An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Dunne J
Charleton J
Hogan J
Murray J

Supreme Court appeal number: S:AP:IE:2021:000149
[2023] IESC 2
High Court record number: 2020/182 JR
[2021] IEHC 521

Between

Jaimee Middelkamp
Applicant/Respondent

- and -

The Minister for Justice and Equality
Respondent/Appellant

-and-

The Irish Human Rights and Equality Commission
Amicus Curiae

Judgment of Mr Justice Peter Charleton delivered on Wednesday 1 February 2023

1. The issues as to whether any rights ever arose in favour of Jaimee Middelkamp under the European Convention on Human Rights and the nature of the letter written by Barrett J to her, explaining his reasoning, as part of his judgment, are linked. That link is the avoidable complexity of law that has removed simplicity of analysis as to where people stand in terms of immigration law, and which threatens the status of ministerial decisions with unending review.

2. While the judgment of Hogan J, with which this judgment concurs as to the result, is a model of clarity, that is because of the way the reasoning deftly negotiates issues placed by counsel for Jaimee Middelkamp in the way of the obvious disposal of this issue. There is a plain reality to this situation: Jaimee Middelkamp and her husband decided in Canada on their own destiny, decided to get married, decided that it would be to their advantage as a couple for him to be educated in Ireland, knew that they must apply for a visa, obtained a visa enabling him to study dentistry in Cork for four years, obtained a visa enabling her to work and live in Ireland for two years, knew that this latter visa was non-renewable, knew that this was the limit of what could be obtained for a foreigner seeking to reside and work in another state, could have returned to Canada and applied for another visa, could have returned to Canada and come for an ordinary 90-day stay as a tourist from time to time without limitation (save the requirement of each being a separate trip); but chose instead to claim a human rights complication where no possible analysis, and no assertion on their part to the Minister, indicates any engagement of rights, much less deprivation of her rights, on the choices made by them. This claim was made in the context of staying in Ireland and then claiming some sort of continuing right.

Duty of clarity

3. In 1823, Best J, in a case over a disputed search warrant where those searching were ostensibly assaulted, declared that judges were "bound to take care that the law relating to the duty of constables shall rest upon broad, plain, intelligible principles"; *R v Weir* (1823) 107 ER 108 at 111. Consciousness of that same duty should rest on judges in areas of law where the administration of legislation is cast upon officials of departments of government. The administration of planning law, of immigration law and of asylum law carries the same imperative: that the law should remain accessible and readily capable of being applied to the statutory framework within which public servants operate. Certainty of law is a duty cast on all branches of government. Thereby, it is required that legislation is comprehensible. Thereby, administrative decisions need to be made through concise reasons which lay out the path to a decision so that those affected will know where they stand and through what law they stand there. Thereby, judges are required to give effect to the law by an application of taking what the law says and reasoning a result in the context of the facts. But, it must be appreciated in the context of genuinely thought-out statutory intervention in the fields of immigration, planning and other branches of law that what the Oireachtas is genuinely about is the setting of defined rules in terms which may be taken in the terms in which legislation is set. Where a possible displacement in our system arises is, in contrast to continental civil law systems, in not taking the actual words of a statute as a complete answer, as a code is taken to be the sole text applied to a given set of circumstances where judges have a Roman law training. Our system does not differ. A statute is not to be taken as a foundation text for the application of imagination. If certainty of law is to remain a cornerstone of our legal system, then what the law says in terms of ordinary sense should become the point of disposal rather than the basis of an inventive argument.

4. Arising from the duty of maintaining certainty of law, it should never be necessary for a public servant to embark on what is not their role: that of issuing legal and factual analyses that are beyond the complexity that the legislation demands. Legislation is of its nature the creation of imperative requirements. Unless ambiguity indicates a difficulty in interpretation, officials should be safe in following the legislation and in a simple indication of reasons to that effect. Since it is also accepted that the reasons required of

judges hearing cases must be assessed as to adequacy by the, entirely notional, member of the public sitting at the back of the court and hearing all of the evidence and submissions, no greater duty in the analysis of an issue should be cast on a public servant in the administration of a statute; see the reasoning of Clarke CJ in *Connelly v An Bord Pleanála & Ors* [2018] IESC 31 at [5.4], [2021] 2 IR 752 at [30], which emphasised the requirement of any reasoning in an administrative decision to "enlighten any interested party as to why the decision went the way it did" and see Lord Hope in *Helow v Secretary of State for the Home Department* [2008] UKHL 62 at [1-3] as to the qualities of the reasonable and unbiased observer and as to how they would judge decisions of administrators or courts.

