaining entry by deception may be set out –

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.

[13] First of all I am satisfied that the applicant is a bona fide businessman who came to the UK in 2007 and 2008 to travel to Northern Ireland to visit Mr McGeough and to buy truck parts for his business. Secondly, on his last visit the applicant entered the UK on a tourist visa rather than a visitors/business visa, as he had done on earlier occasions. I am satisfied that there must have been confusion about the completion of the second visa application. Taking into account that the applicant is a genuine businessman, that he had travelled to Northern Ireland on previous occasions for business purposes, that Mr McGeough confirms the contacts for business purposes, that the records confirm that there has been trading between the applicant and Mr McGeough, that the application which was made for the visa was accompanied by business records, thereby indicating to the immigration authorities that business records were considered relevant, that obviously the agent who submitted the records on behalf of the applicant thought they were relevant to the application although he did not tick the box that related to a business visa, I am satisfied that a mistake was made in the completion of the form. Further, when the applicant arrived at Heathrow he claims to have told the entry officer that he had come to buy parts, although this cannot be confirmed. The applicant was disclosing a business purpose at entry even though he was travelling on a visitor's visa.

[14] Was there deception by the applicant in that he obtained his UK visa in order to enter the Republic for business purposes without the requisite visa from the Irish immigration authorities? Or was the applicant travelling only in Northern Ireland and mistaken as to the address of the location where he was doing business when he described that location as Dundalk? Once the issue emerged the applicant asserted that he had only travelled to McGeough's yard. Mr McGeough's affidavit seeks to confirm that the applicant was travelling within Northern Ireland. Ordnance survey maps and Google plans purport to show the boundaries of the relevant land and show the yard on the northern side of the border. Mr McGeough has said that

he was alive to the problems about immigration and that the Guards were alert to the presence of immigrants on the southern side of the border.

[15] The burden is on the respondent to satisfy the court to a high degree of probability that the applicant was an illegal entrant. In the present case that translates into establishing that the applicant used his visa for the UK for the improper purpose of gaining entry to the Republic over the land border. There is no direct evidence that the applicant visited the Republic. He has referred to doing business at the McGeough yard in Dundalk and I am satisfied that the yard is on the northern side of the border. I accept that he would not have been expected to know whether Dundalk was on one side of the border or the other. I have not been satisfied that the applicant practised deception. I have not been satisfied that the applicant was an illegal entrant.

[16] There are three further issues to which attention has been drawn. First, in relation to the interview of the applicant, the Operations Enforcement Manual at chapters 38 and 39 provides for arrangements in relation to interviews which do not appear to be appropriate when dealing with interviews involving telephone contact with an interpreter. The Manual requires that at the conclusion of the interview the person should be invited to read through the record in his own language and confirm that it is correct by signing his initials at the end of each reply and signing his name in full. In the present case it is said that the interview notes were read through to the applicant and that he confirmed that they were correct. The applicant does not agree that that happened. I am unclear how the reading over of the notes was actually undertaken, given that the applicant, the immigration officer and the notes were in one room and the interpreter was at the end of a telephone. In any event it does not matter in this case because there is not any issue on the content of the interview notes. The applicant agrees that he said to the immigration officer that he was going to Dundalk, although of course he now explains that he was simply describing the McGeough yard and relying on the address of the business. While there is no issue on the content of the interview notes in this particular case that is often not the position and the practical difficulties of dealing with disputed interview notes were referred to in Chhetri's Application.

