THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 383

Finlay Geoghegan J.
Peart J.
Hogan J.

App. No. 2016/147

BETWEEN

YASWIN BALCHAND, CHANDRIKA GOPEE AND CIERON LAKSH BALCHAND (A MINOR SUING BY HIS FATHER AND NEXT FRIEND YASWIN BALCHAND)

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT delivered on the 15th day of December 2016 by Ms. Justice Finlay Geoghegan

1. This appeal is from an order of the High Court (Humphreys J.) dismissing an application for an order of *certiorari* of a decision of the Minister communicated on the 22nd October, 2014, refusing the applicants' application for the renewal of a permission and changes of status pursuant to s. 4(7) of the Immigration Act 2004 ("the 2004 Act"). The order was made for the reasons set out in a written judgment delivered on the 4th March, 2016.

2. In the order of the 7th March, 2016, the trial judge granted leave to appeal and certified that his decision involved points of law of exceptional public importance as follows:-

> (a) Whether the respondent is required in relation to an application to extend a permission the case of a person in a position to renew the application from outside the State to consider related private and/or family rights of such a person either under the Constitution or the European Convention on Human Rights.
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> (b) Whether there is an obligation imposed in law on the respondent to publish a criteria applicable under s. 4(7) of the Immigration Act 2004 to a non-EEA student with a current residence permission at the time of the application who seeks a further permission to reside in the State.

3. The High Court judgment herein was delivered after the High Court judgment in *Luximon v. Minister for Justice* [2015] IEHC 227. This appeal was heard with the appeal in *Luximon*. The approaches of the two trial judges were quite different and they reached differing conclusions. This judgment takes into account submissions made in both appeals by the parties and on behalf of the Irish Human Rights and Equality Commission as *amicus curiae*.

Background facts

4. The first applicant (to whom I will refer as "the father") is a citizen of Mauritius. He arrived in the State on the 7th December 2006, at a time when citizens of Mauritius did not require a visa to enter the State. He registered for studies and was granted a permission to remain in the State with student conditions referred to as "Stamp 2" conditions or permission. The father married the second named applicant, the mother who is also a citizen of Mauritius in June 2008. Shortly thereafter she also arrived in the State and registered as a student and was granted a permission to remain in the State under "Stamp 2" conditions.

5. On the 17th July, 2009, their son, the third named applicant, was born in the State. He has lived his entire life in the State. It was deposed that he has never even visited Mauritius. His first language is English, which he speaks with his parents and had commenced primary school at the time of the application to the Minister, which gave rise to the contested decision.

6. The father and the mother regularly renewed their permissions to be in the State between 2006/2008 and 2013. On each occasion, the permission was renewed with "Stamp 2" conditions. This permitted them to be in the State as students; work for 20 hours during school terms and 40 hours during vacations. It does not appear that any formal permission was sought of obtained for the third named applicant, their child to be in the State. It is not clear if there is any administrative scheme in place for registration of such a child born in the State with the immigration authorities. No point has been taken in relation to this and nothing turns on that in this appeal.

7. On the 1st January, 2011, a new policy document was adopted regarding non- EEA students. It set out time limits for the pursuit of degree courses and non degree courses and an overall time limit of seven years presence in the State as a student.

8. On the 19th December, 2013, solicitors for the applicant sent a lengthy submission to the Minister seeking a variation of the permissions and to change to "Stamp 4" status which permits residence in the State with an entitlement to enter employment and receive social welfare payments and does not require the applicants to be students. At that time the father's then permission was due to expire on the 30th January, 2014. Whilst the application was expressed to be for a change of status it was also in substance an application for a renewal of permission to be in the State and was treated as such. The application indicates that the mother at the time had a permission with Stamp 2 conditions until 30th July 2014.

9. On the 22nd October, 2014, two separate decisions issued addressed to the father and the mother refusing "an extension of your

immigration permission". In each case a temporary extension of student permission up to the 3rd December, 2014, was authorised to permit each to finalise their affairs in Ireland. After that it was stated "at that stage you MUST leave the State unless you have secured another form of immigration permission".

