THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 76 J.R.]

BETWEEN

DIOGO DE SOUZA AND VIKTORIJA LANGOVSKA

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 4th day of June, 2019

1. The first-named applicant's mother, Nilzene Rosa De Souza, arrived in the State on 30th July, 2007 on a one-month visitor's permission, and unlawfully overstayed thereafter. Her brother, the first-named applicant's uncle, and the brother's wife, had permission to live in the State at the time and indeed since.

2. The first-named applicant was born in Brazil in 1992 and entered the State at the age of fifteen on 10th March, 2008, along with his brother and his father. No visa was granted to him so it is to be assumed that he entered on the basis of a 90-day permission as a tourist. Such permission is conditional on the entrant being a genuine tourist. It does not appear that the first-named applicant's entry was in fact lawful because there is no indication that, at the time, he had an actual intention to return home within the 90 days, but in any event he never got permission thereafter. The father returned to Brazil in 2009 and he and the mother appear to have divorced since then.

3. The first-named applicant was served with notice of intention to deport on 17th April, 2013, and submissions were then made in response to that as envisaged by s. 3 of the Immigration Act 1999. The first-named applicant and the second-named applicant, a national of Latvia, claim to have been in a relationship since 2014.

4. There was then some lapse of time in progressing the first-named applicant's deportation and in January, 2018, the Minister sought further information in relation to the application for leave to remain. Further correspondence then ensued, including further information being provided about the relationship between the applicants.

5. No application for permission to remain in the State on the basis of the free movement directive 2004/38/EC was made by the first-named applicant prior to the making of a deportation order which occurred on 10th December, 2018. The first-named applicant was notified of that order on 17th January, 2019. Only after that, on 7th February, 2019, did it occur to the first-named applicant to make an application pursuant to the directive. That application was refused on 8th May, 2019.

6. The first-named applicant also responded to the deportation order by immediately making an application for revocation of the order pursuant to s. 3(11) of the 1999 Act on 8th February, 2019. While not yet decided, a revocation application is of course not suspensive. Not for the first time one can wonder about the unreality of a reflexive, immediate, application for revocation of an adverse decision. The attitude almost appears to be that adverse decisions mean nothing and indeed are almost welcome because they open up a second front. They allow an applicant such as this one to bring judicial review against the adverse decision and simultaneously to seek immediately to revoke that decision with the implied prospect of the cycle repeating itself *ad nauseam* if a further adverse decision is made.

7. The applicant's mother and brother also had deportation orders issued against them on 10th January, 2019. The present proceedings were filed on 8th February, 2019, the primary relief sought being *certiorari* of the deportation order. Leave was granted on 11th February, 2019 and an interim stay was placed on the deportation of the first-named applicant. The applicants' assert in submissions that the stay was continued pending a termination of proceedings but the respondent doesn't accept that such an order was actually made and indeed the perfected orders back up his position. A statement of opposition was filed on 5th April, 2019. The applicants have since applied for a review of the EU Treaty Rights refusal on 29th May, 2019. In relation to the present proceedings I have received helpful submissions from Mr. Colm O'Dwyer S.C. (with Mr. Ciarán Doherty B.L.) for the applicants and from Ms. Sarah-Jane Hillery B.L. for the respondent.

Grounds 1 and 2: alleged failure to consider free movement rights

8. The complaint under this heading is that the Minister should have considered the first-named applicant's EU Treaty Rights under directive 2004/38/EC, and in effect under the European Union (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). There is no substance whatsoever in that complaint. The procedure for applying for permission based on EU Treaty Rights is set out in the 2015 regulations and that was simply not activated by these applicants prior to the making of the deportation order, so that order simply cannot be invalid on that account.

9. Mr. O'Dwyer put forward the argument that that applicants raised facts relevant to the EU Treaty Rights claim in the course of the s. 3 submissions, and contended on that basis that the Minister should have treated this as an EU Treaty Rights application under the 2015 regulations. But an EUTR application is a specific statutory procedure, not invoked here at the material time, and it is not for the Minister to adjudicate on an application that an applicant does not make. The Minster consider all the facts raised under the appropriate headings relevant to a deportation order in the context of a process in which those points were actually made.

10. Mr. O'Dwyer fares no better with his alternative complaint that the Minister should have reverted to the applicants to explain the procedure. It is not the role of the Minister to hold an applicant's hand; but even if it is, that does not make the deportation order invalid. The applicants in their submissions to the Minister under the 1999 Act did not mention the 2004 directive, so it is pure gaslighting of the Minister to seek to challenge the legal validity of his ultimate decision based on an argument founded upon that directive (see *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018), *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018)).

Ground 3: alleged failure to carry out a lawful analysis of art. 8 rights

11. Ground 3 alleges that "*Further or in the alternative, the respondent failed to carry out a lawful (or any) analysis of the first named applicant's right to respect for his family and private life in the State under Article 8 of the European Convention on Human Rights".* This is incorrectly pleaded insofar as it does not refer to the European Convention on Human Rights Act 2003, which is the mechanism by which art. 8 of the ECHR is relevant to Irish law, but in any event, the first-named applicant was at all material times an unsettled migrant and it is well-established that deportation breaches art. 8 only in exceptional circumstances. No such circumstances have been demonstrated here.

