THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 629 J.R.]

BETWEEN

S.O.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of May, 2017

Issues

1. Leave was afforded on the 29th July 2016 to the within applicant to maintain judicial review proceedings for the purposes of seeking an order of *certiorari* quashing the deportation order of the 27th May 2016 made against the applicant.

2. In the statement of grounds four grounds are set out however only the first two were pursued namely that the respondent erred in her consideration of the effect of the deportation order on the private life rights of the applicant and it flies in the face of common sense that the decision to deport the applicant does not constitute an interference of such gravity as to engage Article 8 of the ECHR. In addition it is claimed that the consideration of the private life rights was flawed having regard to the length of time the applicant had been in the State her level of integration and the information furnished.

3. A statement of opposition has been filed bearing the date 8th March 2017. In it the application for *certiorari* is opposed on the basis that the respondent has provided reasons and a rationale for the conclusions which are discernable from the decision and that the applicant entered the State on a finite basis with a limited right to reside and was obliged to leave at the expiry of the said permission. It is also argued that the respondent was not required to justify the proposed deportation in accordance with Article 8 (2) of the ECHR and this is appropriate as the respondent had concluded on the individual facts of the within case that the potential interference did not have consequences of such gravity as to engage the operation of Article 8. The respondent also argues that upon expiry of the applicant's permission, she remained in the State illegally and accordingly the respondent applied the correct test, i.e. the applicant's position was precarious as distinct to that of a "settled migrant".

4. At the opening of the hearing of the application the applicant contended that the deportation order of 27th May 2016 could not be condemned if the entirety of the applicant's stay in Ireland was considered precarious. In this regard the applicant submits that in fact during the currency of her period of permission she was a settled migrant.

5. Although in written submissions the respondent argued that even if the applicant might be considered a settled migrant nevertheless the decision should not be impeached, however, this aspect of the opposition to the applicant's application was withdrawn at the opening of the matter and the respondent suggested that if it was considered that the applicant was a settled migrant for some or all of a period of residence within the State then the respondent would not seek to support the decision and to this end the respondent argued that notwithstanding the applicant's student status within Ireland continuously for a period from 10th December 2007 until 30th September 2012, nevertheless the applicant was in a precarious status throughout that period and was not considered to be a settled migrant.

6. Both parties therefore agree that the status of the applicant as a settled migrant or as precarious is dispositive of the within proceedings and both parties refer to the judgment of Lord Reid in *Agyarko v. Secretary of State for the Home Department* [2017] 1 WLR 823.

7. At para. 54 of the Lord Reid judgment aforesaid it is stated:

> "As explained in para 49 above, the European court has said 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."

8. This Court delivered judgment in the matter of *W.S. v. the Minister for Justice and Equality* [2017] IEHC 128 on 23rd February 2017 and it was held that the applicant was a settled migrant in Ireland for the one year period for which he had student permission and the applicant relies on this judgment in support of her submissions. On the other hand the respondent argues that the judgment in *W.S.* should not be followed as same was made in the absence of information being made available to the court namely:

> (a) the judgment of Humphreys J. delivered on 14th November 2016 in *Rughoonauth v. Minister for Justice and Equality* [2016] IEHC 656 and
>
> (b) legislation introduced in 2014 in the United Kingdom.

9. In addition the respondent argues that *W.S.* should not be followed because of an error within the body of the decision namely at para. 22 thereof where it is stated that the Court of Appeal recognised in the judgment of *Balchand v. The Minister for Justice and Equality* [2016] IECA 383 and *Luximon v. The Minister for Justice and Equality* [2016] IECA 382 that student permission can be considered within the concept of a settled migrant.

10. The respondent is correct in identifying the error in para. 22 of the judgment of *W.S.* aforesaid (albeit by the omission of a single word, in error) and for this reason as well as because the information aforesaid was not brought to the court's attention in advance of the delivery of the judgment in *W.S.* this court agreed to re-visit the concept of students coming within the ambit of the settled migrant bracket for the purposes of the Article 8 assessment.

11. During the course of the hearing neither party developed any argument further in respect of the deportation order decision but

rather confined their submissions to whether or not the application of the concept of "settled migrant" applies to the applicant student or not.

Brief background
12. The applicant was born in 1985 and is from Mauritius. She arrived in Ireland on 15th October 2007 on a visa. Subsequently as and from 10th December 2007 she secured student status – stamp 2 status. This permission was renewed annually and ultimately expired on the 30th September 2012.

