THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 668 J.R.]

BETWEEN

VIKRAM SHARMA RUGHOONAUTH AND RASHMA RUGHOONAUTH

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of April, 2017

1. In *Rughoonauth v. Minister for Justice and Equality* (No. 1) (Unreported, High Court, 14th December 2016) I refused leave to the applicants to seek judicial review of deportation orders. Mr. Ian Whelan B.L. now seeks relief on behalf of the applicants by way of an unusual application to revisit the original decision, the order not having yet been perfected, having regard to subsequent decisions of the Court of Appeal in *Luximon v. The Minister for Justice and Equality* [2016] IECA 382 and *Balchand v. The Minister for Justice and Equality* [2016] IECA 383 as well as the decision in *W.S. v. The Minister for Justice and Equality* (Unreported, High Court, O'Regan J., 23rd February, 2017).

2. Mr. Whelan submits that my decision in *Rughoonauth* (No. 1) is incorrect and needs to be revisited in the light of that subsequent jurisprudence. I have also heard from Mr. David Conlan Smyth S.C. (with Mr. Alexander Caffrey B.L.) for the respondent. I refused the application *ex tempore* on 3rd April, 2017 and now set out more formal reasons for having done so.

Does the court have jurisdiction to make the order sought?

3. The first issue is jurisdiction to make the order sought. The application arises in circumstances where the order has not been perfected. The question is whether I can reopen the judgment. The respondent submits that I do not have such jurisdiction, and that the appropriate course is simply for the order refusing leave to be perfected and for the applicant to seek leave to appeal. On a first principles basis it seems more convenient and more deferential to the appellate courts to take the view that the jurisdiction to review a decision before perfection of the order, illustrated by *Re McInerney Homes Ltd*. [2011] IEHC 25, is wide enough to cover this sort of application because otherwise, in this type of situation, one would be required (assuming that there was merit in the point) to refuse the application and to require the matter to go on appeal for the decision to be set aside and for the matter to be potentially reheard either on appeal or by way of remittal. That does not seem a terribly convenient procedure, and seems to add to rather than diminish the workload of the appellate courts. Thus all other things being equal I would be inclined to view the jurisdiction to review a decision before perfection of the order as wide enough to encompass the sort of application being made here, so that a ruling can be revisited if there is a submission that the law has been clarified, developed or changed by reason of an appellate decision shortly after a High Court ruling was orally pronounced but before the order was perfected. Such an approach does not open the floodgates for any and every decision to be potentially open for reargument after it is handed down. The default position remains that the normally-appropriate course is for an adverse decision to be appealed. Here there are unusual circumstances namely a submission that there is what is alleged to be a conflicting appellate authority that has come into being shortly following the decision but before perfection of the order. (Of course on one view of legal theory, court decisions do not "change" the law but simply declare what it always has been, but that is perhaps best viewed as something of a legal fiction which need not concern us further here or perhaps at all.) I also emphasise that taking the view that I have jurisdiction to consider the argument that the law has developed in a material way is not to be viewed as equivalent to accepting the argument that such a development has in fact occurred, a matter to which we will now turn.

Do Luximon and Balchand mean that students' art. 8 rights must be subject to a proportionality assessment?

4. The next question is whether the Court of Appeal decisions in *Luximon* and *Balchand* mean that the rights under art. 8 of the ECHR enjoyed by those possessing student permissions must be subject to a proportionality assessment. The applicants' case is that there are substantial grounds to contend that they are settled migrants. Reliance is placed on paras. 25 and 26 of *Balchand* and on *C.I. v. Minister for Justice and Equality* [2015] IECA 192 which state that it is not the case that persons who are residing under an express permission, such as students, do not have a right to a private life such that the Minister is not obliged to consider whether the consequences of interference with that right are of such gravity that art. 8 is engaged.

