THE COURT OF APPEAL

Peart J.
McGovern J.
Baker J.

APPEAL NO: 2017/310

BETWEEN:

VIKRAM SHARMA RUGHOONAUTH AND RISHMA RUGHOONAUTH

APPELLANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

APPEAL NO: 2017/392

BETWEEN:

SHYANI DEVI OMRAWOO

RESPONDENT

- AND -

MINISTER FOR JUSTICE AND EQUALITY

APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF DECEMBER 2018

1. These two appeals raise the same issue and may be conveniently the subject of a single judgment. In the case of VR and RR, their application for leave to seek a judicial review of a deportation order was refused by order of the High Court (Humphreys J.) dated 1st June 2017, and they seek to appeal against that refusal.

2. In the case of SO, she was granted leave to seek judicial review, and by order of the High Court (O'Regan J.) dated 14th June 2017 was granted an order of *certiorari* quashing a deportation order dated 27th May 2016 made by the Minister. The Minister appeals against that order, having been granted leave to appeal in respect of two questions which I set out below.

3. For convenience, I will refer VR, RR and SO either by their initials or simply as "the applicants", since using "appellants" or "respondents" will be apt to confuse since they are appellants in one appeal and respondents in the other.

4. Each of VR, RR and SO are nationals of the Republic of Mauritius. Each on different dates entered the State, and resided here lawfully on foot of a student permission (Stamp 2) with conditions attached thereto, and upon the expiry of these permissions remained in the State unlawfully. In due course in each case the Minister made a deportation order.

5. The period of unlawful residence up to the date of the respective deportation orders for each of these persons is of different duration. In the case of VR the period is three years and nine months. In the case of RR (his wife) the period is one year and five months, and in the case of SO the period of three years and nine months.

6. The Stamp 2 student permission has a number of conditions attaching, namely:

(a) Student permissions are for one year only;

(b) Since 2011, the maximum stay permitted on foot of renewals is for a period of 7 years;

(c) Holders have no right to bring family members to the State;

(d) Student permissions are not automatically renewable;

(e) Student permissions cannot amount to reckonable residence in law for the purposes of naturalisation;

(f) Holders can work only a limited number of hours per week;

(g) Holders must be enrolled in an accredited educational institution;

(h) Holders have no access to public resources.

7. Each of VR, RR and SO must be taken to have been aware of these conditions attaching to their student permission to be in the State, and of the requirement that they must leave the State upon the expiry thereof.

8. Nevertheless, VR, RR and SO contend that at the date on which the deportation orders were made they were "settled migrants" and as such entitled to a detailed consideration of their private life rights under Art. 8 ECHR, including a proportionality assessment by

the Minister under Art. 8.2 ECHR before any decision is taken to deport them.

9. In the case of SO the High Court (O'Regan J.) concluded after the full hearing (leave having been granted) that SO was a settled migrant since she had been residing lawfully on foot of her student permission for a portion of her overall period of residence in the State. The Minister appeals against that finding.

10. In the cases of VR and RR the High Court (Humphries J.) refused leave on the basis that the grounds sought to be advanced to impugn the deportation orders in question did not constitute substantial grounds. He went on to grant leave to appeal having first refused to accede to an application to set aside his previous order refusing leave (the order not having been by then perfected), having regard to the decisions of this Court in *Luximon v. Minister for Justice and Equality* [2016] IECA 382, and *Balchand v. Minister for Justice and Equality* [2016] IECA 382.

11. The Minister was given leave to appeal by O'Regan J. in respect of two questions:

> (a) Where a person has been granted a student permission is he or she entitled to or eligible as a matter of right to 'settled migrant' status within the meaning of the jurisprudence of the European Court of Human Rights notwithstanding the finite and qualified nature of such an immigration permission.
>
> (b) If so, whether such a person can lose their 'settled migrant' status within the meaning of Article 8 ECHR by virtue of the expiry of his or her student permission followed by a period of unlawful residence within the State.

12. The following point of law was certified by Humphreys J.:-

> "Given their periods of residency in the State as students, are the applicants considered as "settled migrants" and if so, must the respondent when considering whether or not she is to deport them, acknowledge that their deportation would engage the operation of Article 8 ECHR and conduct a proportionality exercise pursuant to Article 8 (2) of the ECHR in order to determine whether the aims/interests of the State are such as will outweigh the private life rights of the applicants that would be engaged by their deportation?"

13. The issue for determination therefore is common to both appeals, which is essentially whether a person who has been present in the State under a limited, conditional and temporary permission in the form of a student immigration permission (Stamp 2) has "settled migrant" status for the purposes of any consideration of rights asserted by him/her to exist under Art. 8 ECHR when the Minister is deciding whether to make a deportation order following the expiry of the student permission and any renewals thereof.

