

THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 571
[2018 No. 1055]

BETWEEN

S.A. (SOUTH AFRICA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 18th day of November, 2020

1. In December, 2018, the Court of Appeal rejected the proposition that a student permission is a grant of settled status, and that deportation of a person in possession of such a permission requires a proportionality assessment under art. 8 of the ECHR (leaving aside for such purposes the inevitable possibility of exceptional circumstances): *Rughoonauth v. Minister for Justice and Equality* [2018] IECA 392 (Unreported, Court of Appeal, Peart J. (McGovern and Baker JJ. concurring), 5th December, 2018).
2. In June, 2019, the Supreme Court refused leave to appeal: *Rughoonauth v. Minister for Justice and Equality* [2019] IESCDET 124 (Unreported, Supreme Court, 13th June, 2019); *Omrawoo v. The Minister for Justice and Equality* [2019] IESCDET 155 (Unreported, Supreme Court, 25th June, 2019).
3. One year on, the present applicant seeks to re-run the point on comparable facts, on the basis of an academic distinction between the low-water-mark of the precise wording used in the particular decision as against the high-water-mark of some of the more general language used, *obiter*, by the Court of Appeal. Unfortunately, the point is not really any more appealing the second time around.

Facts

4. The applicant was born in Pakistan in 1971 and was a citizen of that country by birth. He moved to South Africa in 2003 and was granted South African citizenship in 2005 on foot of a marriage there. He states that this resulted in the loss of his Pakistani citizenship. He divorced later in 2005. In July 2013 he states that he converted to Christianity from Islam, which he says created a danger to him from the Muslim community in South Africa from which he had to flee.
5. He arrived in the State on 19th November, 2013 but did not apply for international protection at that time. Rather he sought and was granted a student permission which was valid for the period 23rd December, 2013 to 6th December, 2016. Only when he was told that the student permission would not be extended did he apply for international protection on 6th December, 2016. That application was refused by the IPO on 7th November, 2018. On 8th November, 2018 he was refused permission to remain by the Minister for Justice and Equality, which is the decision impugned in these proceedings.
6. On 4th December, 2018 he appealed the protection refusal to the IPAT.

7. The statement of grounds was filed on 14th December, 2018 the primary relief sought being an order of *certiorari* directed to the decision of the Minister of 8th November, 2018 refusing to grant permission to remain under s. 49(4)(b) of the International Protection Act 2015. I granted leave on 17th December, 2018.
8. On 13th May, 2019 the IPAT rejected the appeal. That decision was not challenged, but the Minister has undertaken not to carry out a review of the permission to remain decision pending the outcome of the proceedings. I have now received helpful submissions from Mr. Conor Power S.C. (with Mr. Anthony Hanrahan B.L.) for the applicant and from Mr. Alexander Caffrey B.L. for the respondent.

Ground A - failure to consider the correct basis for the applicant's presence in the State

9. Ground A contends that *"the respondent erred in law in effectively treating the applicant as a person who had never been permitted to remain in the State other than pending an examination of his claim for protection when in fact the applicant had been a lawful long duration resident in the State on Stamp 2 student status for three of the five years he had been in the State and had acquired private life rights during this period which have not been considered. The respondent has erroneously applied the wrong test hearing the applicant's residence in the State as having at all times been precarious and thus requiring that exceptional circumstances be shown before Article 8 of the European Convention on Human Rights is considered to be engaged."*
10. There are unfortunately a number of misconceptions in this allegation. Pages 11-13 of the decision essentially hold that it was not accepted that any potential interference with the applicant's rights *"will have consequences of such gravity as potentially to engage the operation of Article 8(1)"* of the ECHR as applied in this context by the European Convention on Human Rights Act 2003, relying expressly on *P.O. v. Minister for Justice and Equality* [2015] IESC 64, [2015] 3 I.R. 164; and *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 192, [2015] 3 I.R. 385.
11. The context here is that the applicant's permissions were inherently transitory. A student permission is by definition time-limited because the whole premise of the scheme of student permissions is that the student is expected to leave the State at the conclusion of his or her studies. If a student permission were to be given in expectation of some kind of ongoing or even eventually permanent residence, then applicants would be subjected to vastly greater scrutiny. The inevitable restrictions on the student scheme would rapidly render it unworkable or at the least, significantly less effective. Just as the student permission is inherently temporary as indeed the Court of Appeal found in *Rughoonauth* (leaving aside exceptional circumstances), the temporary permission for the purposes of making an application for international protection is also inherently transitory. Neither give rise in normal circumstances to an expectation of settled status such as to require a proportionality assessment under art. 8 of the ECHR as incorporated in Irish law. A combination of two transitory permissions does not amount to a settled permission.

