Neutral Citation: [2017] IEHC 128

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 250 J.R.]

BETWEEN

W.S.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 23rd day of February, 2017

Issues

1. The applicant is seeking an order of *certiorari* to quash the deportation order made by the respondent bearing date 27th March, 2014 and received by the applicant on 14th April, 2014. Leave was afforded to bring the within application on or about 25th April, 2014.

2. In the statement of grounds of 25th April, 2014 it is complained that consideration of private life rights of the applicant flies in the face of common sense in that it was found that the decision to deport did not constitute an interference of such gravity as to engage Article 8 of the ECHR. It is complained that no reason or rationale is provided. It is also complained that the respondent erred in his interpretation of "consequences of such gravity" and erred generally in the application of the test enunciated in *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 insofar as the respondent failed to assess whether or not the interference fell into one of the exceptions set out in Article 8 (2) of the ECHR.

Background

3. The applicant hereto is a Malaysian citizen and arrived initially in Ireland in 2007 with his wife. They had secured a visitors' permission to remain for 90 days, however they outstayed this period by approximately 2 years when they returned to Malaysia in 2009. In July, 2009 the applicant secured a 1 year valid student visa and his wife and child accompanied him without permission save that they were visa-exempt for a period of 90 days. The student visa expired on 22nd July, 2010.

4. On 7th June, 2012 the solicitor on behalf of the applicant engaged with the respondent to regularise the position of the applicant which engagement culminated in the 3-option letter of 14th February, 2013. Subsequently, by letter of 5th March, 2013 representations were made on behalf of the then 3 applicants. A letter of 10th October, 2013 from the respondent required further documents and also requested that the applicants would furnish any other information necessary for the application. By response of 15th October, 2013 it was indicated that no further information was to be forthcoming.

5. The parties were married in 2001 and their son G was born in 2007.

Proceedings

6. The proceedings initially related to the private life rights of all three of the family members however following the decision in *Dos Santos & Ors v. Minister for Justice & Ors* [2015] IECA 210, delivered on 30th July, 2015 and in *C.I. v. Minister for Justice* [2015] IECA 192, the application on behalf of the wife and the child was abandoned and the matter proceeded on the basis of an application on behalf of the husband only (who as aforesaid did have permission for a one-year period between 2009 and 2010).

7. The hearing of the matter was further delayed until such time as the Court of Appeal decisions in *Balchand v. Minister for Justice and Equality* [2016] IECA 383 and *Luximon v. Minister for Justice and Equality* [2016] IECA 382 were delivered. Both judgments were delivered on 15th December, 2016.

8. In the letter of representation made on behalf of all three of the family members of 5th March, 2013 the family background was afforded which included an assertion that the within applicant had a full history of employment since returning to the State in 2009. He has paid taxes on his earnings. In addition to the foregoing, certain documentation was furnished including P60s for the year 2011 – 2012 for Mr. S together with Mr. S's recent payslips and the following statement was made in support of the application:—

> "The applicants are of good character and have never come to the adverse attention of An Garda Síochána or the authorities in Malaysia. They have integrated well into Irish society and are both fluent English speakers. They have not obtained any benefit from the State and are both in good health. In their free time, the applicants take their son for walks and go shopping. They also regularly attend church and evidence is attached setting out details of this."

9. Three separate decisions were made by the respondent in respect of each of the three family members.

10. In the decision with regard to the applicant on 11th March, 2014 in p. 3 of 5 there is a heading "Consideration under Article 8 of the European Court of Human Rights (ECHR)". Thereafter a consideration of "Private life" was undertaken by first of all setting out the decision in *Razgar* aforesaid and the five questions that are likely to have to be addressed in the context of a proposal to remove an individual. The decision goes on to state that in considering the first question it is accepted that if the Minister decides to deport the applicant this has the potential to be an interference with his right to respect for private life within the meaning of Article 8 (1) of the ECHR. Thereafter the effective content as hereinbefore quoted from the letter of 5th March, 2013 was set out which is then followed by the following statement:—

> "In addressing the second question, and having considered the facts of this case as set out in this submission it is not however accepted that any such potential interference would have consequences of such gravity as potentially to engage the operation of Article 8."

Submissions

Settled Migrant

11. The applicant asserts that he should be assessed as a settled migrant from July, 2009 – July, 2010 when he had a valid student visa. He relies on the Irish case law aforesaid.