14. Art. 8 ECHR provides:

> "1. Everyone has the right to respect for his *private* and family *life*, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." [Emphasis provided]

15. The Minister emphasises that the Art. 8 rights asserted in these cases are confined to those related to *private life* as opposed to family rights, and therefore relate to matters such as social and educational ties in the State.

16. As appears from the Minister's decisions in these cases the Minister did consider the private rights asserted under Art. 8 ECHR but determined in each case that they were not such as to merit a proportionality assessment under Art. 8.2 ECHR. Those asserted rights were considered by reference to the five-prong test stated by the House of Lords in *R (Razgar) v. Home Secretary* [2004] 2 AC 368. That test refers to five questions which the decision-maker should address sequentially, as follows:-

> 1. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for her private or (as the case may be) family life?
>
> 2. If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> 3. If so, is such interference in accordance with law?
>
> 4. If so, is such interference necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> 5. If so, is such interference proportionate to the legitimate public end is sought to be achieved?

17. In each of these cases the Minister addressed question one, and was satisfied that the deportation had the potential to be an interference with their right to respect for their private life within the meaning of Art. 8. She then went on to consider question two, and having done so in the light of the facts submitted and the case law to which reference is made in the decisions, she concluded that any potential interference would not have consequences of such gravity as potentially to engage the operation of Art. 8 – in other words to require the proportionality assessment under Art. 8.2 ECHR. In those circumstances the Minister did not proceed to address questions three, four and five of *Razgar*.

18. Put very simply, the competing submissions by the parties to these appeals are that the Minister considers that she was not required to carry out a proportionality test under Art. 8.2 ECHR because these persons do not come within the meaning of "settled migrants", and accordingly, once she was satisfied that the interference with Art. 8 rights asserted was not of such gravity as to even potentially engage the operation of Art.8, it was unnecessary to address questions three, four and five of Razgar; whereas the applicants contend that they come within the meaning of "settled migrants" and as such, were entitled to an Art. 8.2 proportionality assessment before any decision to deport them was made.

19. It was agreed between the parties that submissions on these appeals would be first be made on behalf of the Minister, followed by the applicants' submissions.

The Minister's submissions
20. It is submitted by the Minister that a critical consideration as to whether these applicants are settled migrants is in each case the period that they were in the State unlawfully following the expiry of their student permission. It is the Minister's submission that a period of unlawful residence in the State cannot be relied upon by the applicants in order to transform their "precarious migrant" status into "settled migrant" status. In this regard the Minister submits that a resident migrant can fall into any of three possible categories: (1) an unlawful migrant; (2) a migrant whose residence is lawful but precarious; and (3) a settled migrant. An unlawful migrant is one who has never had a permission to reside in the State. A migrant whose residence is lawful but precarious would be, for example, a person who has entered the State and claimed asylum, and who is permitted to remain in the State pending the determination of that application. It is the Minister's submission that a person such as any of the present applicants is in that category also, since they will have been aware from the outset that they are obliged to leave the State when their permission expires. In other words, they can be said to have had no legitimate expectation that that they could remain following the expiry of their permission. Settled migrant status, in the Minister's submission, is confined to a person who has had a prolonged period of lawful residence in the State.

21. The Minister submits that the residence these applicants on foot of study permissions, while lawful for the duration of the permission and any renewals thereof, was nevertheless precarious given the known conditions to which it was subject, and its limited purpose and limited duration, and that this status cannot be transformed into anything better by any period of unlawful residence following its expiry. The Minister again drew attention to the different and significant periods of unlawful residence in respect of the three applicants following expiry of their respective permits.

22. The Minister has referred to the somewhat tenuous nature of the social and educational ties each applicant has asserted they have developed during their residence here, as contained in the submissions made to the Minister and referred to in the Minister's decisions. It is unnecessary for the purpose of the issues on this appeal to describe them in any detail.

23. Before referring to the submissions made by the Minister in relation to the case law to which the Court was referred, I should perhaps say at this stage that the counter argument made by the applicants is that each applicant achieved the status of settled migrant by reason of having resided here lawfully on foot of their student permission, and that they did not cease to be settled migrants by reason of a period of unlawful residence after the expiry of these permissions, and also that once given their student permissions their status was not precarious. They submit that there is no such category as lawful but precarious, and it is argued that a migrant is either unlawfully resident or is a settled migrant. I will return to those submissions in due course.