Circumstances

5. It is unnecessary to repeat the circumstances as set out in the principal judgment of Hogan J in relation to this Canadian couple. From the opening of the academic term in 2018, Jaimee Middelkamp's husband had a visa to study dentistry in University College Cork for a duration of four years. She applied for a working visa under a scheme negotiated with other countries, including her and her husband's home country of Canada, which enabled a visit and work to support that for up to two years. The reciprocal arrangements did not indicate, and nor did the legislation, any possibility of extension. As this two-year period of working in a Cork law firm as a paralegal was drawing to a close, she claimed a human right to stay with her husband. She cited Article 8 of the European Convention on Human Rights. She could, and should, have done precisely what Canada had negotiated on her behalf; stayed two years and returned home and asked to return separately or visited her husband on three-month holiday stints which for Canadians do not require a visa and which may be repeated. It is notable that counsel could refer to no decisions from Canada raising issues as to Irish people staying beyond the two-year working stay, either under the Canadian Charter of Rights and Freedoms, adopted in 1982, or any human rights instrument applicable in any of the other countries with cross-referable facilities.

Applicability of the Convention

6. Article 8 of the European Convention on Human Rights cannot be validly argued into this case. When someone makes a bargain on the basis of reciprocal rights proffered by their home country, that person has a duty to abide by what has been negotiated by international agreement. There are not just rights, there are also duties, including the duty of officials to uphold the clear letter and purpose of the law and the duty of those using a privilege to respect what has been conferred by international agreement. Could an Article 8 claim apply when, for instance, government officials were proposing the adaptation of reciprocal facilities? Would they have to consider, in setting a two-year limit, that some people on working visas would be married couples or have a private life to be taken into consideration in coming to Ireland? Could a person applying for a working visa just mention that they are married and that their husband/wife are likely to be in Ireland to thereby generate a complex analysis on the right of the State not to grant such a visa by turning that absolute right into yet another balancing exercise as between the entitlement of any country to refuse entry at its borders and an asserted human right? This is not a case of a person in peril of persecution or random violence, it is about civilized relations as between states and the rule of law.

7. It is right to emphasise the primacy of the Constitution over any statute and over any international instrument, outside of obligations necessitated by membership of the European Union, as Hogan J sets out so clearly in his judgment. Perhaps the reason that practitioners bring the Convention into almost every argument is that while the Constitution gives a framework for the operation of the State and is the ultimate jurisdictional limit of legal and administrative operation, it is less obviously so given the tangential operation of the Convention as legislatively expressed. Section 3(1) of the European Convention on Human Rights Act 2003 provides:

> Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

8. Since the Convention applies to "every organ of the State" (albeit that the Oireachtas and the courts are both expressly declared by s. 1(1) of the 2003 Act not to be 'organs of the State' for this purpose) and in a manner not limited by any boundaries but expanded into the performance of every function, it is natural that Article 8 comes to mind as a potentially fertile ground for contending that an official failed to consider a privacy right or a duty not to interfere with the family in granting an entitlement subject to conditions, later disputed though then accepted, or refusing any entitlement which statute mandates in clear terms. After all, legislation post-1937 is presumed compatible with the Constitution. Administrative law is there to ensure that decisions do not fly in the face of fundamental reason and common sense as to factual analysis or as to proportion and are taken on the legal basis of jurisdiction. But, as cases are now promulgated, the Convention can be argued to apply to anything done by any official of the State. From that argument can come a contention that reasoning is inadequate, that the Convention was not properly analysed in making a decision, that a proper balance was not struck or that a different balance might, even as a bare possibility, have been engaged had the asserted rights been put into the mix: endless litigation over every possible decision. From this can spring the uncertain ground whereby every case differs from every other, principles fade into a background and reasoning from officials is required at the level of jurisprudents. The Oireachtas cannot have so intended.