13. It is common case that the applicant lived in Ireland for a period prior to coming into force of the student scheme of the 1st January 2011 which provides that an overall maximum period of seven years of student permission would be available within this jurisdiction save in certain exceptional circumstances. When the applicant first secured student permission in 2007 such scheme was not in place nor was a similar type scheme limiting the duration of the student within the jurisdiction in place.

14. On 27th February 2013 the applicant applied to the respondent for a change of permission status to that of stamp 4 permission. Subsequently on 12th April 2013 the applicant applied for a temporary stamp 4 permission to work pending the decision to be made in respect of the application of 27th February 2013. By decision of the 9th of September 2013 both applications were refused.

15. It is clear from details in the applicant's application for permission to work aforesaid that notwithstanding the expiry of her student permission in September 2012 the applicant continued to work in the State. Accordingly the applicant's residence in this State as and from the 30th September 2012 can be considered to be without permission and the applicant has been working at least for some time within this jurisdiction without permission in defiance of Immigration legislation. In this regard s. 5 of the Immigration Act 2004 provides:

> "(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.
>
> (2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

16. Although there are exception to s. 5 (2) above in subs. 3 these exceptions do not apply in the instant matter.

Submissions
Rughoonauth

17. In the *Rughoonauth* (No.1) judgment aforesaid the applicants were students from Mauritius who overstayed their permission since 2012 and 2014 respectively. They processed an application for leave to seek judicial review on the basis that the Article 8 consideration in the impugned decision was insufficient because of the settled migrant status claimed by the applicants. In his judgment of the 14th November 2016 Humphreys J. held that temporary student permission is precisely the sort of permission that precludes the acquisition of significant or perhaps any rights under Article 8 of the ECHR. As deportation orders had already been made the Court refused to withdraw the matter pending the Court of Appeal's decision in Balchand.

18. Following this Court's judgment in *W.S.* it appears that the applicant return to Humphreys J. and requested that he would review his initial decision. Humphreys J. agreed to consider the application on the basis that he felt the Court had jurisdiction to do so.

19. The Court posed the question:

> "Do *Luximon* and *Balchand* mean that students Article 8 rights must be subject to a proportionality assessment?"

and this question was answered at para. 8 of the judgment by stating that these Court of Appeal judgments are simply not authority for that proposition.

20. The next question the court posed was: "Is *W.S.* correct that students are settled migrants?"

21. At para. 13 Humphreys J. notes that although *W.S.* appears to equate settled migrants with lawful migrants, doing so was not decisive in terms of the outcome of that case.

22. In addition it was noted that the Article 8 rights were considered and a proportionality analysis was held not to be necessary therefore he held at the outcome of *W.S.* and the ratio of the decision was not contrary to his ruling in the judgment delivered on 14th November 2016.

23. At para. 14 Humphreys J. did indicate that the view that students are settled migrants is not a categorisation that he could follow and he believed it overlooked a number of matters including United Kingdom Immigration Act 2014 where at s. 19 an express distinction is made between persons who are in the State unlawfully and persons who are in the State precariously. The Court noted that this legislation was supported by Lord Reid in his judgment in *Agyarko*. The Court went on to consider the definition of "lawful", "settled" and "precarious". At para. 26 Humphreys J. states that the applicant was precarious even if lawful for periods and therefore not settled migrants and insofar as *W.S.* took a contrary view *W.S.* went beyond the meaning of the ECHR in terms not warranted by the texts of the Convention or its case law.

Court of Appeal jurisprudence
24. Judgments were given by the Court of Appeal on 30th July 2015 in both *C.I. v. Minister for Justice and Ors.* [2015] IECA 192 and *Dos Santos & Ors. v. Minister for Justice & Ors*. [2015] IECA 210.

25. In addition on 15th December 2016 the Court of Appeal gave judgment in the matter of *Luximon v. Minister for Justice, Equality and Law Reform* [2016] IECA 382 and also gave judgment in the matter *Balchand v. Minister for Justice, Equality and Law Reform* [2016] IECA 383.

26. The July 2015 decisions related to deportation orders made, in C.I., in respect of an applicant who is a failed asylum seeker and in Dos Santos in respect of applicants who had no permission to be in the State.