24. Counsel for the Minister has referred to the case of *Üner v. The Netherlands* (App. No. 46410/99) [2007] 45 EHRR 14 in support of the submission that these applicants are not settled migrants, where the Court placed some emphasis on the age at which a migrant came to the host country, and stated at para. 58 that the so-called '*Boultif* criteria' "would apply all the more so ... to cases concerning applicants who were born in the host country or who moved there at an early age". The Court went on to state in para. 58:

> "… The rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."

25. The Minister submits that given the ages at which these applicants arrived in the State, namely 31, 33 and 21 years of age, they could not be seen as coming within the above statement in *Üner*.

26. The Minister has referred also to the judgment of the Strasbourg Court in *Balogun v. The United Kingdom* (App. No. 60286/09) [2013] 56 EHRR 3. which reiterated that "the age at which the person entered the host country is also of relevance, as is the question of whether they spent a large part or even all of their childhood in that country". The Court went on to state that it "has previously found that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion". Again, the Minister emphasises how different is the situation of the present applicants given the age at which each of them came to the State for the limited purpose of pursuing a course of study.

27. In relation to the concept of a migrant's residence status being "precarious" the Court was referred to the judgment in *Jeunesse v. The Netherlands* (App. No. 12738/10) [2015] 60 EHRR 17. In that case a Surinamese national had been granted a 45-day visa to visit a relative in the Netherlands, but she failed to return to Surinam upon its expiry, and eventually married there and had a child in September 2000. By 2005 she had given birth to a second child. The precise history of events does not need to be set forth, but the Minister seeks support for the submission that the present applicants cannot be considered to be settled migrants, from what the Court stated at paras. 107-108, and particularly para. 108:

> "107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, 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. Factors to be taken into account in this context are the extent to which family life would effectively be 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 the alien concerned 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 ….
>
> *108. Another 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 … .*" [Emphasis provided]

28. The Minister points to the similarity between precarious nature of lawful residence on foot of the temporary visitor visa in *Jeunesse*, and the temporary and limited nature of the student visas in the present appeals where there could have been no reasonable expectation on behalf of the applicants that they could remain here indefinitely after the expiration of their study visas given the finite nature thereof.

29. Similarly, the Minister draws attention to the fact that in *Nnyanzi v. The United Kingdom* (App. No. 21878/06) [2008] 47 EHRR 18, the Court stated that the residence of an asylum seeker in the United Kingdom, while lawful for the duration of that application for asylum status "has at all times been precarious". Following her failure to gain refugee status, N lodged an application with the ECHR claiming that her deportation would breach a number of her human rights including under Art. 8. By the time the case came to be determined by the Strasbourg court, N had been living in the United Kingdom for some 10 years. She asserted that she had acquired a private life there which involved close ties with her church, a part-qualification as an accountant, and she was in a relationship with her boyfriend. In its consideration of the application the Court reiterated that "depending on the circumstances of a particular case" removal might give rise to an infringement of Art. 8 private life rights. But the Court went on to state at para. 76;

> "76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost 10 years in the United Kingdom constitute private life within the meaning of Article 8§1 of the Convention …. *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."

30. The Minister has submitted that the above are but a sample of cases from the ECHR where residence of a precarious nature has been found by that Court in cases where the person has no entitlement to expect that he/she will be permitted to remain resident in the host state after the expiry of the particular limited and temporary visa which entitled him/her to enter the State.

31. The Minister has sought support also from a Council of Europe Recommendation Rec. [2000] 15 concerning the security of residents of long-term migrants which was adopted on 13 September 2000. This document, it was submitted, is an effort on the part of the Council of Europe to ensure a harmonious approach among Member States, and recommended applying certain principles including that:

> "Each member state should recognise as a "long-term immigrant" an alien who: (i) has resided lawfully and habitually for a period of at least five years and for a maximum of 10 years on its territory otherwise than exclusively as a student throughout that period …".

32. Much reliance is placed also by the Minister on the judgment of Lord Reed in *R (Agyarko) v. Secretary of State* [2017] UKSC 11 where at paras. 49 et seq. he discusses the issue of "precariousness", particularly by reference to the case of Jeunesse already referred to above, and emphasises the principle established by the Strasbourg court that where a person's stay in the host state is unlawful or precarious "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", and that residence is precarious in circumstances where the persons concerned are fully aware that the duration of their family life in the host state would be precarious from the outset.

33. The Minister also notes the reference by Lord Reed to two categories of residence, namely unlawful residence and precarious residence. It is submitted that this supports the Minister's contention that there are three categories of migrants, namely unlawful, lawful but precarious, and settled, and not just two, as contended for by the applicants herein.