5. In this case the Minister did consider the art. 8 rights of the applicants and did consider the question of whether any interference with those rights was such as to produce consequences of such gravity that art. 8 was engaged. That makes the present case fundamentally different from *Luximon* and *Balchand* where the rights were not considered at all. So if one looks at the decisions in this case, taking the first named applicant as illustrative, the Minister sets out the test in *R. (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 (consistent with the analysis of Finlay Geoghegan J. in *Luximon* and *Balchand*). Then the Minister accepts that if a deportation order is made "this has the potential to be an interference with the applicant's right to respect for private life within the meaning of art. 8 of the ECHR". The Minister then notes that the private life of the applicant in the State was formed at a time when his permission to remain was renewable and therefore precarious, or when such permission had expired, and it is also noted that the Minister was not obliged to respect the choice of place of residence of the applicant. Finally the analysis concluded that having weighed and considered the facts of the case it was not accepted that any such potential interference would have consequences of such gravity as potentially to engage the operation of art. 8. As a result, the decision to deport the applicant did not constitute a breach of the right to respect for private life under the ECHR. A similar reason process was adopted for the second named applicant.

6. It is true that the Minister's decision in this case did make reference to my decision in *Balchand* which was reversed on this point (and, separately, upheld on the issue of whether there is a need for published guidelines) by the Court of Appeal, but the Minister's decision is not invalid on that ground alone. I had said that the art. 8 rights of precarious individuals were minimal to non–existent. The Court of Appeal did not see matters that way; but even taking that fully into account, in the present case the applicant's art. 8 rights were clearly considered. Rather than stating that non-settled migrants had minimal art. 8 rights, it would have been more appropriate to say that only in exceptional circumstances will the removal of non-settled migrants contravene art. 8. The two

propositions are certainly theoretically distinct, as the Court of Appeal in effect stressed, although the practical outcomes are functionally similar, with the qualification that the Minister should consider such art. 8 rights as the non-settled migrant may have. The Razgar test clearly envisages that not every interference with private life amounts to an interference that requires justification under art. 8(2).

7. Mr. Whelan submits that the comments at paras. 27 and 28 of *Balchand* have the effect that a person who is lawfully present during a particular period, even if thereafter unlawfully present, must have art. 8 rights and that an art. 8(2) analysis is required in each case. The judgment in *Balchand* does not say that; it simply says that that was how the Minister treated the father in *Dos Santos v. Minister for Justice* [2015] IECA 210.

8. Paras. 26 to 28 of *Balchand* do not lay down a proposition contrary to that set out in *Rughoonauth* (No. 1); they decide that *C.I.* and *P.O. v. Minister for Justice and Equality* [2015] IESC 64 do not have the effect that persons who are here under a temporary permission have no right to respect for a private family life such that there is no obligation to consider whether there will be consequences of such gravity that art. 8 is engaged. As I have said, the Minister did consider that. *Luximon* and *Balchand* are simply not authority for the proposition that students have art. 8 rights such that an art. 8(2) proportionality exercise must be conducted either in every case or at all. So no error in the No. 1 judgment by reference to *Luximon* and *Balchand* has been demonstrated.

Is W.S. correct that students are settled migrants?

9. The next question is whether W.S. is correct to the effect that students are settled migrants. In the W.S. case O'Regan J. held that an applicant who had a student permission for a one-year period was to be regarded as a settled migrant. The relevance of whether one was a settled migrant or not would seem, from Mr. Whelan's submission, to be that settled migrants would have a stronger claim that the level of interference with their art. 8 rights would be such as to require justification by way of proportionality analysis under art. 8(2).

10. An unfortunate situation has developed in relation to the W.S. case which is that neither my decision in *Rughoonauth* (No. 1) nor other relevant authorities and materials were open to O'Regan J. Mr. Whelan (who was also counsel for the applicant in W.S.) suggests that the No. 1 judgment may not have been brought to her attention because of a view that the decision could not survive the Court of Appeal judgment in *Balchand*, and that it may be that it was assumed that the Minister took a similar view; but that seems to me to be a self-fulfilling prophecy. That failure to inform the court of a decision has resulted in a subsequent decision going the other way which is now being produced to allegedly demonstrate that the original decision was incorrect.

11. That is self-evidently not an appropriate procedure. Nor is it appropriate for a party or those acting on behalf of a party to take it upon themselves to come to the view that a decision of the court is wrong to the extent that it need not be mentioned.