12. The impugned decision legitimately places reliance on *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 and *P.O. v. Minister for Justice and Equality* [2014] IESC 5 [2014] 2 I.R. 485. Some sort of complaint was made that there was a lack of reference in the Minister's narrative to the judgment in *Balchand v. Minister for Justice and Equality* [2016] IECA 383 [2016] 2 I.R. 749 or the further proceedings on appeal, but the notion that decision-makers generally or the Minister for Justice and Equality in particular must write a narrative essay discussing all or any relevant caselaw is profoundly mistaken and has no jurisprudential basis whatsoever. There is no obligation on the Minister to discuss the caselaw nor in any event is there any conflict between *C.I.* and *P.O.* on the one hand and *Balchand* on the other. *Balchand* does not affect the positon that when considering art. 8 rights of unsettled migrants, deportation of such migrants only breaches that provision in exceptional circumstances.

13. A point is also made about the extent of discussion of family life as between the two applicants. But the submissions made were considered by the Minister. Again consideration is to be distinguished from narrative discussion. Some sort of complaint was made in argument about regard being had to the applicants not living together but that point is not specifically pleaded so the applicant cannot succeed on that, but in any event any such point is hardly central to the deportation decision. Furthermore, it is a fact, so it is hardly unlawful for the Minister to take it into account.

14. With all of the tedious predictability that a plea of lack of consideration generally seems to involve, the applicants' complaints in the present case regarding alleged failures of analysis discussion or narrative explanation make the tyro error of failing to distinguish lawful consideration on the one hand from extensive or indeed any narrative discussion on the other, which is not generally required in decisions of this nature.

Ground 4: alleged failure to conduct a proportionality analysis
15. Ground 4 complains that "*The respondent erred in law and fact, and/or made and relied on a finding which had no sound evidential basis in finding that the decision to deport the first named applicant does not constitute an interference with his right to respect for his family life under Article 8 of the European Convention on Human Rights".*

16. Again passing over the failure of this ground to refer to the 2003 Act, the point must be viewed in the context of the first-named applicant's status as an unsettled migrant. In those circumstances it was legitimate for the Minister to decide that a proportionality exercise was unnecessary.

17. Reliance was placed in argument on *Jeunesse v. Netherlands* (Application No. 12738/10, European Court of Human Rights, 3rd October, 2014), where reference was made to family life that was built up during a time when the applicant's presence in the Netherlands was tolerated. It is true that the first-named applicant in the present case was not actually deported for a number of years after the making of the order, but that does not amount to toleration. In any event, a member state has a wide margin of appreciation in relation to deportation decisions. Furthermore, individual European Court of Human Rights decisions are fact-specific and the ECHR is to be interpreted on a civil law basis and not a common law basis. Under s. 4 of the 2003 Act, it is the general "*principles laid down*" under the Convention that are binding, not individual decisions, however outlying. *Jeunesse* certainly falls into the outlying category. It was decided on unusual facts. The applicant lost any Dutch nationality rights on Surinamese independence, and also had a husband and children in the Netherlands who were all Dutch nationals. Only the applicant herself was proposed to be deported. Such exceptional circumstances certainly do not have a counterpart in the facts of the present case. Here, as it happens, the first-named applicant is being deported with his mother and brother so at least those elements of his family life are not being ruptured.

Ground 5: alleged error in assessment of employment prospects
18. Ground 5 alleges that "*The respondent erred in law and fact, and/or made and relied on a finding which had no sound evidential basis, by holding that the first named applicant's employment prospects were limited in light of the low levels of unemployment in the State at present as well as the fact that the first named applicant had provided payslips and evidence of employment and employment prospects*".

19. There must be a wide margin of appreciation for the Minister to assess issues such as employment prospects; and certainly no clear unlawfulness has been shown in the discussion here. There is no analogy with *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 [2016] 6 JIC 2410 (Unreported, High Court, 24th June, 2016), where the applicant's specific professional qualifications were not properly factored in. Here, without in any way diminishing them, there is nothing greatly out of the ordinary about the first-named applicant's educational attainments.

Order
20. This case demonstrates the absurd lengths to which applicants are prepared to push the logic that they don't have to do anything, can fire in any old rubbish by way of an application, and officialdom has to do all the work including addressing applications that they could have made but did not. Here there is a statutory procedure for applications for EU Treaty Rights. The applicants did not bother to activate it. They waited until the deportation order was made to do so and now seek to challenge the *validity* of the deportation order on the basis that the Minister failed to think of the point himself and to decide on an application that the applicants themselves failed to make. That is an Alice in Wonderland, my-application-means-just-what-I-subsequently-choose-it-to-mean, approach to jurisprudence that would not be entertained, let alone indulged, in any other area of the law outside the peculiar world of immigration. If the applicants have any case regarding EU Treaty Rights, that can be considered in the forum of the review application; but the present proceedings are totally misconceived and are dismissed. For the avoidance of doubt any stay on deportation is discharged.