34. The Minister also refers to a number of cases that have come before the Irish courts which are relevant to the issues in the present appeals. Counsel has referred to three examples of migrants who fit the "precarious" description: (i) persons in the State on foot of a 90-day visitor permission; (ii) failed asylum seekers; and (iii) those persons who are present in the State, but with no legal entitlement to be here.

35. In relation to (i) – 90 day visitors – this Court was referred to the judgment of Humphries J. in *Li and Wang v. Minister for Justice & Equality (No. 1)* [2015] IE HC 638 where he considered what weight, if any, could be given to Article 8 rights accruing during a period of unlawful residence in the State. At p. 23 he stated:

> "A further difficulty for the applicants is that, even if dependency had been alleged let alone established, such family life as they have built up in the State has occurred during a period when their presence in the State was, at a minimum, to use the language of the European Court of Human Rights "precarious" (see *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 210 Finlay Geoghegan J.) citing *Nnyanzi v. U,K.* (2008) 47 EHRR 18). In my view, little weight attaches to alleged Article 8 rights that accrue during a period where the presence of the applicant in the country concerned is precarious, and virtually none to a time when the applicant's presence is unlawful, at least as a matter of generality, and that is the conclusion I come to in the present case. The only right or title that the applicants had to be in the State was the slight and transitory one of their entitlement to be here for a period of 90 days and on the expiry of that period they were under a continuing duty to leave the State which they have failed to discharge. Their status therefore went beyond the merely "precarious" (*i.e.* time-limited in duration and depending on the grant of a further permission) and crossed into the category of "unlawful" (*i.e.* without any legal basis). I note in passing that the UK Immigration Act 2014 s. 19 has endeavoured to supply some statutory guidance in that jurisdiction as to how the Article 8 issues to be addressed, identifying precarious and unlawful positions separately. The applicants' decision to maintain a continued unlawful presence in the State since June 2014 combined with the claim of a family life within the State made in these proceedings by way of submission to the Minister and the affidavit evidence filed on their behalf (which shows no basis for a family life going beyond normal emotional ties) might suggest the possibility that future reliance may be placed on Article 8 rights allegedly built up during the period of unlawful presence in the State since June 2014. To my mind virtually no weight can be given to any family life engaged in by the applicants during that period, by reason of its illegality."

36. As for (ii) – failed asylum seekers – the Minister has referred to the judgment of Finlay Geoghegan J. in *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 210 in which, albeit *obiter*, she referred to the distinction between settled migrants and those who had never been lawfully in the host state. But the Minister relies also on the judgment of MacMenamin J. in *P.O v. Minister for Justice & Equality* [2015] 3 I.R. 164 who again recognised that the family life of a person in the State with no lawful basis once his asylum application had failed had "occurred at a time when the first appellant must have been aware that her immigration status was such that her status within the State would, in the words of the European Court of Human Rights, be 'precarious' …."

37. As for (iii) – persons with no lawful entitlement to be present in the State – counsel for the Minister has referred to the judgment of Finlay Geoghegan J. in *Dos Santos & ors v. Minister for Justice and Equality & Others* [2015] 3 I.R. 411. In that case, while the husband/father had arrived here on foot of a work permit valid for one year and had overstayed for some years and was given an Art. 8.2 assessment prior to deportation. His wife and five children had entered the State with no permission whatever, and in their case deportation orders were made without any Art. 8.2 assessment since the facts did not get the applicants beyond the second of the

five *Razgar* questions. Ms. Justice Finlay Geoghegan found no error in that approach in relation to persons who never had any entitlement to be in the State, and she noted that the trial judge had considered the distinction between the position of settled migrants and those who were never lawfully entitled to be in the State. It follows, in the Minister's submission, that even though the present applicants were here initially on foot of a student permission, their otherwise precarious migrant status cannot be enhanced into that of settled migrant status by virtue of any period of unlawful residence here.

38. Insofar as the applicants have sought to rely upon the judgments of the Supreme Court in *Luximon and Balchand v. Minister for Justice & Equality* [2018] IESC 24, Minister submits that the judgments are not relevant to the issues in the present cases since firstly, the facts are very different, and secondly in any event they speak to the obligations of the Minister to consider Art. 8 rights in the context of applications brought under s. 4(7) of the Immigration Act, 2004, where no consideration whatsoever had been given by the Minister to such rights, and therefore a different context altogether from the case of a migrant overstaying a student permission. Counsel has also submitted that the Supreme Court never considered those cases by reference to whether those applicants were or were not settled migrants, and never referred to that phrase.

