

No. 2

O. 58, r. 18(1)



SUPREME COURT

Record No:

031/2019

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Title of the Proceedings:

**VIKRAM SHARMA RUGHOONAUTH AND RISHMA RUGHOONAUTH
APPLICANTS**

-v-

**THE MINISTER FOR JUSTICE AND EQUALITY
RESPONDENT**

2. Name of Respondent:

THE MINISTER FOR JUSTICE AND EQUALITY

3. Application to extend time:

Yes

No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

N/A

4. Do you oppose the applicant's application to extend time:

Yes

No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A

5. Do you oppose the applicant's application for leave to appeal:

Yes

No

6. **Matter of general public importance:**

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. The Court of Appeal has resolved the conflict between the High Court judgments in this case and the related case of *Omrawoo v Minister for Justice and Equality*. No uncertainty remains such that there is any necessity for an Appeal to this Honourable Court.
2. The within proceedings relate to the deportation of persons who were once lawfully present in the State on student immigration permissions but who then unlawfully overstayed these limited and conditional permissions for a number of years. Their situation by definition cannot constitute a matter of general public importance.
3. The issue raised is not closely related to the judgment of this Court in *Luximon and Balchand v Minister for Justice and Equality* [2018] 2 ILRM 153. The facts, status and legal context in those cases were entirely different notwithstanding that the Appellants in those cases also held student permissions and this Court was required to consider the refusal by the Respondent to consider asserted Article 8 ECHR rights in the context of a change of immigration status under Section 4(7) of the Immigration Act, 2004. There was no such refusal in the present case which fell to be considered under Section 3 of the Immigration Act, 1999. Whilst the applicants in *Luximon & Balchand* were granted student immigration permissions they enjoyed a much longer period of lawful residence in the State than the Appellants herein and never fell into unlawfulness (save for a short period in respect of Ms. Luximon in respect of which this Court noted that the Respondent had not taken issue in the decision impugned in that case). Moreover, the principal issue in those cases was the Respondent's refusal to carry out any consideration of asserted Article 8 ECHR rights in an application for the variation of an immigration permission pursuant to Section 4(7) of the Immigration Act, 2004.
4. Insofar as there are other cases awaiting the outcome of these proceedings, this factor in and of itself is not dispositive of the question of whether the proceedings are of general public importance. The Applicants are part of a small number of persons in the State who resided here lawfully on student immigration permissions

but who have since overstayed. Accordingly, the matter is not of general public importance.

Word count – 381+

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The basis for the Applicants' submission that there are now "irreconcilable differences" is that this Honourable Court found in *Luximon & Balchand*, at paragraph 86, that the Applicants Article 8 rights were "at least engaged, and there should have been a consideration of such rights in the S.4(7) decisions". However, that judgment does not impose any obligation on the Respondent to carry out an Article 8(2) assessment and the Applicants misunderstand the use of the term 'engaged' in this context. Rather, the judgment means that the issue of the applicants' rights in *Luximon and Balchand* should have been considered by the Respondent. Indeed, this Honourable Court also stated at paragraph 86 of that case:

"What weight is placed on Article 8 private and family-life criteria is a matter for the Minister. "

2. At paragraph 57 of the Court of Appeal decision herein the Court of Appeal notes the differences between the within proceedings and those in *Luximon & Balchand*. There is therefore no disparity between the judgment of this Honourable Court in *Luximon & Balchand* and that of the Court of Appeal herein in relation to the applicable legal principles. The facts, legal context and issues in both cases are readily distinguishable.
3. Finally there was no obligation in law on the Court of Appeal to assess the case through what is referred to by the Applicants as the "settled migrant prism". The Applicants cannot dictate the manner in which the Court of Appeal should have considered its judgment given the engagement with the issues by that Court and by definition this cannot constitute a ground based on the interests of justice such that the application for leave to appeal should be granted.

Word count – 285

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

N/A

Word count – 0

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal. Please see appendix

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

The Respondent seeks to cross-appeal the order of the Court of Appeal dated 14th December 2018 and perfected on 31st January 2019 insofar as it awarded 50% of the costs of the appeal to the Court of Appeal (together with appeal no. 2017/392 in *Omrawoo v. Minister for Justice and Equality*) on the basis of a single appeal to be taxed in default of agreement in favour of the Applicants.