10. It appears that by this time the mother had obtained an extension of her permission with "Stamp 2" conditions until the 18th July, 2015. This was not adverted to by the immigration official making the decision communicated by letter of 22nd October, 2014 and notwithstanding that she held such permission she was on the face of the decision required to leave Ireland by the 3rd December, 2014.

11. The application made on behalf of the applicants referred expressly to their alleged rights to respect for private and family rights pursuant to Article 8 ECHR and also to rights guaranteed by Articles 40 and 41 of the Constitution. The position of their child who was born in and had never left Ireland and was at school was relied upon and express reference was made to the then entitlement of the mother to remain in Ireland for a longer period of 18 months than the father to finish her studies and the potential disruption in their family life if the father was refused a renewal of his permission. The decision of the Minister did not refer to the alleged family or private life rights of the applicants nor to the position of their child.

12. By order of the High Court (McEochaidh J.) of the 1st December, 2014, leave was granted to seek an order of *certiorari* quashing the decisions communicated on the 22nd October, 2014, and related reliefs on a number of grounds. In relation to the primary issue on appeal, grounds 1 and 5 are pertinent and are:-

> 1. The respondent's decision to reject the applicants' application for change of status/permission to reside in the [State] on "Stamp 4" conditions pursuant to s. 4(7) of the Immigration Act 2004, is unlawful and contrary to s. 3 of the European Convention on Human Rights Act 2003, by reason of the failure to have any regard to the personal and/or family and/or private life rights of the first and/or second and/or third named applicants pursuant to Article 40.3 and/or 41 of the Constitution and/or Article 8 of the European Convention on Human Rights.
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> 5. Insofar as the respondent's policy and/or procedure is that the applicants' personal rights, including their Article 8 rights, can only be considered in the context of a proposal to deport pursuant to s. 3 of the Immigration Act 2003(sic), the said policy and/or procedure is unlawful and in breach of natural and constitutional justice in that such application is considered in the pre-deportation process when the respondent has already formed an intention to consider making a deportation order. Furthermore, such policy or procedure requires the applicants become unlawfully resident in the State in order to apply for permission to reside in the State on the basis of their family and/or private life rights, which would significantly prejudice the first and second named applicants in terms of losing their entitlement to work and thus depriving them of the ability to support themselves and their son.

13. In the statement of opposition the Minister denied the obligation to consider, when determining the application of the applicants any alleged rights pursuant to Article 8 ECHR and/or the Constitution. In addition two positive pleas were included at paras. 3 and 11:-

> 3. It is pleaded that, in deciding whether or not to grant the application made by the Applicants there was no obligation on the Respondent, having regard to the circumstances of the case, and in particular the basis upon which the Applicants had been permitted to enter and reside in the State as students, to consider any personal, family, or private rights enjoyed by the applicants, as referred to in ground (1) of the statement of grounds.
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> 11. It is pleaded that, in the event of the Respondent's proposing to make deportation orders in respect of the Applicants and their making representations on foot thereof in support of an application for leave to remain in the State, the respondent will consider all such representations and any rights the applicants may seek to assert pursuant to Article 8 ECHR and/or the Constitution.

14. It is relevant and important to both the judgment of the trial judge and the appeal therefrom to note that in her notice of opposition in these proceedings the Minister did not deny that the applicants had rights protected either by the Constitution or Article 8 ECHR. Rather, the fundamental contention in these proceedings, as in the *Luximon* proceedings, was that the Minister was not obliged to consider any such alleged rights relied upon in the application when taking a decision under s. 4(7) of the 2004 Act. Part of the reason for which the Minister so contended in each case was that it was acknowledged that the Minister would consider any such alleged rights in the event that she proposed to make a deportation order in respect of the applicants and if on notification of such a proposal they sought leave to remain in the State.

High Court judgment

15. The trial judge in his judgment recognised at para. 12 that the application raised an issue "very similar to that decided by Barr J. in *Luximon v. Minister for Justice and Equality".* In addition he recognised in that paragraph that the parents in this application did have a subsisting permission to be in the State as of the date of their application.