12. Thus, contrary to what is asserted by the applicant in ground A, there was no error in treating the applicant's residence in the State as having at all times been precarious and requiring that exceptional circumstances be shown before art. 8 of the ECHR would be considered to be engaged. Indeed, that is precisely the correct approach here.
13. The applicant may have allowed himself to become misled by the word "*precarious*", which is to be construed not simply as a term in a dictionary, or a concept in Irish law to be fashioned without context, but in the sense in which it is used in the Strasbourg caselaw. In that context it means presence other than by way of settled status. And settled status means where the person has been the subject of a formal grant of permission to reside in the country - reside on an ongoing basis, as opposed to purely be present on a temporary basis. Thus, in Strasbourg parlance the term "*precarious*" or equivalent terms such as uncertain or non-settled encompasses a range of situations - both presence that is wholly unlawful and presence that is lawful, but inherently temporary or time-limited, such as the permission granted by operation of law for the making of a protection application or a visitor's visa or permission for some time-limited purpose such as a student permission. Essentially the "*precarious*" category is a residual category covering all situations where the person is not "*settled*" in the sense of being the recipient of a formal permission to reside in the country.
14. The other misconception in the ground as pleaded is that during a period of unsettled status the applicant "*had acquired private life rights during this period which have not been considered.*" That unfortunately is a misunderstanding of the logic of the Strasbourg caselaw in relation to the application of art. 8 of the ECHR to the context of removal decisions. I will discuss this in more detail below, but for present purposes it is sufficient to summarise the position by saying that the kind of family and private life rights that are intended to be protected by art. 8(1) are those acquired during an applicant's period of settled residence in a contracting party's territory, leaving aside the question of exceptional circumstances. The reason why a proportionality analysis is not required, save in such exceptional circumstances, for an unsettled migrant, is that an applicant is not permitted to assert under the heading of art. 8 such personal interests as might have accrued during a period of unlawful or otherwise temporary or precarious presence. Such interests simply do not constitute the sort of "*rights*" which art. 8(1) is intended to protect and, therefore, the question of a proportionality analysis does not arise. This hopefully will become clearer below when I discuss the Strasbourg caselaw more specifically.

Ground B - criticism of wording of the decision

15. Ground B contends that "*[i]n circumstances where the Applicant was lawfully resident in the State on Stamp 2 student status for more than 3 years, the Respondent erred in law and acted unreasonably and irrationally in finding "no expectation was given to the applicant that he could form a private life in Ireland and therefore it is not open to him to seek to rely on Article 8 to circumvent the immigration rules which he would be normally subject to."*
16. A similar wording was upheld in *F.Z. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 368, [2019] 4 JIC 1223 (Unreported, High Court, 12th April, 2019), and I apply the

same approach here. A presumption of validity attaches to administrative decisions (as discussed further below), so a court should read a decision as being valid rather than invalid if that interpretation is legitimately open. Taking the decision as a whole, it cannot be read as some form of utterly blanket rejection of the applicant's submissions, not least because the possibility of exceptional circumstances is adverted to, albeit in the context of a quotation from the Supreme Court decision in *P.O.*

17. The rider about exceptional circumstances is just simply not relevant to this applicant, who is not an exceptional case and consequently cannot condemn the decision for not discussing something that would not have benefitted him.
18. More fundamentally though, it seems to me that the Minister's analysis in the passage quoted in ground B is not in fact incorrect. The point being made by the Minister is that because no expectation was given to the applicant that he could form a private life in Ireland during the period of transitory permissions, specifically student permissions, he thus could not rely on art. 8(1) to assert any interests built up in that period for the simple reason that art. 8(1) does not protect mere interests of an applicant built up during a period of unsettled status because they do not constitute "*rights*" in the sense of the ECHR save in exceptional circumstances. Now admittedly the Minister could have gone on to provide a more academically perfect statement of the law by adding something like "*an applicant may only successfully contend that art. 8(1) is engaged in respect of private and family life built up during a period without settled status in exceptional circumstances which have not been demonstrated in the present case*". However, the function of the court is not to correct the Minister's homework by awarding marks for academic perfection. The fact that the Minister did not say that this analysis does not apply to an exceptional case is irrelevant because this applicant is not such a case. It does not make any difference here and could not possibly be a ground on which the decision should be quashed.