The applicants' submissions

39. It is submitted by the applicants that the Court should not concentrate so much on their period of unlawful residence following the expiration of their student permissions, but rather on the period of time they resided here lawfully. They point also to the fact that one explanation for the length of time that they were here unlawfully was simply because the Minister delayed in deciding whether or not to make a deportation order. It is submitted that any period of such delay should not be taken into account against the applicants.

40. Counsel has referred to the facts of the individual cases. In relation to SO the position is that she arrived in the State in October 2007 on a student permission. Counsel points out that in 2007 there was no limit on the number of renewals that a student might obtain, since the limitation that now exists was not introduced until September 2010 when the Minister published the 'New Immigration regime for Full Time Non-EEA Students'.

41. Ms. O resided lawfully as a student in the State until the expiry of her permission on 30th September 2012 – a period of almost five years. Thereafter her residence was unlawful. But the Minister did not make any proposal to deport her until December 2013. As soon as she did, SO sought leave to remain in November 2013, and no decision was made on that application by the Minister for a further two and a half years approximately.

42. VR arrived in the State in April 2008 on a student permission. His residence was lawful for a period of some four years and seven months until his permission expired in September 2012. Thereafter he was here unlawfully. The Minister made a proposal to deport him in January 2013, but did not make a deportation order until July 2016.

43. RR, the wife of VR arrived in the State in November 2009 on a student permission, and resided lawfully in the State for a period of five years and one month until that permission expired in December 2014. As in the case of VR the Minister did not make a deportation order in respect of RR until July 2016.

44. The Court is urged to have regard to the length of time each of the three applicants herein resided lawfully in the State, and also the total period of residence in each case, when considering whether they should be considered entitled to a proportionality assessment in relation to the private life rights which accrued to them (a) during their period of lawful residence, but also having regard to their overall period of residence in the State, whether lawful or unlawful.

45. Counsel has submitted that there is no case from the European Court of Human Rights or elsewhere, including the courts of this jurisdiction, which has stated in categorical terms that a person residing in the host state on foot of only a student permission cannot be considered to be "settled migrant", as that term is to be correctly understood, for the purpose of an Art. 8 proportionality assessment. It is submitted that in his first judgment in VR and RR (refusing leave) Humphries J. was incorrect to state that "persons whose only basis for presence in the State is a student visa do not enjoy anything more than minimal Art. 8 rights, if they enjoy them at all", and in his second judgment to state that "only in exceptional circumstances will the removal of non-settled migrants contravene Art. 8".

46. Counsel is at pains to emphasise that these applicants are not saying that they have an entitlement to be permitted to remain in the State. Their submission is confined to a contention that their length of time in the State is in each case such that they are "settled migrants", and as such are entitled at a minimum to an assessment by the Minister of their Article 8 private life rights prior to any decision being taken to deport them. They say that they are in a much better position than those migrants the Minister had described as "precarious" such as failed asylum seekers and persons whose presence in the State has never been the subject of a permission. In the present cases the distinction is emphasised, namely that they each entered the State lawfully, resided here and worked here lawfully for lengthy periods until their permissions expired, and remained thereafter albeit without an extant permission.

47. In this regard the applicants seek to draw support for their arguments from the judgment of Finlay Geoghegan J. in the Court of Appeal in *C.I. v. Minister for Justice, Equality and Law Reform* [2015] 3 I.R. 385. It is a case where the applicants were failed asylums seekers and in respect of whom it was contended that the Minister had failed to consider their private life rights and in particular their educational and social ties in the State before deciding to make a deportation order. Counsel in the present case, as I have said, seeks to distinguish the position of a student whose temporary presence in the State is on foot of a student permission, from a failed asylum seeker whose presence in the State is lawful only for as long as it takes to have the asylum application finally determined. Nevertheless, counsel points to the fact that neither this judgment nor other cases such as *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 and *Dos Santos v. Minister for Justice* [2015] 3 I.R. 411 support the conclusion that a student present in the State on foot of a student permission may not be considered to be a "settled migrant" as found by Humphries J. in the VR and RR cases.

48. Counsel suggests that it is clear from the judgment in *C.I. v. Minister for Justice, Equality and Law Reform* that the Court of Appeal acknowledged that there were just two categories of migrant, namely settled migrants and those migrants who never had a permission to reside in the host state. In that regard reference is made to para. 27 of the judgment of Finlay Geoghegan J. where, having considered the *jurisprudence* of the ECtHR in relation to what elements of life of a migrant's private life rights are to be considered she said:

> "27. However, it does not appear that such definition is exhaustive. In a number of cases relating to *settled migrants (in the sense of immigrants who have been lawfully present in the host State*), the European Court of Human Rights appears to have gone further in its approach to what constitutes private life (and the right to private life) for the purpose of article 8." [Emphasis provided]

49. Counsel relies on the underlined sentence, and suggests that this supports the proposition that a person who has spent a period of lawful residence in the host state is to be considered a settled migrant, in contrast to a person whose presence has at all times been unlawful. Counsel has referred also to further passages from the judgment in *C.I. v. Minister for Justice, Equality and Law Reform* in support of his argument, such as at paras. 28-30 where again the distinction is drawn between settled migrants and persons who have never lived lawfully in the host state.