12. At para. 26 of the Court of Appeal judgment in C.I. aforesaid it is stated that in a number of cases relating to settled migrants (in the sense of immigrants who have been lawfully present in the host state) the ECtHR appears to have gone further in its approach as to what might constitute private life rights for the purposes of Article 8. The Court quotes from the case of *Balogun v. United Kingdom* (App. No. 60286/09) (2013) 56 EHRR 3 to the effect that it will be in a rare case where a settled migrant would be unable to demonstrate that his or her deportation would interfere with his private life as guaranteed by Article 8. The *Balogun* case goes on to state at para. 43 that, "*not all settled migrants will have equally strong family or social ties in the contracting state where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8(2).*"

13. The applicant relies on *Luximon* and *Balchand* for the purposes of establishing that the Court of Appeal has recognised that student permission is sufficient, at least in some cases, to give rise to private life rights which must be considered under Article 8.

14. In para. 27 of *Luximon* the Court held that the respondent was only obliged to take into account matters that have been raised.

15. The Court further stated at para. 59:-

> "The question as to whether or not on the particular facts of the application, a decision not to renew the permission would have consequences of such gravity for Ms. Luximon and her daughter in relation to their rights to family or private life such that Article 8 is engaged… […]…is a matter for determination by the Minister subject only to judicial review by the Courts."

16. In resisting the argument that the applicant might be considered a settled migrant for any portion of his time in Ireland including as a student between July, 2009 and July, 2010, the respondent refers to the fact that student permission is particularly restricted and does not have the same liberties as permission to work in the State, for example, it is not possible to bring family members into the State on foot of a student permission where it is possible at least to apply in respect of an individual who is within the State on work permission.

17. The respondent also refers to various European Court of Human Rights case law to the effect that it should be assumed that when the European Court of Human Rights refers to "settled migrants" they are doing so in relation to parties who for the majority of the period in a given country are there with permission as opposed to being there illegally or without permission. The respondent refers to the case of *Balogun* at para. 46 which suggests that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. The respondent refers to the case of *Jeunesse v. The Netherlands* (App. No. 12738/10) (2015) 60 EHRR 17, a judgment of the European Court of Human Rights delivered on 3rd October, 2014 to the effect that the assessment of para. 104 thereof might suggest that the case at hand could be distinguished from cases concerning settled migrants who had been granted formerly a right of residence in a host country but there was a subsequent withdrawal of that right. The respondent says there was no such withdrawal in the instant circumstances so as to constitute an interference with Article 8 rights. The respondent refers to the case of *Üner v. The Netherlands* (App. No. 46410/99) (2007) 45 EHRR 14, a judgment of the European Court of Human Rights delivered on 18th October, 2006 to suggest that in dealing with the concept of a settled migrant, a very strong residence status is required and further in that case reference was also made to the fact that the applicant held a permanent residence status.

18. It does appear to me that the cases of *Balogun* and *Üner* are concerned with circumstances where a criminal conviction might cause a withdrawal of a permission as opposed to dealing specifically with the concept of a settled migrant. A similar comment arises in respect of the case *Maslov v. Austria* (App. No. 1638/03) (2008) 47 EHRR 20, a decision of the European Court of Human Rights of 22nd March, 2007 which the respondent also relies on.

19. At para. 104 of *Jeunesse* aforesaid the Court distinguished between settled migrants and the referenced case which involved an applicant who did not have permission when in the Netherlands and I am satisfied that the first sentence thereof is particularly material to the instant circumstances when it is stated:—

> "104. The instant case may be distinguished from cases concerning "settled migrants" as this notion has been used in the Court's case-law, namely, persons who have already been granted formally a right of residence in a host country."

20. I am not satisfied that the conditions which might have attached to a student visa would preclude such a party from being considered to be a settled migrant for the period for which they have permission. Further, I am not satisfied that the European Court of Human Rights or indeed the Court of Appeal in Ireland has identified a category of aliens outside the bracket of either settled migrant or those in a precarious position.

21. In this regard, in the appeal case of *C.I.* the Court quoted from *Balogun* aforesaid, including para. 76 thereof which incorporated the following statement:—

> "In this regard, the Court notes that, unlike the applicant in the case of *Üner* (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them."

