

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

Delivered: 4/12/07

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY PAUL UDU AND
VALENTINE NYENTY FOR JUDICIAL REVIEW**

CAMPBELL LJ

[1] In June 2004 immigration officers were on duty at Belfast International Airport as part of an operation, authorised by the Secretary of State for the Home Department, which was designed to monitor the movement of illegal immigrants within the United Kingdom and in particular those crossing illegally the land border between Northern Ireland and the Republic of Ireland. Among those examined by the officers were Paul Udu, who was stopped on his arrival on a flight from Gatwick on 26 June 2004, and Valentine Nyenty who was stopped on the same date when he arrived on a flight from Bristol. Following an interview under caution it was decided that each of them was to be treated as an illegal immigrant as he had practised deception contrary to section 26(1) of the Immigration Act 1971. They were each detained under powers contained in paragraph 8 of Schedule 2 of the 1971 Act.

[2] They applied for judicial review of these decisions and Girvan J. made a declaration that their detention was unlawful and quashed the decisions to detain them. He awarded £20,277 in damages to Mr Udu and £12,500 to Mr Nyenty together with the costs of the application. The Secretary of State appealed against the judge's decision though he did not seek to have the measure of damages reviewed should the decision be upheld that he was liable to pay damages.

Paul Udu

[3] Mr Udu is a Nigerian national and a banking official employed at the head office of the Citizen's International Bank in Lagos. Since he obtained his first visa in 1998 he has been a regular visitor to the United Kingdom where a younger brother, who is a British citizen and a member of the medical profession, resides. On the expiry of an earlier visa Mr Udu was granted a two year multiple entry visit visa for the United Kingdom on 20 February

2003. In his affidavit he said that his wife was also the holder in 2004 of a two year United Kingdom multiple entry visa as were the two older children of the family. Mrs Udu travelled to Dallas, Texas in February 2004 and there she gave birth to a third child who now holds a United States passport. Following the birth Mrs Udu remained in Texas until May 2004 to allow time for the baby to be strong enough to travel.

[4] Mr Udu obtained four weeks leave from his employment from 24 June 2004 and arranged to have a holiday in the United Kingdom and in the United States. He planned to collect his wife and family in the United Kingdom on his return from the United States and to travel with them back to Nigeria. In early June 2004 his wife contacted him to say that she was going to Dublin to “sort out some issues regarding my two year old son who was born there two years ago.”

[5] When Mr Udu arrived at Gatwick Airport on 25 June 2004 he already had a seat booked to travel on to Los Angeles on 3 July 2004. He said that on reaching the United Kingdom he realised that he had to give his wife some money for shopping and to allow her to make arrangements for the new born child, with a United States passport, to obtain a visa for Nigeria. So it was decided that he and his wife would meet at Renshaw’s Hotel in Belfast where he would hand over cash to her and some gifts. If she failed to turn up as he had her address in Dublin he would travel there.

[6] At Belfast International Airport Mr Udu was interviewed by John Harrison who is an immigration officer. Mr Harrison said that Mr Udu told him that he had come to Belfast on a two - day trip to visit a friend and would be returning to Gatwick to catch a flight to the United States on 3 July 2004. He denied that he would be travelling on to the Republic of Ireland. He produced to Mr Harrison an extract from his diary containing a reference to the hotel in Belfast where he planned to stay. When the officer examined the diary he noted it contained details of an address in Dublin and Mr Udu told him that this was the address of a cousin and continued to deny that he had any plan to travel to the Republic of Ireland. With his agreement the officer examined the bag Mr Udu was carrying and found that it contained a large number of nappies, clothing for women and children and footwear, moisturiser and cough medicine. An interview under caution then followed. When Mr Udu was asked what had happened when he approached the control at Gatwick he said that he had been asked how long he was staying and had replied for a few days and he would then fly to the United States. In the course of the interview Mr Udu said that his wife and children were in Dublin and that his purpose in travelling to the United Kingdom was to go, very briefly, to see them until he went on to the United States. Mr Udu did not have a visa permitting him to enter the Republic of Ireland.