50. Further support is sought from the judgment of Finlay Geoghegan J. in *Dos Santos*, and in particular from the fact that one of the applicants in that case, the father of the five children, and the husband of the other applicant, had spent just one year in the State on foot of a work permit valid from 2002 to 2003, and yet the Minister carried out an Article 8§2 proportionality assessment before making a deportation order. His wife and children had never been lawfully present in the State. Following the expiration of his work permit Mr Dos Santos appears to have spent a further four years unlawfully in the State before the authorities discovered his unlawful status here in 2007. He sought leave to remain, and it took a number of years for a decision to be finally made refusing that application, and for a deportation order to be made eventually in March 2013. It is argued that if Mr Dos Santos could be considered entitled to an assessment, then a *fortiori* the present applicants must have that entitlement given their far greater period of lawful residence in the State.

51. In that case the Minister had decided that the mother and five children did not get past the second question in *Razgar*, and therefore no proportionality assessment was conducted before the decision to deport them was taken. As noted by Finlay Geoghegan J. a different approach was taken in the case of Mr Dos Santos. In that regard she stated at para. 25:

> "In the examination of file of the father, a different approach was taken by reason of the fact that he had initially arrived in the State and was given permission to remain in the State for approximately one year as he was in possession of a valid work permit. It was acknowledged that during that period he had the opportunity to develop links with his community and develop his private life in the State. The official then considered the proposed interference by deportation with that private life in accordance with the principles applicable to article 8 (2) and concluded and recommended that the signing of a deportation order was in accordance with law, pursued a pressing social need and legitimate aim and was necessary and proportionate. There was no challenge to the validity of that assessment and it was submitted on behalf of the children that a similar assessment pursuant to article (8) (2) of the European Convention on Human Rights should have been conducted."

52. It is submitted that *Dos Santos* supports the applicants' argument that they are to be distinguished from the category of precarious migrant into which fall persons such as failed asylum seekers, since they have been resident on foot of an actual permission given to them, albeit for a defined period and limited to a particular purpose, and have not been permitted to remain solely for the purpose of having their asylum claim assessed and determined.

53. Counsel has also sought to rely on the judgment of the Court of Appeal in Balchand and Luximon v. Minister for Justice, Equality and Law Reform [2016] IEHC 132, and to that of MacMenamin J. in the Supreme Court in the same cases ([2018] IESC 24). The issues in those cases were different, albeit that the applicants had come to reside in the State to pursue courses of study and had received student permissions of a similar nature to the present applicants. But the issue was different. The Minister had taken the view that upon an application made under s. 4(7) of the Immigration Act, 2004 to renew the student permission, he/she was not required at that stage to consider Article 8 rights when deciding to refuse the application, since such rights would be considered at the time that a decision to deport the applicant would be taken. The Court of Appeal (Finlay Geoghegan J.) considered that the trial judge had been correct to conclude that such rights had to receive consideration by the Minister on the s. 4(7) application since the consequence of a refusal of the application was such that the unsuccessful applicant was that the applicant was no longer lawfully present in the State, and was required to leave, or face deportation. The decision in the Court of Appeal was upheld in the Supreme Court (MacMenamin J.). While that distinction clearly exists in relation to the issues decided, it is submitted that nevertheless there are material similarities to the present cases. In particular, it is sought to rely on what is stated by MacMenamin J. when determining that the applicants were entitled to have a consideration by the Minister of their Art. 8 rights, as follows:

> "84. … In my view, the ministerial decisions or notices served on the respondents, in fact, had the effect of expulsion orders. The consideration required the assessment of private and family rights. The respondent families legally entered this State. Such rights as may have arisen were acquired during lawful residents in the State. Their long-term residence, although conditional, required that consideration should have been given to their Article 8 rights in the s. 4 (7) consideration for variation or renewal of their entitlements. The respondents were not simply "visitors", or short-term entrants to the State, or persons who had no entitlement to be here at all. These cases are very different from those other categories of persons. The factual basis of the respondents' status required consideration of Article 8 rights when the Minister was considering renewal or variation decisions concerning them."