Ground C - the approach to art. 8 ECHR

19. Ground C contends that "*the decision of the respondent is invalid and based on a fundamental error of law in circumstances where the recommendation of the 8th November, 2018 on which the decision is based concludes by stating that the applicant "could not be given permission to remain in the State under s. 49 of the 2015 Act."*"
20. The applicant also seeks to tie in the Minister's finding under the family life heading that the applicant "*could never be considered to have been allowed to settle as a result of this temporary permission.*" But the latter wording is unimpeachable for the reasons set out by the Court of Appeal in *Rughoonauth* (leaving aside exceptional circumstances which have not been demonstrated here). The applicant characterises the decision of the Minister as one involving what he pejoratively calls "*an unlawful bright line rule*" as opposed to the kind of decision which he wants which is a more discretionary, less categorical approach.
21. The major problem for this submission is of course the judgement of Peart J. in *Rughoonauth* at para. 66 to the effect that, "*I see nothing fundamentally incorrect in*

describing the position of a person whose presence in the State is on foot of a temporary and purpose-limiting student permission as being 'precarious', in the sense that under normal and foreseeable circumstances, it is known that the permission will inevitably come to end, and indeed is intended to come to an end by virtue of its specified time limitation, on the expiry of which the person will be required to leave the State."

22. Peart J. went on to point out that there are a range of kinds of temporary permission some of which might be viewed as less insecure than others. For example, the transitory permission to be present when making an application for international protection does carry with it the possibility that that application might be granted. That is true of course, but unless and until such application is actually granted, the applicant is precarious in the sense of the Strasbourg caselaw. It's worth repeating, given the confusion generated on the applicants' side of the house on this issue, that "*precarious*" is in this context not just a word in Irish jurisprudence or in the English language. It is a European term, a term of art in Strasbourg caselaw, meaning presence on a non-settled basis. As noted above, that can cover a range of situations spanning from presence that is wholly unlawful, to presence that is lawful with the as yet unrealised possibility of becoming settled. Indeed, the UK government in the Brexit context introduced the term "*pre-settled*" (reflected in *e.g.*, s. 2(b) of Scottish Elections (Franchise and Representation Act 2020 (2020 asp 6)) to cover the category of person that might be at the very upper end of the spectrum of precariousness where settled status has not as yet been granted, but where the applicant is on track for the grant of such settled status. Thus, Peart J., albeit *obiter*, drew attention to the fact that there may well be different senses of the extent to which a person's presence in a contracting party might be uncertain. However, those different senses are not relevant when we are talking about art. 8 of the ECHR because there is only one relevant sense of "*precarious*", which is its sense in the Strasbourg jurisprudence, and in that sense it means not settled.
23. Despite facing the severe difficulty that the *ratio* of the Court of Appeal judgment in *Rughoonauth* would seem fatal to this particular applicant's claim, he has combed through the judgment of the Court of Appeal and has woven together an argument based on some isolated strands of *obiter* statements. His argument centres particularly on a line in para. 67 of the judgment that "*I feel that the particular words used to describe the quality of a person's status can distract from the more fundamental question as to whether or not a particular person's residence in the State has been such as to not only give rise to the existence of Article 8 rights (question 1 of Razgar [R (Razgar) v. Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368]), but are of such gravity as to engage the requirement for proportionality under Article 8.2 ECHR."* The applicant's interpretation of this sentence is that it lays down a "*test*" which must be followed by the decision-maker, and that a decision is wholly invalid and liable to be quashed in *certiorari* if it fails to replicate this wording and analysis. That is not a plausible interpretation of this particular *obiter* comment.
24. Firstly, the Court of Appeal was talking here about viewing the question at the level of theoretical analysis. This sentence does not purport to be an empirical description of how