16. The trial judge then stated:-

> "13. On what might be termed a first principles basis, having regard to cases such as *East Donegal Cooperative Livestock Mart v. Attorney General* [1970] I.R. 317, and to s. 3 of the European Convention on Human Rights Act 2003, I would venture to hope that it would be uncontroversial to suggest that private and family rights (or any constitutional or ECHR rights) should be considered in the context of an administrative decision if two conditions are met:-
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> (i) that applicant enjoyed those rights in the first place to the appropriate threshold of substance and materiality; and
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> (ii) that those rights were in fact improperly interfered with by the decision to a material extent.
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> 14. Clearly, an applicant cannot quash a decision by reference to rights which he or she does not enjoy. Nor can a decision be quashed if it does not interfere with those rights in an unconstitutional or unlawful manner.
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> 15. To the extent that *Luximon* is to be read as incorporating the test I have just referred to, then I would have no hesitation in following such an approach. The real question is whether either or both of those conditions are met in circumstances such as the present case."

17. There are, in my view, a number of difficulties with the above approach of the trial judge. First, the Minister in these proceedings did not contend that the applicants did not enjoy rights either pursuant to or protected by the Constitution and/or Article 8 ECHR. Rather, she contended that she was not under an obligation to consider them at all when determining a s. 4(7) application and pleaded instead that they would be considered on an application for leave to remain following a proposal to deport. Second, it was not contended that the applicants did not have *locus standii* to challenge the decisions by reason of an absence of alleged rights or interference in their alleged rights.

18. On this ground alone I would allow this appeal, but as the trial judge went on to consider the conditions which he set out in para. 13 it is appropriate to consider further the appeal against his conclusions on those issues and in particular his conclusions on the question he then posed as to whether private or family rights were "engaged". He referred to the view taken by Barr J. in *Luximon* to that effect and then to a decision of this Court and of the Supreme Court given since the decision in *Luximon* in the following terms:-

> "18. Subsequent to *Luximon*, the Court of Appeal in *C.I. v. Minister for Justice, Equality*, and Law Reform [2015] IECA 192 (30th July, 2015), at paras. 42 to 46, held that, in general, persons whose situation was "precarious" did not enjoy private and family rights of sufficient weight to engage art. 8.
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> 19. Furthermore, and also after the decision of the High Court in *Luximon*, the Supreme Court gave judgment in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (16th July, 2015). In that case, both MacMenamin J. (at para. 26) and Charleton J. (at para 35) referred to the minimal art. 8 rights of persons whose situation in the State is precarious.
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> . . .
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> 21. Applying *C.I.* and *P.O.,* as I am required to do, I conclude that students who are admitted into the State pursuant to a scheme with a very clear seven-year maximum duration of permissions are persons who firmly fall into the "precarious" category, and in general, their private and family rights to remain in the State are minimal to non-existent and do not need to be considered by the Minister at any stage of the process, because they simply do not reach the level of significance required to engage such consideration."

19. The conclusion reached by the trial judge at para. 21 is stark and goes beyond what was contended for by the Minister in the notice of opposition. As I have already stated, the Minister expressly pleaded that the alleged rights of the applicants pursuant to the Constitution and Article 8 ECHR would be considered at a future stage namely prior to deportation. It is not clear what the trial judge had in mind by stating that the alleged rights "do not need to be considered by the Minister at any stage of the process". The only question at issue was whether the alleged rights had to be considered when taking a decision not to renew permission on an application pursuant to s. 4(7) of the 2004 Act.

20. I recognise that the application of what was decided by this Court in *C.I. v. Minister for Justice, Equality and Law Reform* and by the Supreme Court in *P.O. v. Minister for Justice and Equality* to the High Court decision in *Luximon* is complicated by the different ways in which the phrase "Article 8 rights are engaged" has been used.