12. The consequences of that inappropriate procedure having been adopted are that O'Regan J. made a decision without access to relevant material, and consequently something of a conflict of authority has come about. Both sides in the present case accept that the material should have been open to O'Regan J. Mr. Conlan Smyth (who also appeared for the respondent in W.S.) emphasises that he was not personally involved in the correspondence on this issue that took place in W.S. prior to the hearing because he was only brought into the W.S. case the day before the hearing, and I fully accept in those circumstances that he cannot be faulted given that his attention was not directed to this issue in the context of that case.

13. W.S. was a case where O'Regan J. held that if a lawful permission existed, private life rights required consideration but not necessarily a proportionality analysis; and again that is what happened here. The art. 8 rights were considered and a proportionality analysis was held not to be necessary, so the outcome of W.S. and the ratio of the decision is not contrary to my ruling in the No. 1 judgment here. O'Regan J. does describe students availing of a permission as settled migrants at para. 22, and if one looks at para. 12 of W.S., O'Regan J. appears to equate settled migrants with lawful migrants; but doing so is not decisive in terms of the outcome of that case.

14. However, obviously the logic of my decision in the No. 1 judgment is that the view that students are settled migrants is respectfully not a categorisation that I can follow. Such an approach overlooks a number of matters.

15. Firstly I can start with the U.K. Immigration Act, 2014. Under s. 19 of the U.K. Human Rights Act, 1998, British legislation must be certified by the executive as being ECHR-compatible, so we do know that it is the view of the U.K. law officers that the provisions of s. 19 of the 2014 Act are consistent with the ECHR. This is perhaps a helpful example of the point made by Prof. Fiona de Londras in Laura Cahillane, James Gallen and Tom Hickey (Eds.), *Judges, Politics and the Irish Constitution* (Manchester, 2017) p. 12, that questions of interpretation may be illuminated by opinions of law officers as well as purely by judicial decision.

16. Section 19 inserts a new Part 5A in the Nationality, Immigration and Asylum Act 2002 which includes a new s. 117B with the cross-heading "*Article 8: public interest considerations applicable in all cases*". Sub-section (4) of that section says that "*little weight should be given to (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully*". Sub-section (5) goes on to say "*[l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious*".

17. The U.K. legislation thus makes an express distinction between persons who are in the state unlawfully and persons who are in the state precariously which obviously from its context means lawfully but precariously. That conclusion was emphasised in the judgment I gave in *Li v. Minister for Justice and Equality* [2015] IEHC 638 and in *Rughoonauth* No. 1 and it also emerges very clearly from a decision of the U.K. Supreme Court in *Agyarko v. the Secretary of State for the Home Department* [2017] UKSC 11 which is a judgment delivered on 22nd February, 2017, the day before the judgment in *W.S.* A number of paragraphs of the judgment of Lord Reed are instructive in that regard.

18. At para. 49 he refers to *Jeunesse v. Netherlands* (Application no. 12738/10, European Court of Human Rights, 3rd October, 2014) , a judgment of the Grand Chamber, where the court emphasises that it has said consistently that the "*earlier judgments of the court, that an important consideration when assessing the proportionality under Article 8 of the removal of non settled migrants from a contracting state in which they are family members, is whether family life was created at a time when the persons involved where aware that the immigration status of one of them was such that the existence of that family life within the State would from the outset be 'precarious'*".

19. I pause there to note the phrase "*immigration status* [being] *precarious*"; not that the person has no immigration status but that they have an immigration status - by inference therefore some form of lawful status - but that it is precarious.

20. The U.K. Supreme Court goes on then to note that the Strasbourg court in that situation held that it is likely only to be in

exceptional circumstances that the removal of the non-national family member would constitute a violation of art. 8 (para. 108 of *Jeunesse*).