the Strasbourg Court goes about analysing art. 8 cases and nor indeed is it such an empirical description because the Strasbourg Court focuses very heavily on "*the particular words used to describe the quality of a person's status*" and has never in the course of its lengthy and well-established caselaw suggested that the quality of that status "*can distract*" from the question of whether a proportionality analysis is required. The applicant's interpretation of this sentence is thus wholly implausible. It seems to me that this *obiter* comment of the Court of Appeal is clearly directed to the situations where exceptional circumstances apply, which are relatively few and far between as we shall see shortly when looking at the Strasbourg caselaw more specifically. But this particular sentence is of no relevance to applicants that do not fall into the exceptional circumstances category.

25. Nor could it plausibly be interpreted as a test. It is not phrased as such. It is clearly phrased as an *obiter* statement, and in any event, it is clearly language used to convey the point that there may be cases where a proportionality examination is required notwithstanding the lack of a particular status. The applicant's implicit suggestion that this could work as a test is a non-starter if for no other reason than that the subject of the clause "*are of such gravity*" is not identified. No doubt if a decision-maker did try to reproduce this language, applicants would object to it as not amounting to a legal test and indeed they would be correct.
26. The applicant's interpretation of this isolated sentence and one or two other passages in the judgment is essentially that when we are talking about art. 8 of the ECHR we can put aside the methodology that is applied by the Strasbourg Court on a clear and consistent basis in well-established caselaw, and we should proceed on the basis that the Irish courts in December 2018 discovered a totally new methodology for analysing art. 8 cases which has never been heard of either before or since, and that Irish decisions (and presumably Irish decisions alone), are in breach of the ECHR and invalid unless that new methodology is followed to the exclusion of the approach actually adopted in Strasbourg. That is just simply not a plausible interpretation of the judgment of the Court of Appeal.
27. When we are talking about art. 8 overall, we are generally talking about well-established Strasbourg caselaw, not some outlying case that the national courts can legitimately push back against. The Strasbourg jurisprudence is very consistent in analysing whether an applicant's presence in the State is settled or precarious and in finding no violation in the latter cases, save in exceptional circumstances, and in requiring no proportionality assessment in the latter cases save in exceptional circumstances.
28. The net effect is that it does not particularly matter how grave the impact on the applicant is of being deported. That is essentially a "quantum" issue. If the applicant is unsettled at the time the private and family life was built up, then their art. 8 claims almost invariably fail. Leaving aside exceptional circumstances, they simply do not get across the "liability" hurdle, if I can put it that way. The way that the matter has been presented by the applicant here is that if a case is strong on quantum it does not matter if it is ropery on liability. That unfortunately is not a correct legal approach.

29. For the same reason, when the Court of Appeal went on to say that "*that is the question that the Minister must ask when giving consideration to whether an applicant is entitled to have private life rights assessed for proportionality and not simply (as in the case of the present applicants) determine that there is no such entitlement because the applicant has been in the State on foot of a student permission*", the only plausible interpretation of that is that the court was speaking in terms of cases that come into the exceptional circumstances category. For the reasons stated above it does not purport to be, and indeed is not, an empirical description of how Strasbourg in fact analyses art. 8 cases, because generally the basis on which the applicant has been in the state concerned is the starting point and normally for practical purposes also the end-point of the analysis. Non-settled status ("precarious") status is normally fatal to a claim under art. 8 and no proportionality assessment arises save in exceptional circumstances.
30. The fact that Peart J. in *Rughoonauth* makes this precise point expressly in para. 68 shows how implausible the applicant's interpretation of the judgment is. He said that "*while in the vast majority of cases of persons in the State on foot of a student permission, such private life rights under Article 8 as may have been acquired while here will not be such as to engage the right to an assessment (the second Razgar question) one could never rule out the possibility that in an exceptional case, such an assessment might not be required.*" That is a very clear summary of the situation and unfortunately it is fatal to this applicant because he is not such an exceptional case; so the mere fact that the Minister did not specifically add for completeness that "*the applicant is not an exceptional case to allow a different approach*" does not entitle this applicant to an order of *certiorari*.
31. If confirmation were needed, all of the above becomes even clearer when one looks at the Strasbourg caselaw in more detail. The leading caselaw is referred to under the heading "*Deportation and expulsion decisions*" at pp. 71 and 72 of the European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*, updated on 31st August, 2019. It is probably helpful to refer to the cases listed in that document to get a full overview:
- (i). *Üner v. The Netherlands*, Application No. 46410/99 (European Court of Human Rights, 18th October, 2006). The applicant had settled status, but removal was not contrary to art 8.
 - (ii). *Maslov v. Austria*, Application No. 1638/03 (European Court of Human Rights, 23rd June, 2008). The applicant had settled status and a violation of art. 8 was found. Obviously that and similar cases do not assist this applicant as a non-settled migrant.
 - (iii). *Kolonja v. Greece*, Application No. 49441/12 (European Court of Human Rights, 19th May, 2016). Again, the applicant had settled status and a violation of art. 8 was found. That doesn't help this applicant as an unsettled migrant.

