[2019] IEHC 879

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 132 J.R.]

BETWEEN

HARINI HARISH

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of December, 2019

1. The applicant arrived in the State from India on 10th December, 2014 on a student permission lasting one year. She then obtained a graduate student permission stamp 1G for a further year, which expired on 2nd October, 2016. From that point onwards, she lived illegally in the jurisdiction and indeed worked illegally here, contrary to the criminal law of the State.

2. The applicant is thus an over-stayer; but contrary to some perceptions, over-staying is not a victimless wrong. This form of behaviour makes it more difficult for the State to grant similar student or temporary permissions to other persons who may apply in the future and who are by definition persons who are not before the court and whose interests therefore go unrepresented and unheard. Those interests are nonetheless very real and cannot be ignored. The integrity of the immigration system, as the applicant's counsel concedes here, includes the concept of the interests of other immigration applicants. Failure by the court to allow the Minister to enforce the requirement that temporary visitors must leave can only damage the rights and interests of persons downstream who are not currently before the court but who should not be regarded for that purpose as legally or constitutionally invisible. It is worth adding that the discounting into invisibility of the legitimate interests of unrepresented parties is one of the fundamental aberrations of a self-indulgent approach to adjudication that sees only rights rather than duties, and then only the rights of the particular litigant and not of wider society.

3. After a year of illegal presence in the State, the applicant then applied for a further permission on 4th September, 2017. She was informed that permission to remain (at that point in the process) had to be dealt with in the context of a proposal to deport, which proposal was made under s.3 of the Immigration Act 1999 on 11th September, 2017. She then made submissions on foot of that proposal but a deportation order was made on 21st January, 2019. It required her to leave the State by 16th March, 2019, which she failed to do. Instead she applied for judicial review on 11th March, 2019 seeking *certiorari* of the deportation order. In that regard I have received helpful submissions from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicant and from Mr. Mark William Murphy B.L. for the respondent

Jurisprudential developments relevant to the case

4. A potted history of the slightly tangled recent jurisprudence on this issue will be of assistance in explaining how this matter is to be resolved.

5. On 14th November, 2016, I dismissed an application for leave to seek judicial review in respect of students who made the implausible submission that a student permission gave them settled status: see *Rughoonauth v. Minister for Justice and Equality (No. 1)* [2016] IEHC 656 [2016] 11 JIC 1414 (Unreported, High Court, 14th November, 2016).

6. On 15th December, 2016, the Court of Appeal decided the case of *Luximon v. Minister for Justice and Equality* [2016] IECA 382 [2016] 2 I.R. 725 and *Balchand v. Minister for Justice and Equality* [2016] IECA 383 [2016] 2 I.R. 749, which related to the manner in which private life should be considered in the context of renewal of permissions under the Immigration Act 2004.

7. On 23rd February, 2016, O'Regan J. in *W.S. v. Minister for Justice and Equality* [2017] IEHC 128 (Unreported, High Court, 23rd February, 2017) seemed to consider students to be settled migrants. Very unhappily, she arrived at that position because counsel failed to bring the decision in *Rughoonauth (No. 1*) to her attention: see *Rughoonauth v. Minister for Justice and Equality (No. 2)* [2017] IEHC 241 [2017] 4 JIC 2401 (Unreported, High Court, 24th April, 2017) at paras. 10-11.

8. Emboldened by the decision in *Luximon*, the applicants in *Rughoonauth (No. 1*) applied to me to set aside my decision in that case. I gave judgment in *Rughoonauth (No. 2*) on 24th April, 2017, refusing to do so. Indeed in effect I doubled-down on my original view.

9. On 24th May, 2017 in *Omwaroo v. Minister for Justice and Equality* [2017] IEHC 326 (Unreported, High Court, 24th May, 2017), O'Regan J. also in effect doubled-down on her view to the contrary; so inevitably the matter then had to be resolved on appeal. That happened a year and a half later on 5th December, 2018 in *Rughoonauth v. Minister for Justice and Equality* [2018] IECA 392 (Unreported, Court of Appeal, 5th December, 2018), where Peart J. at para. 71 said that: "*It is highly unlikely that a person here on a temporary student permission could acquire the same level of private life rights as a person to whom the description of 'settled migrant' might normally be attached, given the certain knowledge that the student has from the outset known their presence in the State is temporary only and for a limited and defined purpose*." Peart J. did disapprove of entirely rigid categorisations, and indeed one might say that it is very hard to banish exceptional circumstances from any area of the law, but that does not take from the point that it is highly unlikely that the person here on a temporary student permission could acquire the same level of private life rights as a settled migrant. The Supreme Court then refused leave to appeal in both cases: see *Rughoonauth v. Minister for Justice and Equality* [2019] IESCDET 124 and *Omwaroo v. Minister for Justice and Equality* [2019] IESCDET 155.

10. Having seen her original point knocked down so comprehensively by the Court of Appeal, and as far as leave to appeal is concerned, by the Supreme Court, the applicant here has, perhaps surprisingly, not tip-toed quietly away from the Four Courts, but instead is

leading with her chin and is trying to agitate this whole legal bottle of smoke once again. If the law is to command any public confidence, and indeed if language is to have any meaning, this sort of festival of legal obfuscation has to be brought to a definite conclusion.