21. For the reasons more fully set out in the judgment being delivered by me to-day in *Luximon*, it is, perhaps, more appropriate to state that what is at issue both in that appeal and in this appeal is whether or not ,on an application pursuant to s. 4(7) of the 2004 Act where rights to private life and/or family life are relied upon by an 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 ECHR or Article 8 is "potentially or capable of being engaged" such that the Minister is obliged to consider on the individual facts of the application whether the proposed decision will have consequences of such gravity for the family or private life of the applicants that Article 8 is engaged such that the Minister must then make the assessment required by Article 8(2). It is only where there are such consequences that Article 8 is engaged in the sense that term is used in *C.I.* and in the related decision in an appeal heard at the same time, *Dos Santos and Others v. Minister for Justice and Equality and Others* [2015] IECA 210 and for the most part in *P.O..*

22. The judgments in *C.I.* and *P.O.* must be considered in their relevant context. Each concerned challenges to a decision of the Minister where it was accepted that the decision of the Minister was within the scope of Article 8 ECHR. In *C.I.* and *in Dos Santos*, the challenge was to deportation orders and to the consideration given by the Minister to rights of the applicants pursuant to Article 8 following a proposal to deport. *P.O.* concerned an application to revoke a deportation order where again the Minister had considered alleged rights pursuant to Article 8.

23. *C.I.* concerned applicants who had never lived in the State pursuant to permission under s. 4 of the 2004 Act. It is important to emphasise that the *C.I.* judgment did not determine that even those applicants who had never been given permission to lawfully reside in the State did not enjoy private and family rights which required consideration in the context of a proposal to deport which was to bring to an end their residence in the State. At para. 41 of *C.I.* judgment I stated:-

> "It is important to add the following. The Minister submitted that the Court should determine on this appeal that persons such as the applicants herein, who were never lawfully present in the State (other than being permitted to enter and/or remain to pursue an asylum claim) are not capable of establishing within Ireland a private life in the sense of educational or other social or community ties potentially capable of protection pursuant to Article 8. It does not seem to me that we should do so. Firstly, as I hope demonstrated, the ECtHR has not directly addressed this question and the decision in *Nnyanzi* appears, at minimum, to deliberately leave it open. Secondly, the Minister in adopting the examination of file adopted a position, correctly in my view, having regard to s.3 of the Act of 2003 that the proposed deportation potentially constituted an interference with the right to private life within the meaning of Article 8. This approach is consistent with the current case law of the ECtHR. Nevertheless, it also appears correct to observe that in accordance with the judgments of the ECtHR, and in particular *Nnyanzi* and *Bensaid*, 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 (other than being permitted to remain pending determination of an asylum application). This appears to follow from the fact that any consideration of the gravity of the consequences of expulsion must be in the context of the long standing principles stated by the ECtHR, that Article 8 does not entail a general obligation for a State to respect the immigrant's choice of the country of their residence. This approach is emphasised by the facts of *Bensaid* and the conclusion reached by the ECtHR on its facts that Article 8 was not even engaged by his proposed removal. It appears to me that in relation to interference with a right to respect for private life it follows 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 of the impact on an individual and his physical and moral integrity of enforcement of immigration law, including deportation."

24. The above comments were made in relation to persons who never had permission to be in the State. Neither that judgment not the judgments of the Supreme Court in *P.O.* consider the position of a person, such as the father or the mother herein who has been in the State pursuant to an express permission, albeit one with conditions attached which limited the duration of any such stay.

25. "Engaging" Article 8 rights in the context in which it is used in *C.I.* means that it has been determined that the proposed decision of the Minister has consequences of such gravity for the applicant that it constitutes an interference with his right to respect for private or family right with the meaning of Article 8(1) and, hence, unless justified in accordance with Article 8(2) will constitute a breach by the State of Article 8. The issue in this appeal, having regard to the issues in the judicial review in the High Court, is whether the Minister is obliged to consider and determine whether her proposed decision not to renew permission to be in the State engages Article 8 rights in the above sense. That is a decision for the Minister and not for the court. The Minister's decision is of course subject to judicial review.

26. From my reading of the judgments of Charleton J. and MacMenamin J. in *P.O.*, the engagement of Article 8 is used in a similar context in most places. In my view, the judgments in *C.I.* and *P.O.* do not decide that persons, such as the mother and father herein who have resided in the State lawfully pursuant to an express permission granted then under s. 4 of the 2004 Act, do not have a right to respect for their private and family rights such that the Minister in determining an application to renew a permission to remain in the State is not obliged to consider the potential interference in the rights claimed by the proposed decision and, assess by reference to the individual facts, whether there will be consequences of such gravity that Article 8 is engaged in the sense used in *C.I.* and *Dos Santos*.