[7] Inquiries were made by Mr Harrison from the Garda Immigration Bureau and these revealed that Mrs Udu had made a claim for asylum in the Republic of Ireland on the 30 September 2002 and had subsequently withdrawn it in favour of an Irish – born child application which was lodged on 11 February 2004. At the interview under caution it was accepted by Mr Udu that when he made his application for a multiple entry visa he did not inform the United Kingdom authorities that his wife and family had gone to the Irish Republic or that his wife had made an application for asylum in the Republic of Ireland. When he arrived at Gatwick airport on the 25 June 2004 he did not declare to the immigration official, to whom he had spoken, that his wife and children were now living in the Republic of Ireland as he was not asked.

[8] Mr Harrison decided that although Mr Udu held a valid visa for the United Kingdom it was his intention to misuse this for the purpose of gaining entry into the Republic of Ireland and that as his circumstances had changed he ought to have notified the immigration official to whom he had spoken at Gatwick of the changes. Therefore he was an illegal immigrant as he had practised “verbal deception” contrary to section 26(1) of the Immigration Act 1971. Mr Udu was then detained pending his eventual removal from the United Kingdom to Nigeria.

Valentine Nyenty

[9] Mr Nyenty is a national of Cameroon and employed in the telecommunications field by Cameroon Oil Transportation Company. He is married with a two-year old child and at the time of his application for judicial review his wife was 9 months pregnant. He applied for and received a six months’ visa to visit the United Kingdom from 19 May to 19 November 2004 marked “FOR MITEL TRAINING ONLY”. The visa was issued to allow him to undertake a training course at the Mitel Training Centre at Caldicot in Wales which ran between 21 of June 2004 and 25 June 2004. Mr Nyenty left Douala on 19 June and arrived at Heathrow on 20 June 2004 where his passport was stamped on entry by an immigration officer. He attended the training course and completed it on 25 June 2004. The course coincided with a period of leave from work and on finishing it he decided to do some sight seeing before his return flight home which was booked for 10 July 2004. He said that he decided to visit Belfast because it was “a modest city with an interesting history”. On being questioned on his arrival at Belfast International Airport by Amanda Lear, an immigration official, he told her that he had come to Belfast on a sight seeing trip but he had not booked any hotel and was unable to identify any tourist attractions in Northern Ireland. He was asked if he told the immigration officer at Heathrow of his plans to come to Belfast and replied:

“No, I told you that it was abrupt and I had no plan to have a trip while I was here. I decided to take a trip.”

[10] With his consent, Mr Nyenty's luggage was searched and letters addressed to a Mr Augustine Manchang in Dublin were found and in addition two large bags of food and grain which he said he had brought with him from Cameroon at the request of friends who had family members living in Dublin. He said that they had asked him to post these items from the United Kingdom to a friend although he did not have this person's postal address. He had in his possession two unsigned Cameroonian passports in the names of two Cameroonian nationals and these were contained in an unopened envelope. It was later established that these were the names of two people who were seeking asylum in the Republic of Ireland. Mr Nyenty claimed that he had not checked the contents of the envelope and had assumed that he was carrying church diaries as the contents of the envelope were of a similar size to a diary produced by a local church. He had also in his possession 1,500 euro. After the interview had concluded Mr Nyenty asked to speak to the officer again and he then admitted that did intend to travel to the Republic of Ireland and had been unable to obtain a visa for this purpose. He had been asked by some people in his village to deliver items to others who came from the village and who were seeking asylum in the Republic of Ireland and he added that he had no intention of remaining in the Republic of Ireland or indeed in the United Kingdom.