27. In the judgments of December 2016 the Court of Appeal gave consideration to whether or not the respondent is required to consider Article 8 rights raised in connection with an application for a change of permission status under s. 4 (7) of the Immigration Act 2004. In the events the applicants in *Luximon* and *Balchand* had student permission and had both applied for a change of such status to stamp 4 permission.

28. At para. 7 of *Luximon* the Court noted that the applicant had arrived in the State in July 2006 for the purposes of pursuing a course of studies and secured stamp 2 permission. Thereafter at para. 8 the Court identified the conditions attaching to stamp 2 permission. On 30th October 2012 the applicant had applied for a change to a stamp 4 permission pursuant to the provisions of s. 4 (7) however this was refused based upon the scheme which was introduced on 1st January 2011. It was specifically stated that Article 8 rights would not be considered in the context of this change of permission application.

29. At para. 15 of the judgment the Court noted that the Minister did not assert in the proceedings before the Court as a ground of opposition that the applicants did not have rights to private life or family life capable of protection either by the Constitution or Article 8 of the ECHR but rather that same would be considered at a deportation stage rather than at a s. 4 (7) application stage. At para. 28 the judgment records that it is important to recall for the purposes of the appeal the Minister did not assert that Ms. Luximon and her daughter at the time of the s. 4 (7) application did not hold rights to private life and a family life which the State was obliged to respect pursuant to Article 8 ECHR. At para. 59 the Court stated:

> "I am in agreement with the trial judge that a proposed decision not to renew a permission pursuant s. 4 (7) of a person such as Ms. Luximon who has been in the State lawfully pursuant to a s. 4 permission for several years has the potential to be interference with her right to respect her private life and family right such that it is capable of engaging Article 8 of ECHR."

30. In the judgment in *Balchand* at para. 21 the Court reiterated that what is at issue is whether or not on an application pursuant to s. 4 (7), where private life and/or family life rights are relied upon by the applicant and it is proposed not to renew a permission for a person who has been lawfully living in the State for a number of years the application is within the scope of Article 8 ECtHR or Article 8 is potentially or capable of being engaged.

31. At para. 23 of the judgment it is recorded that C.I. concerned applicants who had never lived in the State pursuant to permission and the court then goes on to quote from para. 41 of the C.I. judgment where the court observed that the ECTHR and in particular *Nyanzi v United Kingdom* (2008) 47 EHRR 18 and *Bensaid v. United Kingdom* (44599/98) (2001) 11 BHRC 297 observed that it would require wholly exceptional circumstances to engage the operation of Article 8 in relation to a proposal to deport persons who have never had permission to reside in the State. The Court of Appeal also noted that Article 8 does not entail a general obligation for a State to respect the immigrant's choice of the country of their residence and, thereafter, para. 41 of C.I. concluded with a statement that "in order to engage Article 8, the gravity of the consequences for an illegal immigrant or for his physical or moral integrity must be above the normal consequences…".

32. At para. 24 of *Balchand*, the Court of Appeal states that the comments in C.I. were made in relation to persons who never had permission to be in the State and the court noted that neither that judgment or the Supreme Court judgment in P.O. v. Minister for Justice and Equality [2015] IESC 64 considered the position of a person "such as the father or the mother herein who had been in the State pursuant to an express permission, albeit one with conditions attached which would limit the duration of any such stay".

33. At para. 27, in *Balchand*, the Court of Appeal noted that the father in the case of Dos Santos had a valid work permit for a one year period and, thereafter remained without permission and the court noted as it did already in the Dos Santos judgment at para. 24, that the Minister's examination of the file acknowledged a private right created during the lawful period of Mr. Dos Santos.

34. Although, therefore, it is correct to say there is an error in para. 22 of *W.S.*, the error is in fact the omission of the word "implicit" prior to "recognition of the Court of Appeal in *Balchand* and *Luximon* that a student permission can be considered in the concept of a settled migrant…".

35. The respondent argues that any such implicit recognition by the Court of Appeal is implicit only and in any event obiter and therefore should not constrain this Court nevertheless I remain of the view expressed in para. 22 of *W.S.* subject of course to the clarification/amendment by incorporation of the word "implicit" as mentioned above.

Additional Authorities

36. The respondent refers to the judgment of Humphreys J. in *Li & Wang v. Minister for Justice* [2015] IEHC 638 as being a matter which should have featured in the *W.S.* decision. However, that judgment concerned the application of applicants who only ever had a 90 day visitors visa to come to Ireland to visit their daughter and therefore is wholly disguisable from a party who has student permission such as the within applicant for a period of almost five years continuously albeit on the basis of successive permissions on an annual basis.