Questions presented by the proceedings

11. Grounds 1-4 of the statement of grounds seem largely to be unhelpful reformulations in different language of the same point, but the questions presented by the case as set out in the applicant's legal submissions are: "*Did the respondent fall into error in the manner in which he assessed/considered the applicant's private life rights such that the deportation order made in respect of the applicant should be quashed?*" and "*Did the respondent fall into error in failing to report a proportionality assessment pursuant to Article 8 (2) ECHR to the applicant in circumstances where she was, for a time, resident on foot of a graduate visa and/or failed to provide reasons as to why, in spite of the said graduate visa the applicant was still considered as being at all material times precarious in the State?"*.

12. The issue of reasons was not hugely pressed but adequate reasons are given in the context. The fact that the applicant was unlawfully present in the State at the time of the making of the deportation order is certainly not irrelevant to the level of reasons that is required. The duty to give reasons is to give the *main* reasons for the decision, not necessarily an extravagant or detailed level of reasons that might be of interest to an applicant, and that duty was certainly complied with here. As far as reasons for considering that, despite the graduate visa, she was at all material times precarious, the reason for that is self-evident in the decision, namely, that this permission was purely a temporary permission for one year.

13. Sadly for the applicant, no illegality in the decision has been demonstrated. On these facts this applicant is not a settled migrant. She was only here for one year on a student permission, one year on a graduate permission and two years unlawfully. That comes nowhere near being a settled migrant on the ECHR jurisprudence. Helpfully, Mr. Power says that the applicant's counsel are not "*articulating that she is a settled migrant*", but he says that the Minister could not lawfully conclude that her deportation does not engage art. 8.

14. Asked what are the factors that engage art. 8 in this particular case, the best Mr. Power could come up with was:

    (i). The applicant had a period of lawful residence.

    (ii). Insofar as there was a graduate visa, it is a "*more superior type of student visa"* than a regular student visa.

    (iii). She did in fact work in the State.

    (iv). Thus, she formed ties with the State.

(v). Ties with other countries were simultaneously diminished.

15. There is simply nothing in that. Such points could apply to vast numbers of persons here on a temporary basis. It is perfectly lawful on these facts for the Minister to conclude that the applicant's ties to the State were not so intimate as to engage art. 8 of the ECHR (as applied by the European Convention on Human Rights Act 2003). There was no rigid categorisation as considered inappropriate by the Court of Appeal in *Rughoonauth*.

16. The examination of file says that "*all information submitted on behalf of the applicant has been considered and it is not accepted that any exceptional circumstances arise…having regard in particular to the fact that the status of the applicant has at all times been precarious, it is not accepted that any potential interference with her private life rights will have consequences of such gravity as to engage the operation of Article 8*". Mr. Power implausibly reads that as saying that "if you are a student you are outside art. 8". But the decision does not say that and it does not mean that. "*Precarious*" in this passage means unsettled. My own preference would be, for the simple reason that the applicants' side of the house has caused extraordinary jurisprudential confusion around the word "precarious", that the Department might consider in future using the term non-settled or unsettled, if that is what they mean. But using the term "precarious" means the same thing and does not make the decision unlawful. The statement that everything was considered engages the doctrine enunciated by Hardiman J. in *G.K. v. Minister for Justice and Equality* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 that it is up to the applicant to prove otherwise, which she hasn't done.

17. One can endeavour to summarise the legal position here as follows. In deciding whether the deportation of a migrant engages art. 8 of the ECHR (as applied by the 2003 Act), it is lawful for the Minister to have regard to:

(i). whether and to what extent the applicant's status has been settled or unsettled over the full period of presence in the State;

(ii). whether and over what period the applicant's presence is State has been lawful or unlawful;

(iii). the personal circumstances of the applicant;

(iv). whether and to what extent those circumstances involve matters causing something above and beyond ordinary disruption if the applicant is required to leave the State; and

(v). whether and to what extent the applicant's private and family life was formed at a time when his or her status was unsettled, or indeed unlawful.

18. Mr. Power in fact broadly accepts those principles but says that one can't take a categorical approach, that that should not be the totality of the analysis, and that such factors are not determinative. With that concession in mind, the case then boils down to simply whether these agreed principles were followed on the very specific facts of this

particular case. The onus to demonstrate otherwise is on the applicant. That onus has not been discharged, nor indeed has the applicant discharged the burden to displace the Minister's statement that all relevant information was considered (*G.K. v. Minister for Justice and Equality*). Finally, in any event, there is a presumption of lawfulness in the sense that an administrative decision should be read in the way that renders it lawful rather than unlawful *per* Finlay J., as he then was, in *Re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977).

19. There is simply nothing in this case, not even a point of law, because where Mr. Power's submission ended up was a totally fact-specific argument that the foregoing agreed principles were not followed in the particular wording used here. Even bearing in mind that similar language may be used in other decisions, such a situation does not make this case anything other than entirely fact-specific.

Lack of substantial prejudice

20. Even if counterfactually there was some technical infelicity in the wording here, more fundamentally this is a challenge to a deportation order and the applicant has the problem that her deportation does not breach art. 8 of the ECHR save in exceptional circumstances which do not arise here for the simple reason that she is an unsettled migrant. Thus, in any event, there is no actual breach of her rights. This follows from the Supreme Court decision in *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64 *per* MacMenamin J., citing *Nunez v. Norway* (Application no. 55597/09, European Court of Human Rights, 28th June, 2011) para. 70. As put in the respondent's submissions as para. 5.5.6, "*this is not a borderline case".*

21. Mr. Power asks "*who knows what the Minister might have decided*"; but that submission is rather undermined by the fact that he could not point to any exceptional circumstances and indeed had to concede that it was unlikely that there were any.

Order

22. Thus the appropriate order is that:

    (i). the application be dismissed; and

    (ii). the respondent be released from any undertaking not to deport the applicant.