9. Hence, keeping to a threshold test of when the Convention is actually engaged on a human rights basis remains indispensably important. Without that threshold test, the law descends into the complications that risk driving even modern and well thought-through statutes into the uncertain ground of the assessment of balance, rather than applying the law as stated.

10. According to the State's submissions on this appeal, as a matter of routine, had this gone to actually requiring the expulsion of Jaimee Middelkamp, then humanitarian considerations, if urged by her, would have come into play. Normally, Article 8 is considered as part of that process should expulsion interfere with any asserted right to respect for private and family life in a manner that cannot be justified in accordance with Article 8(2). This argument is raised frequently by reason of the wording of the 2003 Act. But, only in the context of deportation does this, on the current case law, arise and only then if, as is always the case, a proposed deportee is given the chance to argue humanitarian considerations under s 3(3)(b) of the Immigration Act 1999. The burden of proof to show how their rights may possibly be interfered with then arises but only if the invitation to make an argument is taken up. It cannot arise in asking, the word is used advisedly as this is a request to extend a privilege, to extend a visa or to grant another

kind of visa. In that instance, a request is made of the State: human rights considerations do not arise unless in making such a request these are clearly laid before the decision-maker and the Minister is asked to take special, and clearly specified circumstances into consideration. Those considerations, if argued, must also be asserted by an applicant to extend a visa in such a way as to potentially engage, and potentially require revision of the fundamental consideration: that is the entitlement of the State to make decisions as to who is to be allowed stay on its territory absent a right derived from either citizenship of the State, or the European Union, or otherwise derived from statute. Where it is merely a question of what arrangements suit study and work, Article 8 is not engaged or, on Hogan J's view, is engaged so weakly that it is not essential to have regard to it. That is the basis of the international arrangement as between Canada and Ireland detailed in the judgment of Hogan J. Further, where a deportation order is to be made, non-citizens are entitled to raise humanitarian issues as to why they might then stay. Again, all that is called for is a factual assessment in the light of their arrangements for coming here unless they then claim a radical change.

11. The European Court of Human Rights has repeatedly stressed that "the Convention does not guarantee the right of an alien to enter or to reside in a particular country" and that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of foreign nationals; this was recently confirmed by the European Court of Human Rights in *Hoti v Croatia*, (Application No 63311/14, 26 April 2018) at [120]. For similar findings in relation to Irish law, see *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 IR 360. This was reiterated in *Haghighi v The Netherlands* (Application No 38165/07, 14 April 2009, where the court held that in cases involving such persons, the following matters require consideration:

> Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be 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. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006-I).

Principles

12. There is no general entitlement of non-nationals to choose to come to and live in any contracting state without the permission of the appropriate authorities; *Nunez v Norway* (Application No 55597/09, 28 September 2011). Barring the most exceptional of circumstances, someone coming to a country on a visa or as a tourist, with or without their family, cannot through that act of permission somehow garner to themselves exaggerated rights based on respect for family life. They control their own family life. This has nothing to do with the host state. At paragraph 70 of that judgment, the court emphasised the basic principle might be displaced as "the extent of a State's obligations

to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül*, cited above, § 38; and *Rodrigues da Silva and Hoogkamer*, cited above, § 39)." Those factors are necessarily exceptional and include "the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion". Here, on this appeal, it is proposed that family life can only be respected by the State doing more than its obligation by way of bilateral arrangement with Canada requires. But, the court regarded the issue of "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 (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999; *Andrey Sheabashov c. la Lettonie* (dec.), no. 50065/99, 22 May 1999)." It would only be in "exceptional circumstances" that the removal of a "non-national family member would be incompatible with Article 8".

13. There was no uncertainty as to the duration and purpose of the stay in Ireland of Jaimee Middelkamp. Uncertainty was sought to be created through the evocation of the duty to "respect … private and family life". That duty, as Feeney J explained in *Agbonlahor & Ors v Minister for Justice, Equality and Law Reform & Ors* [2007] IEHC 166, [2007] 4 IR 309 at 316 as being variable from case to case because of "the diversity of circumstances and practices in the contracting states". There is, on the decided cases, a threshold and those that render their status certain, cannot make it uncertain by mere recourse to a claim that the State is not somehow respecting the arrangements that they themselves have made; *Bensaid v the United Kingdom* (Application No 44599/98, 6 February 2001), (2001) 33 EHRR 305 at [46] that "not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8", and also see *Nnyanzi v the United Kingdom* (Application No 21878/06, 8 April 2008) at [72-78]. Arising from that entitlement of countries to decide who is to enter national territory and on what basis, the words of Article 8 should be recalled: the Convention recognises that restrictions which are "in accordance with the law" and "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country" are not a denigration of respect.