- (iv). *Levakovic v. Denmark*, Application No. 7841/14 (European Court of Human Rights 23rd October, 2018). The applicant had settled status and no violation of art. 8 was found.
- (v). *Ndidi v. the United Kingdom*, Application No. 41215/14 (European Court of Human Rights, 14th September, 2017). The applicant had settled status and no violation of art. 8 was found.
- (vi). *Hamesevic v. Denmark*, Application No. 25748/15 (European Court of Human Rights, 8th June, 2017). The precise status of the applicant is not expressly set out, but he appears to have been settled. Nonetheless the complaint was rejected as manifestly ill founded.
- (vii). *Alam v. Denmark*, Application No. 33809/15 (European Court of Human Rights, 29th June, 2017). The applicant had settled status, but the complaint was rejected partly for failure to exhaust remedies and partly as manifestly ill founded.
- (viii). *I.M. v. Switzerland*, Application No. 23887/16 (European Court of Human Rights, 9th April, 2019). While the applicant's status is not specifically set out, he appears to have been settled as residence was granted on the basis of marriage. A violation of art. 8 was found. That doesn't help this applicant as an unsettled migrant.
- (ix). *Udeh v. Switzerland*, Application No. 12020/09 (European Court of Human Rights, 16th April, 2013). The applicant's status is not wholly clear, but the inference from para. 50 of the judgment is that the applicant was settled for part of his residence and was partly precarious. The applicant in this case seems to have been treated as settled in subsequent caselaw particularly *Jeunesse* discussed below. It was held that a proposed expulsion would be a violation of art. 8. But at para. 50, the court drew a distinction between two separate sets of family relationships engaged in by the applicant. In relation to one of those sets of relationships the applicant was held to be entitled to assert rights under art. 8, but the court went on to say, "[h]owever, as regards the first applicant's relationship with his new girlfriend and the birth of a child from that relationship, those facts cannot be taken into consideration in the Court's examination, given that they occurred at a time when his right to stay in Switzerland was already insecure. He is not therefore entitled to rely on this situation in the context of the present case, even if he does get married again." This very much brings out the point discussed above that interests in the private and family sphere that are acquired during a period of precarious (here described as "insecure") presence do not constitute "rights" that an applicant is entitled to assert under art. 8(1) save in exceptional circumstances - indeed they "cannot be taken into consideration in the Court's examination" - hence no proportionality assessment could be required. This is the exact sort of read-across from lack of settled status to the lack of necessity for a proportionality examination that this applicant implausibly rejects.