54. Counsel has submitted that the present applicants are not mere "short-term entrants to the State" or "visitors" who have outstayed their permission, or persons who "had no entitlement to be here at all", and that, like the Balchand and Luximon applicants, the present applicants "are very different from those other categories of persons". It is submitted that the above passage confirms that persons in the position of the present applicants are not considered to have a "precarious" status, that they have private life rights such that Article 8 is engaged, and further, that their deportation would undoubtedly interfere to a significant degree with those rights given the length of time that they were in the State, and hence an assessment was required to be undertaken by the Minister.

Conclusions

55. The applicants have submitted that the Minister's decisions are clearly based on a view that because these applicants were lawfully present in the State on foot of a student visa, they can never be considered to be settled migrants, that in all the circumstances their residence status is precarious, and as such that they are not entitled to an assessment under Art. 8.2 ECHR. They say that this inflexible view is wrong, and that it wrongly equates them to persons in the position of failed asylum seekers whose status has been considered to be precarious. The applicants submit that this fixed view adopted by the Minister in relation to student visa applicants wrongly precludes any possibility that a student, depending on his/her particular facts and circumstances, might acquire private life rights akin to those acquired by persons who are entitled to be considered as settled migrants, and that question 2 of the *Razgar* test may be satisfied such that a proportionality assessment must be carried out.

56. It has been submitted that if that fixed view adopted by the Minister is found to be incorrect, then this Court should remit the matter to the Minister in the case of Ms. O for a fresh consideration of whether or not the applicants' private life rights are such that an assessment is warranted, notwithstanding that they were lawfully present on foot of student permissions, and in the cases of VR and RR to the High Court for a fresh consideration of the application for leave to seek judicial review of the Minister's decision.

57. The *Balchand* and *Luximon* cases are very different on their facts from the present cases. The issue was also different as the Minister had taken the view that there was no requirement to give any consideration whatever to private life rights at the point in time when she was considering whether or not to grant an application to renew a student permission and vary conditions under s. 4(7) of the 2004 Act. In the present cases, the applicants did have their Article 8 rights considered. The problem for them was that such consideration did not get them beyond question 2 of the *Razgar* test because the Minister did not consider that their asserted rights were such as to engage the need for an assessment under Article 8.2 ECHR.

58. But that apart, I do not think the fact that a distinction was drawn in those judgments between persons such as the *Balchand* and *Luximon* applicants (being over-staying students like the present applicants), and failed asylum seekers or short-stay visitors (whose presence in the State is precarious from the outset of his/her arrival in the State pending the determination of an asylum application) is of any real assistance to the present applicants. It does not follow from the distinction drawn that therefore a student's status may not also be considered to be precarious.

59. It is perhaps not helpful to try and shoe-horn particular categories of migrants into one of a number of differently labelled boxes in order to discover the extent of rights to which they may be entitled. I accept of course that some judgments have described the status of an asylum seeker as being "precarious" for certain purposes, and there can be no doubt that that is correct in the sense that such applicants can have no expectation of, or entitlement to, a positive outcome of their application, and will therefore know that if unsuccessful they may be deported. The adjective "precarious" therefore connotes a level of uncertainty around an applicant's right to indefinitely reside lawfully in the State. If that is the meaning to be given to "precarious", and it seems to be correct, then, if anything, the status of persons whose residence in the State is lawful only because they have been granted a temporary permission for the limited purpose of pursuing a course of study, is in a worse position than the asylum seeker because they know from the very outset that, although their permission is renewable up to a maximum of seven years, the lawfulness of their residence will terminate at an identified time and once the conditions of residence can no longer be satisfied. At least for the asylum seeker there is the possibility that the application will be successful, thereby enabling them to reside permanently in the State. The student has no such possibility arising from a student permission. In such circumstances it is difficult to see how a person in a worse position that an asylum seeker could, *qua* student, be accorded that higher status of "settled migrant" leading to the type of proportionality assessment contended for by the present applicants.

60. The applicants have relied also upon the *Dos Santos* decision, and place particular emphasis on the fact that the father in *Dos Santos* was here on a one year work permit only, and yet was given an Art. 8.2 assessment. Unlike his wife and five children who never had any permission to be in the State, his private life rights were considered and assessed from the point of view of proportionality. That is undoubtedly factually correct. But that fact alone does not mean that all persons present in the State on foot of a temporary permit, whether a work permit or a student permission, are settled migrants. There is nothing in the judgment to indicate that Mr Dos Santos was found to be a "settled migrant". The fact that he received an assessment does not of itself lead inexorably to such a conclusion. It may well be that the Minister could lawfully have decided not to do so. That question was not at issue in *Dos Santos*.