Exceptional circumstances

14. It may also be noted that there is a threshold for raising claims under Article 3 as well as under Article 8; see *Costello-Roberts v the United Kingdom* (Application 13134/87, 25 March 1993) at [32] and [36]. Hogan J takes a different view; [48]. Even still, officials of the Minister cannot be faulted, as in his analysis, when the overwhelming weight of circumstance indicates that the State's entitlement to control its borders outweighs the speculative argument made here. Since Article 8 is in reality only engaged where exceptional circumstances befall a person who has made a definite arrangement to leave the State, it follows that the duty of defining those circumstances, documenting them and expressly advocating why the right of the State to decide who may stay after a visa has expired rests on the person applying for the privilege of remaining on. There is a complete absence of any exceptional circumstance here. In fact, the circumstances lack exceptionality. Jaimee Middelkamp came for a defined period in accordance with international bilateral arrangements with Canada and other countries, knowing she would cease to be able to work after two years but that she would be able to enter as a citizen of

a country enabled by the laws of the State to remain for holidays of 90 days on the basis of repeated entry from Canada.

Reasons

15. There was no need to engage in any elaborate analysis of this case on the part of the officials of the Minister. The circumstances were clear. It is not appropriate that speculative burdens be placed on them. As Hogan J states in the principal judgment, the reasoning "conveys with sufficient clarity the concerns of the Minister" in the context of a scheme that is "finite and time-limited." There were no exceptional circumstances. Further, in this sphere, the concern and duty of officials is to apply what is now the code related to immigration. Elaborate reasons are not required for this. The same tendency in other areas where the Oireachtas has laid down statutory rules simply requires those rules to be followed.

Letter

16. Barrett J explained his reasoning in a letter to Jaimee Middelkamp. Save in the context of a closed academic conference, a judge should say nothing to qualify what the text of the judgment declares to be the reasoning and the order consequent. Even at an academic conference, it is better not to explain beyond the text for fear of introducing any qualification. But, in practice, and thus outside the sphere of academic discourse, a judge may read parts of a judgment out to the parties when there has been a trial and a reserved decision and may condense reasoning or simplify it orally for the sake of ensuring the parties' understanding as to what has transpired. Complex decisions of this Court may be accompanied by a summary; *Costello v Ireland* [2022] IESC 44. Sometimes a summary may be incorporated as a final or penultimate paragraph of a judgment or sometimes it may be a separate document which does not form, and is not to be taken as forming, any part of the reasoning. That is in aid of understanding. That may be necessary even with relatively simple decisions. Judges may orally add after reading a decision: "So, what I therefore have decided is . . ." Where there is a family law case, the fraught circumstances of disappointed affection often render immediate comprehension distant; immigration and asylum cases may involve parties with limited command of the language of the case; complex judgments may need to be orally explained where the judge takes on the duty of delivering what is often disappointing news to at least one party.

17. A simple letter, as part of the judgment, cannot therefore be wrong. That kind of practice is not universally necessary. It should never become part of a tick list of a judge. Surely it should be done only where really necessary. Further, in explaining outside a judgment, a judge should be aware both of even-handedness, the danger of writing to one party only, even if the other is a State party or official, and of the peril of any qualification outside the reasons given. This letter was a quiet and calm exposition of why the judge reached the decision he felt the law compelled him to make. As such, it came to the point. Writing such a letter, in any event, could never be a ground of appeal unless it was such as to contradict or somehow fatally qualify the text of a judgment.

Disposal

18. Therefore, for the reasons contained in this judgment, the Minister's appeal should be allowed since the decision refusing to alter the terms of the existing visa permission did not infringe Article 8 of the Convention or even engage any aspect of it.

Approved

Peter Charleton

St Brigid's Day 2023

No Redaction Needed