- (x). *Jeunesse v. The Netherlands*, Application No. 12738/10 (European Court of Human Rights, 3rd October, 2014). This is one of the limited cases that bears any relationship, however remote, to the point being made by the applicant here. The applicant in *Jeunesse* was precarious, first as a visa holder who overstayed and during that overstaying period as an unlawful resident. The court set out an important definitional point at para. 104, that “[t]he instant case may be distinguished from cases concerning “settled migrants” as this notion has been used in the Court’s case-law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8.” This is an important reminder of the point that while it is easy to slip into thinking about dictionary definitions of words like “settled” and “precarious”, these are firmly established as terms of art in the Strasbourg jurisprudence. One is not settled unless one has “already been granted formally a right of residence in the host country” and everyone else is precarious. The court in *Jeunesse* did apply a proportionality assessment and indeed found a violation, but that was because *Jeunesse* was an exceptional case. Just how exceptional is clear from para. 115, where the court noted that the applicant’s spouse and their three children all had a right to reside in the Netherlands, and that the applicant herself held Netherlands nationality at birth and then lost that nationality and became a Surinamese national, not by her own choice, but by Surinamese independence and art. 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality, of 25 November 1975. The court concluded that, “[c]onsequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.” These sort of factors take that case well into the category of exceptional circumstances, but that category is simply a world away from the present applicant’s case and has absolutely nothing to do with him. The fact that the Minister did not dabble in a discursive examination of the wilder shores of such jurisprudence does not render the decision invalid as it relates to this applicant.
- (xi). *Kwakyé-Nti et Duffie v. Netherlands*, Application No. 31519/96 (European Court of Human Rights, 7th November, 2000). The applicant appears to have been unsettled and the complaint under art. 8 was found inadmissible without any necessity for a proportionality analysis.
- (xii). *Slivenko v. Latvia*, Application No. 48321/99 (European Court of Human Rights, 9th October, 2003). The applicant was settled in Latvia as a former USSR citizen, albeit that the settled status might not be fully spelled out in the judgment. A violation of art. 8 was held to have occurred in relation to a requirement to leave on the basis of a Treaty between Latvia and Russia on the withdrawal of Russian Troops done at Moscow on 30 April, 1994. Again this and other cases involving settled migrants are of no benefit whatsoever to an unsettled applicant such as the present one.

- (xiii). *A.S. v. Switzerland*, Application No. 39350/13 (European Court of Human Rights, 30th June, 2015). Here the applicant was precarious as having been present on the basis of being an asylum seeker. There was no violation of art. 8 and the court went out of its way to draw a distinction between settled and precarious migrants. At para. 45 it repeated the point made in *Jeunesse* about the definition of settled migrants. At para. 48 it recalled a point made in *Jeunesse* at para. 108, saying that, “[a]nother important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court’s well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.” No proportionality analysis was required. This again reiterates the point that one can generally read across from the lack of status to the lack of necessity for proportionality examination, so the applicant’s claim that this is somehow unlawful dissolves yet again on even glancing contact with the actual Strasbourg jurisprudence.
- (xiv). *De Souza Ribeiro v. France*, Application No. 22689/07 (European Court of Human Rights, 13th December, 2012). The applicant’s status was precarious in the sense that the applicant arrived on a tourist visa, but there was a failure to regularise the status over a lengthy period. That, however, ultimately came down to a violation of art. 13 taken in conjunction with art. 8. The facts were highly unusual in the sense that the applicant arrived aged four months to join family members and the state had not regularised the position by the time the applicant turned eighteen. Secondly, this was not an art. 8 violation as such. A violation of art. 13 taken in conjunction with another art. of the ECHR only requires an arguable claim under that other provision, rather than an independent showing of a violation of that other provision.
- (xv). *M. v. Bulgaria*, Application No. 41416/08 (European Court of Human Rights, 26th July, 2011). The first applicant here was partly settled while the second applicant’s presence was mostly precarious. A residence permit was granted on the basis of a successful claim for asylum. In that context it was held that there would be a violation of art. 8 if the applicant was deported. That doesn’t really help this applicant.
- (xvi). *Al-Nashif v. Bulgaria*, Application No. 50963/99 (European Court of Human Rights, 20th June, 2002). A violation of art. 8 was held in the case of a settled migrant. That doesn’t help this applicant as an unsettled migrant.
- (xvii). *Ozdil v. Moldova*, Application No. 42305/18 (European Court of Human Rights, 11th June, 2019). Again, art. 8 was held to be violated in the case of a settled migrant. That doesn’t help this applicant as an unsettled migrant.

(xviii) *Kotiy v. Ukraine*, Application No. 28718/09 (European Court of Human Rights, 5th March, 2015). The applicant was a citizen of the respondent contracting party and it was held that a violation of art. 8 had occurred. That doesn't help this applicant as an unsettled migrant.

