Neutral Citation [2016] IEHC 656

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 668 J.R.]

BETWEEN

VIKRAM SHARMA RUGHOONAUTH AND RASHMA RUGHOONAUTH

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. The applicants are students from Mauritius who enjoyed the benefit of temporary student permissions but then illegally overstayed. The first named applicant received a permission in 2008 but has been present in the State illegally since September, 2012. The second named applicant received a permission in 2009 and has been illegally present in the State since December, 2014.

2. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

Are there substantial grounds for contending that the deportation order is contrary to art. 8 rights of the applicant?
3. Mr. Ian Whelan B.L. for the applicant submits that a person with a permission is a settled migrant. This submission is fundamentally misconceived. The ECHR case law is clear that a person whose immigration status is "*precarious*" is not a settled migrant and does not enjoy significant rights under art. 8 of the ECHR. A person who enjoys a purely temporary and transitory permission, such as for a limited period to pursue a course of study, is precisely the type of person in a "*precarious*" position that the Strasbourg court envisages (see *C.I. v. Minister for Justice Equality and Law Reform* [2015] IECA 192 (Unreported, Court of Appeal, 30th July, 2015) (Finlay Geoghegan J.) citing *Nnyanzi v. UK* [2008] 47 EHRR 18). To illustrate this point, I noted in *Li v. Minister for Justice and Equality* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015) at para. 65 that the UK Immigration Act 2014 s. 19 has identified precarious and unlawful positions separately in terms of the application of art. 8. Mr. Whelan's submission is fundamentally misconceived because it collapses this distinction and assumes that if one is not unlawful one is therefore not precarious. That is just incorrect. There are no substantial grounds for advancing this proposition. One can be unlawful, lawful but precarious, or lawful and not precarious (that is, a settled migrant).

4. Students are simply not settled migrants. A temporary student permission is precisely the sort of permission that precludes the acquisition of significant or perhaps any rights under art. 8 of the ECHR. Mr. Whelan submits that I should adjourn the present application on notice to see what happens in the Court of Appeal in its consideration of my decision in *Balchand v. Minister for Justice and Equality* [2016] IEHC 132 (unreported, High Court, 4th March, 2016). However at the same time he also submitted that the application should not be added to the list of timed-out student cases awaiting clarification of the law. I do not propose to adjourn the matter because in this case, the action taken by the Minister has progressed well beyond the refusal of a permission as in *Balchand.* Deportation orders have now been made, which was not the case in *Balchand.* That factor tips the present case strongly towards finality at this point. In the present context, persons whose only basis for presence in the State is a student visa do not enjoy anything more than minimal art. 8 rights, if they enjoy any at all. Furthermore the applicants were illegally present for substantial periods prior to the initiation of these proceedings, during which they certainly could not be said to be settled migrants. Substantial grounds for contending that the deportation order is invalid have not been demonstrated.

Are there substantial grounds for contending that the Minister failed to weigh humanitarian considerations correctly or give reasons?
5. Mr. Whelan also complains of a lack of reasons or disproportionality, insofar as that in rejecting the application for leave to remain, the Minister stated that the humanitarian considerations in the case were not of sufficient weight so as to preclude deportation. This is a perfectly legitimate finding. No rights of the applicants are engaged or interfered with. The Minister is considering an essentially *ad misericordiam* application, and is entitled to reject such an application in terms such as those adopted here. The complaint of lack of reasons or disproportionality lacks substantial grounds.

Are there substantial grounds for contending that the decision is disproportionate in terms of the test in Heaney v. Ireland?
6. Finally Mr. Whelan complains that the decision lacks in statements such as that "no less restrictive process was available". Firstly it is not for the applicant to dictate the form of a decision. Secondly no particular formula is required in decisions of this nature. More fundamentally, proportionality as laid down in *Heaney v. Ireland* [1994] 3 I.R. 593 and *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 presupposes and requires that the decision be one which interferes with rights. That is not the case here. The applicant is illegally present in the State "*for all purposes*" by virtue of the Immigration Act 2004.

7. No substantial grounds have been demonstrated for the proposition that the deportation orders are invalid.

Order.
8. For the foregoing reasons I will order

(i). that the application for leave to seek judicial review be refused;

(ii). that the matter be adjourned to enable the applicants to consider any application for leave to appeal, which if made should be on notice to the respondents; and

(iii). that the applicant serve the CSSO with a copy of this judgment in any event within 7 days.