THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 122 J.R.]

BETWEEN

P.C.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 16th day of February, 2017

Issues

1. The applicant secured leave on 14th March, 2016 to maintain the within proceedings seeking to quash the decision of the respondent refusing to consider the applicant's application for permission to remain pursuant to "Conclusion of 2004 Student Probationary Extension" Scheme together with declarations to the effect that she has a legitimate expectation that her application pursuant to the Scheme would be considered in full and on the basis of the criteria of the Scheme as published, and a declaration that in refusing to consider her application pursuant to the Scheme the respondent operated an unduly fixed policy.

2. In the amended statement of grounds bearing date 21st March, 2016 the applicant complains that she was excluded from eligibility solely on the basis of a strict cut-off date of 1st January, 2005. She asserts that there was an implied representation made to her that she came within the ambit of the Scheme because of two prior permissions secured and on the basis of such asserted representation she took up employment with her present employer and therefore asserts that it would be unjust to permit the respondent to resile from the representation. It is argued that by refusing the applicant the respondent applied a fixed policy amounting to an unlawful fettering of her discretion.

3. As part of the grounds to support the securing of an injunction pending the determination of these proceedings (para. 12 of the grounds) the applicant refers to her current employment as "a wonderful opportunity for her".

4. The claim is based upon the initial affidavit of the applicant on 24th February, 2016 and the exhibits therein referred to together with two further affidavits and exhibits. In her initial affidavit she states that she is a catering assistant from Mauritius and arrived in the State on 18th August, 2006 as a student.

5. According to the applicant the basis for suggesting that there was an implied representation is threefold, namely:—

> (a) The applicant attended the respondents premises in October, 2014 and secured a six-month stamp for permission. She was advised by an unnamed individual to keep an eye on the immigration website as there would be an update on the site of the applicant's kind of visa and apparently the site was updated in February, 2015. This asserted representation was not raised in the Statement of Grounds and therefore leave was not granted on this point.
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> (b) The application form which the applicant availed of to apply for an extension in October, 2012 was in fact the form then specified under the relevant Scheme and accordingly the applicant suggests that by submitting this form and securing permission to remain there was an implied representation that she was the beneficiary of the Scheme. On this basis she applied for and obtained work which has been a very positive experience for her (see para. 5 of her supplemental affidavit of 7th March, 2016).
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> (c) The applicant also complains that despite seeking documentation under the Freedom of Information legislation she cannot ascertain the basis for the granting of the permission to remain in 2012 and again in 2014, as aforesaid.

Brief background

6. The applicant was born in 1984 and arrived in Ireland as a student on 16th August, 2006.

7. Although the applicant refers, in her affidavit to an update on the website of the INIS of March, 2015, nevertheless it is clear from a perusal of the initial post in respect of the Scheme which was uploaded to the website in or about August, 2012 that the data which the applicant was relying on of March, 2015 is effectively a continuation of or update on the August, 2012 notice.

8. It appears that following the updating of the INIS website the applicant downloaded the application form and completed same on or about 25th March, 2015. She subsequently posted same to the respondent on or about 21st April, 2015. She received a letter of refusal bearing date 15th September, 2015 and was advised that the Scheme commenced on 22nd August, 2012 and ran for an 8-week period available to qualifying students, namely students residing in Ireland from before 1st January, 2015. She was advised that on an examination of the INIS records she had not been afforded an extension of permission under the provisions of the Scheme (presumably this refers to both of the permissions of 2012 and 2014).

9. Thereafter the applicant entered into communications with the respondent on the basis of seeking documents under the Freedom of Information legislation. Documents held by the INIS save for the list of students who did obtain the extension under the Scheme were afforded and the balance of the documents which the applicant sought apparently was not within the privilege of the INIS to furnish but rather these documents were held by GNIB at their offices.

10. A statement of opposition together with an affidavit of Mary Sayers of 17th October, 2016 has been filed on the part of the respondent in resisting the application. The entirety of the application is traversed and it is specifically pleaded that the applicant could never have met the eligibility requirements of the relevant Scheme. The letter to her of 15th September, 2015 was correct in every respect. Furthermore it has denied that the application which the applicant made in 2012 and/or 2014 for an extension of

permission was ever in fact received by the INIS and in particular by the personnel administering this particular Scheme. It is asserted that if the applicant had applied in October, 2012 to the Student Review Section of the INIS for an extension under the Scheme, she would not have been able to provide the necessary documentation to secure permission under the Scheme.

Submissions
11. The applicant submits that in granting her permission under the Student Probationary Extension Scheme in October, 2012 there was an implied representation that she came within the remit of the Scheme (see para. 7 of the amended statement of grounds). At para. 3 of her grounding affidavit the applicant says that she filled out the form for the Student Probationary Extension Scheme on 23rd October, 2012 and was granted the permission to remain for two years — she states that she was given the application form at the INIS offices and filled it out and submitted it when there in person.