37. Similarly the UK Supreme Court in its judgment of 22nd February, 2017, in *Agyarko* was dealing with permission limited to an initial visitor visa only and, therefore, in my view does not advance a debate as to whether or not student permission can give rise to a settled migrant's status.

38. Although it is noted at para. 27 of *Rughoonauth*, the committee of Minister's recommendation 2015, on the security of residence of long term migrants, excludes students from category 1 of three categories nevertheless students are not excluded from the next two categories and in addition Council Directive 2003/109/EC in dealing with long term residence status in a Member State provides at Article 4(2) that only half of the period of residence for study purpose or vocational training may be taken into account in the calculation of the period of, inter alia, the five year requirement to secure long term residence status. This Directive, therefore, does not appear to support a contention that students are, at all times, precarious.

39. The judgment of the European Court of Human Rights in the matter of *Jeunesse v. Netherlands* (App. No. 12738/10) (2015) 60 EHRR 17, was also referred to by the respondent, in addition to the cases referred to in the *W.S.* matter, however, the applicant argues that this case does not advance the query currently under consideration as it dealt with failed asylum seeker. I agree with the applicant – the claimant in that matter was allowed to live in Holland pending his asylum application. The Court stated; "This cannot be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country".

40. The respondent referred to the European Court of Human Rights decision in *Butt v. Norway* (47017/09), a judgment of 4th March,

2013. The respondent relies on the case to support the proposition that although a party may have had permission, subsequent illegal status within a particular State will give rise to a loss of the settled status that might arise on foot of the permission.

41. At para. 78 of the European Court of Human Rights judgment aforesaid it is stated:-

> "The court therefore agrees that the Government that the applicants could not be viewed as 'settled migrants' as this notion has been used in the case law."

42. The applicant points out that permission was secured in that matter based on dishonest representations where permanent residence status was removed once the dishonesty was discovered and therefore if one discounts the permission that was secured on a dishonest basis, it appears that the applicant in that matter in fact held permission from February 1992 until the summer of 1992, only.

43. In the circumstances I am not satisfied that the case advances the respondents' argument that:

> (1) subsequent illegal status will eliminate prior settled migrant status, or,
>
> (2) the status of an applicant at the date of any application will be the relevant status for the purpose of the decision maker.

44. The respondent refers to the judgment of the Court of Third Chamber of 18th October, 2012, in the matter of Case C-501/10 *Staatssecretaris van Justities v Mangat Singh*, in particulars para. 46 and 47 thereof. Paragraph 46 noted that Directive 2003/109 in its preamble stated that it is the duration of the legal and continuous residence of five years which shows that the person concerned has put down roots in the country and, therefore, the long term residence of that person.

45. Para. 47 then goes on to state that in the light of the objectives of the Directive, Article 3(2) excludes third country nationals who are lawful and possibly continuous in nature but such party's residence does not *prima facie* reflect any intention on the part of such nationals to settle on a long term basis.

46. In addition, the respondents refer to para. 32 and 33 of the opinion of Mr. Bot in the *Singh* case aforesaid, to the effect that the duration of the stay of the third country national in the Member State reveals the intensity of the links established and after a period of residence which is sufficiently long and continuous such third country national has expressed his intention to settle permanently and is shown that he has put down roots in the State. Mr. Bot opines that the longer the period of residence in the host Member State, the closer the links with that State are, presumed to be.

47. The *Singh* case and the opinion of Mr. Bot, however, were dealing with an application seeking the issue of a long term EC residence permit by Mr. Singh and do not deal with the concept of who might come under the umbrella of "settled migrant" which is outside the scope of that Directive and in the event does not apply to Ireland.

Conclusion

48. By reason of the foregoing matters and for the reasons outlined in the judgment in *W.S.*, subject to the clarification/amendment to para. 22 thereof by the inclusion of the word "implicit" as herein before outlined, student permission such as that enjoyed by the instant applicant from 10th December, 2007 to 30th September, 2012, gives rise to the applicant being characterised as "a settled migrant" for that period.

49. As the parties limited themselves to arguments on whether or not a categorisation of a settled migrant applies to the instant applicant during the period for which he had student permission, the within judgment is similarly limited.

he within judgment is similarly limited.