[11] Ms. Lear considered that although he held a valid visa for the United Kingdom it was Mr Nyenty's intention to misuse the visa for the purpose of entering the Republic of Ireland. There had been a change in circumstances since Mr Nyenty had obtained his visa and he should have informed the immigration officer of this on his arrival at Heathrow on 20 June 2004. She was satisfied that he had practised verbal deception contrary to section 26(1) of the Immigration Act 1971. His visa had been issued solely for training purposes and it was his intention to travel to the Republic of Ireland and had the Entry Clearance Officer known of his plan to deliver various items including passports to asylum seekers in the Republic of Ireland the officer would not have issued the 'training only' UK visa. Mr Nyenty was detained pending his return to Cameroon on 3 July 2004.

The legislation and principles to be applied

[12] An "entrant" is defined in section 33(1) of the Immigration Act 1971 as a person entering or seeking to enter the United Kingdom and an "illegal entrant" as a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or entering or seeking to enter by means which include deception by another person. These include a person who has entered as mentioned above.

The Act provides in section 24A (1) that:

“(1) A person who is not a British citizen is guilty of an offence if, by means which include deception by him -

(a) he obtains or seeks to obtain leave to enter or remain in the United Kingdom” ...

[13] The principles which are relevant to the present case are contained in the speeches in the House of Lords in *Reg v Home Secretary, Ex p. Khawaja* [1984] 1AC 74, and these are:

(i) There is an onus on the immigration officers to prove by a preponderance of probability to the satisfaction of the court that leave to enter was obtained by deception.

(ii) In judicial review it is the function of the courts, including an appellate court, to go beyond inquiring only if the immigration officer had reasonable grounds for his belief and to decide if the applicant is an illegal immigrant.

(iii) A duty approximating to *uberrima fides* is not imposed on a person seeking entry.

(iv) Deception may arise from silence as to a material fact in some circumstances.

The judge's decision

[14] In his judgment at paragraph [13] the judge set out the reason for his decision:

“The cases against Udu and Nyenty are based on material nondisclosure of information as to their true intentions. The Crown, however, did not adduce the visa application forms or rely on any particular question and answer at the point of entry. The questions and answers in the interviews of Udu and Nyenty in Belfast did not elicit evidence that the applicants had said anything that was directly deceptive or anything that was rendered deceptive by an omission to state something which made misleading what he had actually said when applying for his visa or when entering the United Kingdom. In

effect for the Crown cases to succeed against these applicants the Crown has to rely on a duty to disclose information, a duty which in the light of *Khawaja* is not cast on the appellant. It was open to the Immigration Authorities to elicit information from the applicants which if honestly answered would have entitled the authorities to refuse entry or if answered dishonestly, or misleadingly by virtue of silence or omission about material facts, would have allowed the authorities to treat them as illegal entrants. In these cases the evidence to justify the detention and removal of the applicants on the ground of deception was lacking. Accordingly, the applicants Udu and Nyenty must succeed in their applications.”

The issue is whether the judge was correct in holding that there was insufficient evidence before the immigration officers for Mr Urdu and Mr Nyenty to be treated as illegal entrants to the United Kingdom by reason of deception.

The appellant's case

[15] Mr McCloskey QC, who appeared with Miss Connolly for the Secretary of State for the Home Department, submitted that there was sufficient evidence to justify the detention and removal of Mr Udu and Mr Nyenty on the ground of deception. He relied upon the failure of Mr Udu on his arrival at Gatwick on 25 June 2004 to disclose to the immigration officer that since he had obtained the visa on which he was seeking to enter the United Kingdom his wife and family had gone to the Republic of Ireland where his wife had withdrawn a claim to asylum in favour of an Irish born child application. Mr McCloskey relied also upon the failure of Mr Udu to disclose to the officer that he intended to use his visa for the purpose of entering the Republic of Ireland through Northern Ireland in order to visit his wife and family there. He had therefore remained silent as to material facts that were likely to have influenced the decision of the officer to permit him to enter the United Kingdom.