(xix). *Paposhvili v. Belgium*, Application No. 41738/10 (European Court of Human Rights, 13th December, 2016). The applicant was precarious in that he had been unlawfully present in Belgium for a fifteen-year period. The court noted at para. 224, that the assessment of art. 8 "*not only falls to the domestic authorities, which are competent in the matter, but also constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life.*" This rather important finding completely blows out of the water the necessary logical consequence of the applicant's essential submission here, which is that the Court of Appeal judgment in *Rughoonauth* should be interpreted as meaning that Irish decision-makers alone should interpret and apply art. 8 in a different manner and using a different methodology from that actually applied by Strasbourg. That approach is fundamentally misconceived. Any interpretation of *Rughoonauth* on that basis is simply implausible. It is perfectly lawful for the Minister for Justice and Equality to use the same kind of procedural methodology as Strasbourg itself uses, and indeed that is a requirement of para. 224 of *Paposhvili*. The applicant's interpretation of this paragraph is that "*this included Art. 8(2)*". It may have done in that particular case, but as a general proposition the obligation to consider art. 8(2) only arises if that provision actually applies, which almost invariably it does not in the case of non-settled migrants.

32. Apart from those nineteen leading cases, the parties also cited other Strasbourg decisions as follows:

- (i). *Balogun v. United Kingdom*, Application No. 60286/09 (European Court of Human Rights, 10th April, 2012), [2013] 53 EHRR 3. The applicant was a settled migrant and no breach of art. 8 was found.
- (ii). *Nyanzi v. United Kingdom*, Application No. 21878/06 (European Court of Human Rights, 8th April, 2008), [2008] 47 EHRR 18. The applicant was present on a precarious basis and while no violation of art. 8 was found, the applicant in the present case is keen to point out that a proportionality analysis under art. 8(2) was conducted. This may be regarded as an exceptional case where proportionality was considered, but even then it has to be noted that, at para. 76 of the judgment, the proportionality analysis is set out in the most skeletal terms, the court saying that, "*[a]s to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the*

respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them." The acceptability of this sort of modest level of reasoning provides little comfort for the applicant in his quest to have the present detailed decision quashed as wholly invalid.

- (iii). *Makdoudi v. Belgium*, Application No. 12848/15 (European Court of Human Rights, 18th February, 2020). The applicant's interpretation of this judgment in submissions is that "*lengthy periods spent in a precarious immigration position appear to have been taken into account in finding a breach of Article 8 ECHR in an expulsion context*". That submission is incorrect and mischaracterises the judgment. It is clear that the applicant was not wholly unsettled and on the contrary had positive permissions. That is patent from paras. 22 and 23 of the judgment where it is set out that the applicant obtained not only a resident's permission, but also a work permit: "*22. Suite à une demande faite le 27 mai 2013, le requérant obtint de la commune d'Ixelles, le 28 novembre 2013, une carte de séjour de type « F » en qualité de membre de la famille d'un citoyen de l'Union européenne. 23. Le 9 décembre 2013, le requérant fut engagé sous contrat de travail à durée déterminée. Ce contrat se transforma en contrat à durée indéterminée le 1er février 2014.*" Under those conditions it is no wonder that there was a proportionality analysis given that the applicant was settled within the meaning of the Strasbourg jurisprudence.
- (iv). *Sudita Keita v. Hungary*, Application No. 42321/15 (European Court of Human Rights, 12th May, 2020). Again the applicant's interpretation here in submissions is that "*lengthy periods spent in a precarious immigration position appear to have been taken into account in finding a breach of Article 8 ECHR in a failure to regularise context.*" But unfortunately again the problem for this applicant is that that submission is also incorrect and mischaracterises that judgment as well. The applicant in that case had permissions so was not unsettled. At para. 12 of the judgment, it set out that the applicant was given a residence permit and at para. 13 that he was given entitlement to healthcare and employment. At para. 21 it set out that the applicant was granted "*stateless status*" and an entitlement to healthcare and employment rights.
- (v). *Azerkane v. Netherlands*, Application No. 3138/16 (European Court of Human Rights, 2nd June, 2020). Here expulsion of a settled migrant did not involve a violation of art. 8.

33. It is clear from the foregoing firstly that Strasbourg does not generally separate a view on how an applicant's presence is to be categorised from an assessment of whether a proportionality exercise is required; and secondly, that the domestic authorities are required to analyse art. 8, by definition using Strasbourg methodology. An attempt to suggest that the decision here should be condemned because it did not recognise the

possibility of exceptions in exceptional circumstances (and indeed the survey of the Strasbourg caselaw just shows how exceptional such circumstances are), fails for a number of reasons.