12. It must be borne in mind that at this time, according to the applicant's evidence, she was unaware of the initial notice, which is Exhibit no. 1 of Ms. Sayers's affidavit, which of course would clearly identify to her that she was not eligible because it referred to students residing in Ireland from before 1st January, 2005. It also clearly states that students must also furnish a P60 certificate. It states that eligible students must complete the form and statutory declaration for Student Probationary Extension which was available at the INIS. Furthermore it clarifies that in order for a student to be granted an extension they must have maintained their residence as a student from first registration until the date of their application.

13. Part of the applicant's argument is to the effect that she was not a student at the time she applied on 23rd October, 2014 and was not required to produce any documents to the effect that she was a student. This in itself runs counter to the Scheme as first advertised to the public on the INIS website.

14. When questioned as to how the applicant could overcome the fact that she cannot exhibit the documents that she asserts comprised the application under the Scheme, the applicant's counsel acknowledged somewhat of an evidential deficit, however, suggested para. 3 of her initial affidavit aforesaid was sufficient to overcome this deficit notwithstanding that at all times the respondent has maintained that she did not apply under this particular Scheme.

15. Surprise was expressed that the applicant might be in a position to positively identify the Scheme under which she applied a number of years earlier in circumstances where she did not know the significance of the Scheme and had never kept a copy thereof.

16. The respondent suggests that the evidence of the applicant as per para. 3 of her initial affidavit is insufficient as she does not make any reference to having the statutory declaration notarised, nor does she make any reference to her P60 and of course for two substantial reasons she was not eligible for the Scheme in any event, namely that she was not in Ireland prior to 1st January, 2005 and at the date of her application of 23rd October, 2012 she was not a student.

17. Given the foregoing, there is a clear conflict of factual evidence sufficient to determine that the applicant hasn't established she did submit a form under the Scheme on the 23rd of October, 2012, and therefore has not established any representation to her on that date.

18. As to the applicant's complaint that no explanation is forthcoming as to why in all of the circumstances the applicant did obtain permission for a further two-year period from the 23rd October, 2012 and thereafter a further six month period, I do not accept that the lack of clarity amounts to evidence that in fact the application form which she signed in person at the INIS office was under the relevant Scheme.

19. At para. 8 of the applicant's initial affidavit of 24th February, 2016 she states that relying on the fact that the respondent had made an implied representation that the permission she had been granted for two and a half years was under the Scheme she took up employment and has been working with KSG Limited since June, 2014 which has been a wonderful opportunity for her.

20. On the basis that when she took up employment in June, 2014 she was not aware of the Scheme according to her own evidence (the only document relevant to the Scheme which she exhibits is that which was published in Spring, 2015) it would have been impossible for her to rely on the extension involved in the Scheme as a basis for taking up her employment. The applicant's counsel suggests that by taking up this employment she acted to her detriment. However she states at para. 8 of her affidavit aforesaid that working with the company had been a wonderful opportunity for her, therefore it is hard to conceive how working for this company was to her detriment. In any event, however, as in *Daly v. Minister for the Marine* [2001] 3 I.R. 513 the Supreme Court did indicate that "unfair" in the context of the Glencar principles of legitimate expectation did not amount to "detriment."

21. Both parties accept that the principles founding legitimate expectation were set out by the Supreme Court in *Glencar Explorations p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 112 as follows:—

> 1. There must be a promise or a representation, either express or implied as to how the relevant authority will act in an identifiable area.
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> 2. Such representation must be addressed or conveyed directly or indirectly to an identifiable person or group of persons.
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> 3. The expectation is reasonably entertained and it would be unfair not to require the authority to comply with the representation made.

22. In *Power v. Minister for Social & Family Affairs* [2007] 1 I.R. 543 the High Court held that when dealing with a non-statutory discretionary power, legitimate expectation will arise only if the Court thinks there is no good public policy reason why it should not arise.

23. In the instant circumstances in accordance with *Bode v. Minister for Justice & Ors*. [2008] 3 I.R. 663 it is in the interests of the common good of the State that it have the power to control the entry, residency and exit of foreign nationals, which power is an aspect of the executive power and as part of same the executive has a power to establish an ex gratia scheme.

24. In addition to the above, the respondent relies on the Supreme Court judgment in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 to the effect that an applicant might have an expectation but not necessarily a legitimate expectation. In that case it was held that the applicant knew or ought to have known that he was not eligible in respect of the relevant scheme.

25. Further in the Supreme Court judgment in Daly aforesaid it was indicated that the expectation must be objectively justifiable.