Word count: 70

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

If the Court grants leave to appeal, priority should be granted as there are approximately 20 cases raising similar issues at present in the holding list in the High Court.

Word count: 30

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

Part II

The information contained in this part will not be published.

14. Respondent's Representatives:

If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email. Provided in application for leave to appeal.

15. Legal Aid:

In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

N/A

Signed:

Maria Brann
(Solicitor for) the Respondent

Date:

14.3.19

To be served on:

Brian Kelly Carrigan
(Solicitor for) the Applicant / Other Respondent(s)

Please file your completed Notice in:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7**

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: [As in the Court of first instance]

VIKRAM SHARMA RUGHOONATH AND RISHMA RUGHOONATH
APPLICANTS

-v-

THE MINISTER FOR JUSTICE AND EQUALITY
RESPONDENT

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. Ground 1 is denied. The Court of Appeal was correct in law and in fact in finding that students are in "a worse position than an asylum seeker" in the particular context in which this finding was explained and made. It is clear that the Court of Appeal was referring in this regard to the finite and qualified nature of a student permission.
2. Ground 2 is denied. The Court of Appeal was correct in law in observing that there was nothing in the decision in the case of *Dos Santos & Ors v Minister for Justice and Equality & Ors [2015] IECA 210* which indicated that Mr. Dos Santos was a settled migrant. Moreover, and irrespective of this, the Court of Appeal correctly determined that the *Dos Santos* case did not determine the question in the present case.
3. Ground 3 is denied. The Court of Appeal was correct in law in its understanding of the term "precarious". The caselaw of the Supreme Court, the Court of Appeal and the European Court of Human Rights (and the relevant international instruments e.g. Council of Europe Recommendation Rec. [2000] 15 of 13 September 2000) does not tend towards students falling outside this concept and accordingly the Court of Appeal was correct in this regard.
4. Ground 4 is denied. The Court of Appeal was entitled to find that 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 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 8.2". Moreover, this arose directly from the point of law certified by the High Court for determination by the Court of Appeal.
5. Ground 5 is denied. The Court of Appeal was correct in finding that there were/could be a category of persons in the State who might be considered "settled migrants". The Court of Appeal was not obliged in the circumstances of this case to identify what essential features such a category of persons might possess such

as to bring them within this category and to identify why the Applicants could/did not fall within such a category.

6. Ground 6 is denied. The Court of Appeal was correct in law to find that there was no duty on the Respondent to consider the Appellants' asserted Article 8 rights in the circumstances of their case such that a proportionality assessment under Article 8(2) ECHR was required.
7. Ground 7 is denied. It is denied that the Court of Appeal erred in law as alleged or at all in finding that "*there are no substantial grounds for contending that these applicants, on the facts asserted by them, have an entitlement to a proportionality assessment*". It is further denied that the Court substituted its own view for the view of the Respondent in this regard but merely applied the law as so found.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

The Appellants were at all relevant times aware that they were required to leave the State following the expiry of their student immigration permissions and that their student permissions were finite and qualified in nature. They had no expectation that they could remain in the State following the expiry of their permission. They could not therefore be equated with persons enjoying settled migrant status as identified in the jurisprudence of the European Court of Human Rights. In the present case there was a significant period of unlawful residence in the State following the expiry of the student permissions. Once the Appellants remained in the State without any lawful immigration permission their life in the State was precarious. Accordingly it is only in the most exceptional circumstances that the removal of a person in the position of the Appellants could constitute a violation of Article 8(1) ECHR.

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

The cross-appeal relates to the Order of the Court of Appeal dated 14th December 2018 and perfected on 31st January 2019 insofar as it relates to the partial costs order made in favour of the Appellants.

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5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

<p>An Order setting aside the Order of the Court of Appeal dated 14th December 2018 and perfected on 31st January 2019 insofar as it relates to costs and substituting same with an Order for the costs above and below in favour of the Respondent to be taxed in default of agreement.</p>