[17] Secondly, in relation to deciding issues of deception in judicial review proceedings, the evidence is generally presented on affidavit. This may not be the most appropriate method of dealing with fact specific issues about deception for the purposes of determining the status of immigrants. There is an alternative remedy for applicants seeking to challenge such a finding, namely by appeal to the Asylum and Immigration Tribunal. Mr McTaggart for the applicant contended that one reason for the issue coming to the Court instead of the Tribunal was that the legislation did not permit the Tribunal to overturn a finding that a person was an 'illegal entrant'. It was suggested that while the Tribunal might make a finding in relation to removal directions the

Tribunal could not make a decision that would have the effect of removing from a person's immigration record a finding that the applicant had been an illegal entrant. In response, Mr Coll for the respondent produced a paper approved by the immigration authorities which stated their position to be that an illegal entrant has a right of appeal to the Tribunal which may set aside a finding that the applicant is an illegal entrant and in that event the impugned finding will not operate against the applicant in future decision making.

[18] Section 82 of the Nationality Immigration and Asylum Act 2002 specifies the decisions that may be subject to appeal and such decisions may be appealed on any of the grounds listed in section 84(1) of the Act.

Section 82(1) provides that where an 'immigration decision' is made in respect of a person he may appeal to the Tribunal. An immigration decision includes –

> (g) a decision that a person is to be removed from the United Kingdom by way of directions under the Immigration and Asylum Act 1999;
>
> (h) a decision that an illegal entrant is to be removed from the United Kingdom by way of a direction under the Immigration Act 1971;
>
> Section 84(1) provides that the grounds of appeal include -
>
> (a) that the decision was not in accordance with immigration rules;
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998;
>
> (e) that the decision is otherwise not in accordance with the law;
>
> (f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules.

[19] From a consideration of the statutory provisions it is evident that the Tribunal has the power to make the necessary decision to overturn a finding that a person was an illegal entrant. However there may be practical issues about whether or not that alternative remedy is effective in the particular case. The right of appeal may be exercised 'out of country' and may only be exercised 'in country' where section 92 of the 2002 Act applies, that is, where the person has made a human rights or asylum claim while in the UK or alleges that the decision breaches rights under the European Treaties in respect of entry to or residence in the UK. The benefit of a Tribunal hearing

would include the hearing of oral evidence and the cross examination od witnesses. Where there is no 'in country' right of appeal there may be an issue as to whether, in the absence of the appellant, the Tribunal provides an effective alternative remedy to an application for judicial review. Even in the absence of the appellant there will be cases where other witnesses could attend on behalf of the immigration authorities and on behalf of an applicant who is out of country and an effective alternative to judicial review obtained.

[20] Further it is open to the appellant who does not have a right of appeal exercisable from within the UK to seek judicial review of the decision to set removal directions. Thus it would be possible, where an appellant is about to be removed, to obtain, on an application for judicial review, a stay of removal and then a hearing before the Tribunal rather than the Court. Whether the appellant secures bail from an Immigration Judge or remains in custody is another matter. It may not always be appropriate to require an applicant to exhaust the alternative remedy before the Tribunal because it will not always provide an effective alternative.

[21] As to whether or not success at the appeal before the Tribunal clears the appellant's record in relation to illegal entry, the respondent is careful to say that it does not automatically allow a person to return to the UK. There may of course be other reasons for a decision adverse to an applicant. However the respondent confirms that when an applicant successfully appeals to the Tribunal there will be no adverse effect on the applicant's immigration record and that it would be inappropriate to rely on an overturned finding as part of any decision to evaluate whether the person otherwise meets the requirements of the immigration rules. Thus there is no prejudice to an applicant if the appeal is successful.

[22] The last matter relates to the proceeds of crime application. The respondent contends that there may be a breach of currency regulations because at entry to the UK the applicant would have been required to declare possession of assets in excess of €10,000. That is a different issue to the proceeds of crime application in the Magistrate's Court, which is said to depend on whether the applicant was an illegal entrant. I have found that the respondent has not discharged the burden in these proceedings of establishing that the applicant was an illegal entrant. It is a matter for the District Judge (Magistrates Court) to determine how the proceeds of crime application should be dealt with under the applicable legislation.

[23] Accordingly an Order will be made quashing the decision of the immigration authorities of 12 October 2008 that the applicant was an illegal entrant.