21. Despite the fact that the Strasbourg Court considers that removal of non-settled migrants creates a violation only in exceptional circumstances, art. 8 seems to have developed a life of its own, at least in Irish immigration practice, and seems to be wheeled out at any possible opportunity. That is a matter I will come back to, but it is an approach that is totally incompatible with the settled ECHR caselaw which provides that a violation arises in such circumstances only exceptionally where an applicant does not have both a lawful and a settled immigration status.

22. In para. 50 of the judgment in *Agyarko*, Lord Reed refers to the official instructions under U.K. immigration rules which direct that consideration be given to all relevant factors, including whether the applicant formed a relationship with their partner at a time when they had no immigration status or when this was precarious, and again that is absolutely explicit that unlawfulness and precariousness are two entirely separate things. One can have no immigration status or alternatively one can have immigration status but be precarious. The U.K. Supreme Court goes on to say that that instruction is consistent with the caselaw of the Strasbourg Court such as *Jeunesse*. At para. 51 Lord Reed says "*[w]hether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration [i.e., less weight being given to the unlawful or precarious] depends on what the outcome of immigration control might otherwise be*", again emphasising the very limited art. 8 rights of those who are either unlawful, or lawful but temporary and hence precarious. Para. 53 of the judgment refers to the reference in the instruction "*to full knowledge that their stay here is unlawful or precarious*" again making the same point and again saying that this is also "*consistent with the case law of the European court*". At para. 54 the U.K. Supreme Court refers back to *Jeunesse* to the effect that "*in cases concerned with precarious family life, it is 'likely' only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious*". That paragraph goes on to refer to persons who are in the host state unlawfully or temporarily who then seek to present the host State with a *fait accompli*.

23. To some extent one may speculate that the reason that the distinction between unlawfulness and precariousness is not discussed at greater length in the ECHR caselaw is that some things are just too clear to need spelling out and that the Strasbourg court did not anticipate an interpretation as inappropriately inventive as that being advocated by Mr. Whelan, namely equating and conflating lawfulness and settled status, gaining traction. But insofar as one can take the language used in the Convention caselaw itself, it is clear that immigration status, that is lawful status, is not equated with settled status. For example in *Balogun v. United Kingdom* (Application no. 60286/09, European Court of Human Rights, 10th April 2012), para. 51 refers to the settled immigration status of a relative of the applicant as distinct from lawful immigration status.

24. The other element overlooked by the view that "lawful" is equivalent to "settled" as urged successfully on the court in W.S. is the ordinary meaning of language. Lawful and unlawful are very different concepts to settled and precarious. According to the *Concise Oxford English Dictionary* (10th Ed., 2002) one of the connotations of "settle" is "*adopt a more steady or secure style of life especially through establishing a permanent home*". (There are less emphatic meanings such as "*begin to feel comfortable or established in a new situation*".) The definitive (a necessarily subjective assessment) 6th edition of 1976 gives the primary meaning of "settle" as "*establish or become established in more or less permanent abode or place or way of life*". One then contrasts that with precarious, which is defined in the 10th ed. as "*not securely held or in position likely to fall, dependant on chance; uncertain*" from the Latin "*precarius*" meaning "*obtained by entreaty*". The position of a person whose presence in the State is dependent on temporary permission or a series of temporary permissions is precisely that. The 1976 edition has "*dependant on chance, uncertain*" as the primary meaning, and also refers to "*(arch.) held during the pleasure of another*". Again, that is a precise description of the status of a holder of a temporary permission which may be varied as to duration at any time on behalf of the Minister (s. 4(6) of the Immigration Act 2004). It is only when such permissions or series of permissions begin to amount to a "*more or less permanent abode … or way of life*" that we can start to think about moving from precariousness to settled status.

25. If words have any meaning, a hypothesis severely challenged by Mr. Whelan, one can only be reinforced in the clear conclusion that emerges from the ECHR case law, the U.K. Immigration Act, 2014 and immigration instructions thereunder, and the view of the U.K. Supreme Court; which is one and the same interpretation I sought to give effect to in Li and in the *No. 1* judgment in this case. So while it is true that the third last sentence in para. 4 of the *No. 1* judgment in this case would need to be re-phrased having regard to the subsequent judgment of the Court of Appeal in *Balchand*, that sentence is not decisive as to the result. The basic reason why there are no substantial grounds to seek to quash the deportation orders in this case is that each applicant has been here either unlawfully or on time-limited student permissions and it was therefore clearly open to the Minister to hold that the consequences of each applicant's removal were not of such gravity as to require a proportionality assessment under art. 8(2).