27. I note, in passing in reviewing my judgment in *Dos Santos* that the father in that case had initially arrived in the State in possession of a valid work permit and was granted a permission to remain in the State for approximately one year. Thereafter he had remained without permission. His examination of file on behalf of the Minister took a different form to the other members of the family who had never been granted a permission notwithstanding that he had long overstayed the period for which he had permission. As appears from para. 24 of my judgment in Dos Santos, that examination of the file acknowledged a private life created during the lawful period and then the official considered on behalf of the Minster whether the proposed interference by deportation in accordance with the applicable Article 8(2) principles was permissible.

28. Accordingly, even if the issues in this judicial review before the High Court judge required him to consider the extent of the Article 8 rights of the applicants at the time of the contested decision, it does not appear to me that the judgments in *C.I* and *P.O.* lead to the conclusions reached by the trial judge.

29. The trial judge later in his judgment considered in the alternative whether there was an interference with the applicants Article 8 rights sufficient to trigger an obligation to consider them where the Minister was proposing to refuse to renew a permission pursuant to s. 4(7) of the 2004 Act. His conclusion was that the Minister was not so obliged by reason of the fact that the Minister could require the applicants to leave and apply for permission from outside of the State.

30. I cannot agree with that conclusion. It is of course, correct to say that the Minister may require that certain applications from non residents be made from outside the State. However, s. 4(7) of the 2004 Act expressly entitles an application to be made by a person to renew a permission to be in the State and empowers the Minister to consider and if appropriate grant such a renewal of permission. In the context of s. 4 this clearly envisages an application being made from a person who is within the State. For the reasons more fully set out in the judgment being delivered in *Luximon*, the Minister is obliged to consider and determine an application received from a person in the State to renew their permission to be in the State in accordance both with constitutional principles and by reason of s. 3 of the European Convention of Human Rights Act 2003, in a manner consistent with the State's obligations under the European Convention on Human Rights.

31. It must, also be recalled that, on the particular facts of the application made on behalf of the father and the mother, the Minister's attention was specifically drawn to the fact that the mother, at the time of the application was permitted to remain in the State for a further period of eighteen months to complete her degree course and that after that it was contended she should be entitled to avail of the graduate programme scheme. An application was made that, at a minimum, the father should be given permission to remain for the same period as, if not, a break up of their established family unit with their son would occur. These applicants accordingly identified family rights which would be potentially interfered with if the father's application to renew the permission to remain was not granted.

32. On the final issue, I am in agreement with the trial judge for the reasons set out in my judgment in *Luximon* that the Minister was not in breach of any obligation in not publishing a policy or criteria according to which he would entertain an application such as that made to him in these proceedings pursuant to s. 4(7) of the 2004 Act.

Conclusion

33. The trial judge was in error in his approach to the determination of the issues raised by the statement of grounds and by the notice of opposition in this judicial review application. He was not entitled to consider and determine matters which went beyond the issues raised by the notice of opposition. In addition he drew incorrect conclusions from the judgments of this Court in *C.I.* and that of the Supreme Court in *P.O.*

34. For the reasons set out in this judgment and the judgment being delivered today in *Luximon* the applicants herein are entitled to orders of *certiorari* of the decisions communicated on the 22nd October 2014. The applicants had expressly relied upon family rights and private life rights pursuant to Article 8 ECHR. The Minister in considering the application and proposing to take a decision not to renew the permissions of the father and the mother is bound to do so in accordance with constitutional principles and by reason of s. 3 of the European Convention of Human Rights Act 2003, in a manner consistent with the State's obligations under ECHR.

35. It follows on the facts of this application that the Minster was obliged to consider the Article 8 rights contended for on behalf of the applicants. The manner in which this should be done is similar to the manner in which the Minister currently approaches a consideration of Article 8 rights in the context of a proposal to deport subject to the variation indicated in the judgment in *Luximon*.

Relief

36. Accordingly, I would vacate the order of the High Court and grant an order of *certiorari* of the decisions communicated on the 22nd October, 2014 and remit the applications for consideration and decision by the Minister.