61. I do not find it helpful to look at these applicants in a purely binary way. By that I mean that it is not helpful to simply consider whether a student is or is not a settled migrant, and let that alone determine whether the Minister was obliged to carry out a proportionality assessment. The position is more nuanced in my view. Insofar as the trial judge in the cases of VR and RR concluded that because these applicants were students they could therefore never be considered to be "settled migrants" and *ergo* by definition they were not entitled to a proportionality assessment, I think he took too black and white a view. On the other hand, I consider that in the case of O, the trial judge fell into error in concluding that the student permission enjoyed by Ms. O up to the end of September 2012 "gives rise to the applicant being characterised as 'a settled migrant'" for that period.

62. It is necessary to consider the actual decision made in each of these cases by the Minister, since the respective applications for judicial review seek to challenge the lawfulness of those particular decisions.

63. In the case of Ms. O the examination of the file nowhere shows reference to whether or not Ms. O is a settled migrant as such. Clearly the consideration of the relevant issues is carried out in the context of her being a person whose student permission has expired, but there is no reference to any consideration of whether her residence here on foot of a student permission of itself disentitled her to settled migrant status. The High Court judgments in *Balchand* and in *Luximon* are not referred to. The judgments on appeal postdate the Minister's decision.

64. In the cases of VR and RR on the other hand, the respective file refer to the judgment of Humphries J. in *Balchand* in the High Court, that "the Court held that a person who entered the State on a student visa was not a settled migrant even where they had resided in the State for a period of seven years". The Minister went on to state that "[the applicant's] private life was formed at a time when [his/her] permission to remain was renewable and therefore precarious, or such permission had expired".

65. It is correct to note, as was submitted by the parties, that in fact in his second judgment which was delivered following further submissions in the light of the Court of Appeal's judgment in *Balchand* and *Luximon*, Humphries J. accepted that in the light of what was concluded by the Court of Appeal "it would have been more appropriate to say that only in exceptional circumstances will the removal of non-settled migrants contravene Art. 8".

66. 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. But, as I have said, it is not "precarious" in the same sense as given to the status of an asylum seeker, whose lawful presence in the State does not, with the same inevitability, have to come to an end, because there is always the possibility that the asylum application will be granted.

67. For this reason, 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*), but are of such gravity as to engage the requirement for proportionality under Article 8.2 ECHR. 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 of foot of a student permission.

68. I would therefore conclude 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. For that reason, and that alone, I would consider that in VR and RR the trial judge was wrong to conclude as he did on the leave application by stating:

> "There are no substantial grounds to contend that students present on permissions for up to the maximum 7-year period, or present in the State thereafter without permission, are settled migrants; nor are there substantial grounds for contending that the deportation of such persons breaches Art. 8 of the ECHR in the absence of exceptional circumstances."

69. I am satisfied that in the case of Ms. O the trial judge erred when she concluded that a "student permission such as that enjoyed by the instant applicant from 10th December, 2007 to 30th September, 2012 gives rise to the applicant being characterised as 'a settled migrant' for that period".

70. As I have said, the focus of the decision should not be whether a person here on a student permission, for however long, is or is not a "settled migrant", but rather whether in the light of the facts and circumstances of the particular case such private life rights as are asserted are of such substance and significance for the applicant that their interference by deportation could be so grave as to engage Article 8, and therefore to require a proportionality assessment under Article 8.2.

71. As I have said, it is highly unlikely that a person here on a temporary student permission could acquire the same level of private life rights as a person to whom the description of "settled migrant" might normally be attached, given the certain knowledge that the student has from the outset known that their presence in the State is temporary only and for a limited and defined purpose. In my view some exceptional circumstances would have to arise for the status of "settled migrant" to be applied. But it is wrong to rule out on the *a priori* basis the possibility that a migrant student can never be properly considered to be a "settled migrant" in the sense that the phrase has come to be understood, and who as a result is considered to be entitled to a proportionality assessment under Article 8.2 ECHR.

72. I would therefore allow the Minister's appeal in the case of SO, and set aside that part of the order dated the 14th June 2017 which ordered that the deportation order dated 27th May 2016 be quashed.

73. In the case of VR and RR, I would allow the applicants' appeal against the refusal of leave to seek judicial review on the basis of what I have stated at para. 68 above. However, I would not remit the application for leave to the High Court for any reconsideration in the light of this judgment. I am satisfied that in the light of my conclusions, there are no substantial grounds for considering that these applicants, on the facts asserted by them, have an entitlement to a proportionality assessment. To remit the application in those circumstances would serve no useful purpose.