26. That is sufficient to dispose of the applications. In addition, the applicants were at all times precarious even if lawful for periods, and therefore not settled migrants. W.S., insofar it took a view to the contrary, goes beyond the meaning of the ECHR in terms not warranted by the text of the Convention or its caselaw, as is abundantly clear from the U.K. Supreme Court decision and the other matters I have referred to. The court's function under this heading is to apply the ECHR, and it is thus not open to the court to extend the clear and established meaning of the Convention.

27. That conclusion is also reinforced in Committee of Ministers Recommendation R (2000) 15 on the security of residence of long-term migrants, which outlines good practice regarding securing residence for lawful migrants who have been in a given member state for over a five-year period, other than students. That again emphasises a very clear distinction between persons who are merely present lawfully and those who may be settled in a new residence of a more permanent nature by reason of permissions that are not of an inherently limited nature such as those afforded to students.

28. The broader point remains that, as I put it in my recent decision in *K.P. v. The Minister for Justice and Equality* [2017] IEHC 95, which I now need to re-emphasise in the light of the present case, art. 8 is not to be wheeled out at will as a sort of handy, all-purpose, speculative reflex action to quash an exercise of the executive power of the state to control immigration. Judicial eagerness to second guess executive decisions on such claims would be incompatible with any ordered immigration system. The extent to which private life would be affected and if applicable the balancing of such effects against immigration concerns are quintessentially matters of judgment for the Minister and not matters into which the courts can or should wade lightly. The assessment of the impact if any of deportation on art. 8 rights is a matter for the executive, and judicial review of such a decision arises only in extremely limited and exceptional circumstances.

29. The Strasbourg caselaw has been very explicit that only in exceptional circumstances could the deportation of non-settled migrants, which is the context here, give rise to breach of art. 8. These applicants have only been present on temporary student permissions. The students' scheme is explicit that one can be here only for a maximum of seven years under that system. In no

rational sense can such student applicants be viewed as settled within the meaning of the ECHR. For periods when the permissions were in force they were lawful, of course, but that does not take us into the realm of being settled migrants as that phrase is understood in Strasbourg caselaw. Students are simply not settled migrants.

30. While the final outcome in W.S. is perfectly compatible with the approach set out here, I must respectfully conclude that the element of that judgment equating lawful with settled migrants is not one that can be followed; but that view was only arrived at because a great deal of relevant material was not opened to O'Regan J. The primary onus to do so was on the part of the applicant's legal advisers in that case.

31. As I said in *M.Y.A. v. Refugee Applications Commissioner* [2017] IEHC 73, para. 17, the aspect of the principle of *stare decisis* discussed in *Re Worldport Ireland Ltd*. [2005] IEHC 189 relates to the general desirability of following a decision of a court of co-ordinate jurisdiction when arrived at after full consideration of all relevant issues. Where a previous court has not been given the courtesy of having all relevant material opened to it, and especially where such material is crucial and decisive, that principle does not apply. As I noted at para. 60 of *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686, there are five situations where a court can depart from a previous decision, the second of which is where the previous decision overlooked an important legal provision which could have been determinative, such as a statutory provision or a crucial decided case that was not brought to the court's attention.

32. There are no substantial grounds to contend that students present on permissions for up to the maximum 7-year period, or present in the State thereafter without permission, are settled migrants; nor are there substantial grounds for contending that the deportation of such persons breaches art. 8 of the ECHR in the absence of exceptional circumstances.

Order
33. Having regard to the foregoing, the order that I made on 3rd April, 2017 was:

(a). that the application to set aside the refusal of leave be dismissed;

(b). that the matter be listed for any application for leave to appeal;

(c). that costs be adjourned to the outcome of any such further application; and

(d). that it be noted that there was no application for an injunction.