26. The applicant suggests that the decision in *Wiley* and *Bates & Moore v. Minister for Agriculture & Ors* [2012] I.R. 247 should not be relied upon as the applicants in those cases were alleging a legitimate expectation which would in fact breach a statute.

27. In the circumstances I am not satisfied that a representation was made to the applicant as contended for by her. I am not satisfied that the applicant has demonstrated that the form she executed on 23rd October, 2012 was in fact a form in compliance with the relevant Scheme. Furthermore, at para. 4 of her initial affidavit she deals with the securing of a further permission in October, 2014 and she does not suggest in this regard that that permission was afforded to her under the relevant Scheme. Even if I am incorrect in this regard, in all of the circumstances I am not satisfied that the expectation which the applicant says she had was relied upon by her to take up employment as this expectation arose, it appears, in the Spring of 2015 when the INIS website posted or updated on the Scheme. At that time the permission she had received on 23rd October, 2012 had expired and in the meantime she had secured permission in October, 2014 for a six-month period.

28. Furthermore there is nothing advanced to the Court nor was there anything advanced to the respondent which suggests that it would be unfair to the applicant that the alleged promise or representation was not fulfilled.

29. In addition to a claim under the principles of legitimate expectation the applicant makes a further argument to the effect that the policy implementing the Scheme was unlawful because of being operated in an impermissibly rigid and inflexible manner. 30. The central authority for the applicant's claim in this regard is the judgment of Hogan J. in *Ezenwaka v. Minister for Justice & Ors*. [2011] IEHC 328. In that case it was not disputed by the parties but that the appropriate type "D" visa permitting for family reunification was granted by the embassy in June, 2008 to the applicant. Neither was there any dispute but that on the strength of the visa the applicant's wife gave up her job, sold her car and moved out of her family accommodation in anticipation of a permanent move to Ireland. Tickets were purchased for the flight, which was duly taken, however when the wife and two children arrived at Dublin Airport they were advised that the relevant policy did not cover their situation and they had to return to Nigeria. At para. 19 of the judgment the Court states that the policy could not have been operated in a manner which excluded the possibility of exceptions for special cases and the parties had significantly altered their circumstances in reliance on a solemn representation made by the State that they would in principle be allowed entry. Further, confusion arose because of a misunderstanding, not involving the applicants, between the Department and the Embassy.

31. The Court did refer to the judgment of the Supreme Court in *McCarron v. Kennedy* [2010] 3 I.R. 302 where it was held at para. 67 that it would be wrong to preclude decision makers from formulating guidelines by reference to which he makes it clear he will make his decision. Notwithstanding such comment the Court also stated at para. 71 that the problem with the fourth respondent's decision was that it clearly does communicate a rigid inflexible policy. The decision related to the licensing of a firearm and the Court had earlier found that the reason and the weapon were inseparable. The Court indicated that it was difficult to draw the line between permissible guidelines and impermissible, rigid and inflexible policies.

32. This suggests an individual assessment is required to enable the Court to balance and conclude as to which side of the line the particular matter lies.

33. The respondent argues that there was in fact no inflexible application of the policy and the guidelines were clear. The State contends that the decision of the applicant was considered as is evidenced by the letter from Ms. Sayers of 15th September, 2015 when she advised that the Scheme was operated exclusively via the public officer in Burgh Quay for an 8-week period (it appears, in fact, that the Scheme concluded on or about 19th October, 2012 which was prior to the applicant attending on 23rd October, 2012). Ms. Sayers advises the applicant that the extension of permission that she received was not considered or granted under the provisions of the Scheme.

34. It is further clear that in fact the applicant did not make any representation to the respondent in respect of her position other than executing the relevant application under the Scheme on 25th March, 2015 and subsequently posting same on 21st April, 2015. Therefore, this is not a case in which the applicant made various submissions to the respondent which the respondent refused to listen to.

35. It is worth noting that in *Bode* the Supreme Court held that the terms of the relevant scheme were clearly set out in the public documents and stated that one of the requirements was continuous residence in the State with the Irish-born child. The Court held that it was the duty of the respondent to consider each application to see if it met the criteria of the scheme. As the second applicant had not provided evidence of continuous residency he failed to meet the terms of the scheme and therefore the respondent's refusal of his application was a decision made within the terms of the Scheme.

36. I am satisfied that the within matter is readily distinguishable from the case of *Ezenwaka* aforesaid — there was no solemn representation made by the State to the applicant nor had the instant applicant fundamentally altered her circumstances in the manner which the parties had in the case of *Ezenwaka.*

Conclusion

37. I am satisfied that the applicant has not established a legitimate expectation in the manner contended for in this matter and further, I am satisfied that she has not demonstrated that she has made any substantial representation to the respondent which the respondent refused to consider so as to argue that there was an impermissibly rigid and inflexible policy application.

38. In the events, therefore, the application for certiorari and the declaration sought are both refused.