[16] Mr Nyenty entered the United Kingdom on a visa issued for the purpose of allowing him to attend a training course. In fact he intended to travel to the Republic of Ireland at the conclusion of the course to deliver items including passports to people who were seeking asylum there. If the officer at the point of entry had been made aware of this he would not have permitted Mr Nyenty to enter the country.

The Respondents' case

[17] Mr Michael Lavery QC, who appeared with Mr Ronan Lavery, on behalf of Mr Udu and Mr Nyenty submitted that as there was no challenge to the judge's statement of the law this court should not interfere with his decision unless it was unreasonable and perverse and this case was not being made.

[18] Mr Lavery commented upon the absence of any evidence that either at the time of the application for a visa or upon entry to the United Kingdom there was an intention on the part of either of the respondents deliberately to suppress information or to deceive. He suggested that on the facts, as found, the judge could not have been satisfied that there was dishonesty on their part as no statement made by them was alleged to have been false. If there were material facts that had not been disclosed this was, he submitted, insufficient to amount to deception.

[19] The journeys that the respondents proposed to make to the Republic of Ireland were described by Mr Lavery as being casual and not of a nature for which a visitor to the United Kingdom, intending to visit the Republic of Ireland for a day, would normally make a visa application. He suggested that in the circumstances the action taken by the Secretary of State was not proportionate.

Conclusion

[20] Lord Fraser in his speech in *Khawaja* considered the function of the courts when dealing with removal cases and he agreed with Lord Bridge and Lord Scarman "that an immigration officer is only entitled to order 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." This is a "precedent fact" that has to be established and on review the court has to decide if the entry was obtained by deception. This is the task not only of the High Court but also of an appellate court as was stated in *Khawaja*.

[21] In *R v Secretary of State for the Home Department ex parte Al-Zahrany* [1995] Imm AR 510, a decision of the Court of Appeal in England and Wales, Stuart-Smith LJ (with whom Waite and Millett LJ agreed) said:

"In my judgment in proffering a passport which contains a visa valid for the purpose of a visit to this country and to enable her to become a visitor to this country (and that being the leave to enter which she obtained) she [the applicant] is plainly making, albeit silently, a representation that that is the purpose of her visit."

In *R (Zahide Awan) v Secretary of State for the Home Department* [1996] Imm AR 354, Buxton J, sitting at first instance, said:

“In my judgment it was clearly incumbent on her to make the change of circumstances clear when she arrived in this country. The presentation of a passport or the presentation of an entry clearance visa that has been formulated on the basis that no longer persists or no longer represents the totality of a person’s intentions or possibilities is and it is clearly held by the authorities to be an act of deception under the guidance given in *Khawaja*.”

This line of authority has been followed in this jurisdiction by Weatherup J in a judgment delivered in *The Application of Ajayi for judicial review*[2007] NIQB87.

We agree that a representation may be implied from the silent presentation of a passport that the holder is seeking entry for the purpose for which the visa which has been obtained and no other.

[22] When Mr Udu spoke to the immigration officer on his arrival at Gatwick and was asked how long he was staying he said for a few days and that he would then fly on to the United States. He knew then that his wife and family were in Dublin and that his wife had applied for asylum there and had later withdrawn her application and made an application for an Irish born child. He knew also that he intended to visit his wife and family in Dublin albeit, briefly. His visa was to visit the United Kingdom and he failed to disclose the real reason for his visit. Mr Nyente had his passport stamped by an immigration officer when he arrived at Heathrow on 20 June 2004 and he accepted that he did not tell the officer of his plan to travel to Belfast. His visa was for the limited purpose of attending a course and it was his intention to enter the Republic of Ireland, for which he had been refused a visa, by crossing the land border with the United Kingdom. Each of them was impliedly representing to the officer that they were entering for the purpose for which their visa had been granted and no other. In our view there was ample evidence of deception on their part at the time of entry into the United Kingdom to allow the Secretary of State to treat them as illegal entrants.

[23] As we have arrived at a different conclusion to that reached by the judge the appeal will be allowed and his order reversed.