34. As noted above there is a presumption of validity for an administrative decision: see *per* Finlay P., as he then was, in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977) and *per* Keane J., as he then was, in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 at 102. Furthermore, the Minister is not required to write a legal essay, conduct some sort of legal bingo or tick off key phrases: see *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98, [2018] 1 JIC 1607 (Unreported, High Court, 16th January, 2008). Denham J., as she then was, referred in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795, to the lack of a need for a “*micro specific format*” (at p. 819). In *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, at p. 600, Costello J., as he then was, held that a decision was not invalid because “*the Minister himself did not take down the Constitution ... before reaching a decision.*” The same approach was taken in *B.I.S. v. Minister for Justice Equality and Law Reform* [2007] IEHC 398 (Unreported, High Court, 30th November, 2007), at p. 17 onwards, *per* Dunne J.

Summary

35. The principles in relation to the ECHR caselaw relevant to the present application can be summarised as follows:
- (i). “Settled migrants” as this notion has been used in the Strasbourg court’s caselaw means persons who have already been granted formally a right of residence in a host country (*Jeunesse* para. 104).
 - (ii). All other migrants can be described as precarious, unsettled, non-settled, insecure or uncertain in their status (all being interchangeable terms). It is clear from the Strasbourg caselaw that non-settled status covers in essence two categories - those who are unlawfully present and those who have a lawful permission (either express or by operation of law), that is temporary and provisional in nature and falls short of a formal grant of a right of residence.
 - (iii). In general (that is, absent exceptional circumstances), asserted private and family life interests cannot be taken into consideration in the court’s examination, if they occurred at a time when the applicant’s right to stay was precarious in the Strasbourg sense, that is presence that falls short of a formal grant of a right of residence (*Udeh*, para. 50).
 - (iv). In the case of settled migrants, subsequent withdrawal of a formally granted right of residence in a host country will constitute an interference with his or her right to respect for private or family life within the meaning of art. 8 requiring a proportionality analysis. This is not so in relation to non-settled migrants (*Jeunesse* para. 104).

- (v). In the case of non-settled migrants, removal of a non-national family member will constitute a violation of art. 8 only in exceptional circumstances (*Jeunesse* para. 108, A.S. para. 48). This means that no proportionality analysis is required for the removal of non-settled migrants in the absence of exceptional circumstances. That follows logically from the applicant being unable to rely on such asserted interests or rights built up during a period of precariousness.
- (vi). The domestic authorities must conduct an analysis of art. 8 claims (*Paposhvili* para. 224). That involves using the same methodology as Strasbourg caselaw which in the absence of exceptional circumstances involves asking firstly what the status of the person was at the time the asserted private and family life was built up. It follows that there is not a mandatory duty to conduct a proportionality analysis in every case, but only where one is required by the ECHR, which is where either the person had settled status or where exceptional circumstances apply.
- (vii). A decision which (as here) concludes that such private and family rights as the applicant wished to rely on where built up at a time when he or she lacked settled status and, therefore, art. 8(1) is not infringed, is not invalid simply because the Minister did not expressly articulate that the applicant was not considered to be an exceptional case requiring a proportionality assessment (unless the applicant has demonstrated that such an implied failure to find an exceptional case was unreasonable, which this applicant has not).

Order

36. While some of the *obiter* comments of the Court of Appeal in *Rughoonauth* have been seized on by the applicant here, who has offered an implausible interpretation for them, I am very much applying the *ratio* of that decision which was at para. 73, that "*there are no substantial grounds for considering that these applicants, on the facts asserted by them, have an entitlement to a proportionality assessment.*" The same basic conclusion arises here on comparable facts, with the linguistic modification that we are at the stage of the substantive hearing rather than leave. The applicant here hasn't shown an entitlement to such an assessment. Accordingly, the order will be:

- (i). that the application be dismissed; and
- (ii). that the respondent be discharged from her undertaking not to carry out the review under s. 49(7) of the International Protection Act 2015, with effect from five days from the electronic delivery of the judgment, to give the applicant the benefit of the equivalent of the statutory right to top up submissions during the five-day period following notification of a decision of the IPAT.