22. By reason of all of the foregoing therefore it does appear to me that given the *obiter* comments in *Dos Santos* as to the engagement of Article 8 with regard to a party with permission to work in the State for a one-year period and, further, given the recognition by the Court of Appeal in *Balchand* and *Luximon* that student permission can be considered within the concept of a settled migrant I believe that the instant applicant for the period from July, 2009 to July, 2010 was a settled migrant as opposed to being a party during that particular period of time who might be considered to be within the State in a precarious position.

Article 8 right

23. The applicant's complaint in respect of the Article 8 right consideration afforded in the decision might be summarised as:—

a. A proportionality test should have been conducted under Article 8 (2).

b. No reasons are given as to the finding that it was not accepted that the potential interference would have the consequences of such gravity as to engage the operation of Article 8.

c. The decision is irrational.

24. The portion of the decision relative to Article 8 consideration has already been set out above.

25. It is clear from *Meadows v. Minister for Justice* [2010] IESC 3 that even if the principle of proportionality does not arise, at the very least the rationale underlying the decision must be discernible, expressly or inferentially.

26. At para. 27 of the decision of the Court of Appeal in *Luximon* aforesaid it is stated:—

> *"At a level of general principle it appears correct that the Minister in an application under s. 4(7) of the 2004 Act, is only obliged to consider and take into account matters which have been raised on behalf of the applicants in the application or which objectively may be considered as having been brought to the Minister's attention or matters of which the Minister should be aware."*

27. At para. 35 of the Court of Appeal decision in *Balchand*, aforesaid, it is provided:—

> *"It follows on the facts of this application that the Minister was obliged to consider the Article 8 rights contended for on behalf of the applicants. The manner in which this should be done is similar to the manner in which the Minister currently approaches a consideration of Article 8 rights in the context of a proposal to deport subject to the variation indicated in the judgment in Luximon."*

28. By reason of the foregoing I am satisfied that the jurisprudence from the Court of Appeal is to the effect that in considering whether or not to make a decision to deport an individual only matters which have been raised or objectively brought to the Minister's attention or of which the Minister should be aware need be taken into account.

29. The manner in which the Article 8 rights might be dealt with was also considered in the case of *Balogun* aforesaid, at para. 43 thereof by the European Court of Human Rights and in this regard the statement therein to the effect:—

> *"Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 (2)."*

30. It is clear from the foregoing that when considering Article 8 rights in respect of some settled migrants it is not always the case that these rights will be considered under Article 8 (2).

31. I am satisfied that in the instant matter this is a case in which it was rational and reasonable to consider the Article 8 rights outside the proportionality assessment under Article 8(2) by reason of the fact that:—

> (i) By the date of the relevant decision of 11th March, 2014 the applicant had been in the State for a total period of in or about 7 years of which he had a 90 day permission to stay together with a one-year student visa permission. The balance of his time in Ireland was neither with permission nor tolerated as might be the position pending an application for asylum. The vast majority, therefore, of the applicant's stay in Ireland was illegal.
>
> (ii) Minimum details as to integration or societal links were furnished. They amounted to walking, shopping and going to church in Lucan. This detail is more akin to family life rather than private life given the same detail is in all three of the applications.
>
> (iii) The societal links mentioned in the proceeding subparagraph were also raised by the applicant's wife and child and their appeals against the deportation order has been abandoned. There is a valid deportation order against them suggesting that the deportation order against the applicant would not have any adverse consequences to his family life.
>
> (iv) No evidence or submission has been raised (correctly in my view) to the effect that there are any exceptional circumstances arising in the within matter.

32. Insofar as reasons are concerned, as aforesaid, the reasons for the decision must be discernible expressly or inferentially.

33. I am satisfied that it is clear from the decision that the decision maker took into account in making the assessment under para. 2 of the five questions suggested by the House of Lords in *Razgar* that the detail of the societal links contended for were such that any potential interference with same would not be of such gravity as to engage the operation of Article 8. I am satisfied that this is a rational decision on the part of the respondent.

Conclusion

34. For the reasons hereinbefore outlined I am satisfied that the period for which the applicant held a student permission is a period for which his private life rights required consideration in or about any decision to deport him. These private life rights were considered in the decision although a proportionality test under Article 8(2) was not conducted, however in the circumstances of the instant case this was a permissible approach to adopt on behalf of the respondent having regard to para. 43 of the ECtHR decision in *Balogun*, and para. 59 of the *Luximon* judgment.

35. I am satisfied that the rationale underlying the decision is discernible either expressly or inferentially that the decision is rational.

36. For the reasons above, the application for *certiorari* is refused.