Neutral Citation: [2017] IEHC 374

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 288 J.R.]

BETWEEN

HARVEY JOHN DOYLE (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND, MICHAEL PETERS IGBOSONU) AND MICHAEL PETERS IGBOSONU

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 24th day of March, 2017

1. This is an application for leave wherein the applicants seek, *inter alia*:

> (i) a declaration that the first named respondent was wrong in law in refusing the second named applicant's application for temporary permission to reside in the State and in concluding that the decision of the European Court of Justice ("ECJ") in case C-34/09 *Ruiz Zambrano* [2011] ECR 1 – 1177 had no applicability to the second named applicant's residency application;
>
> (ii) an order of c*ertiorari* quashing the first named respondent's decision of 2nd February, 2016, to the effect that the second named applicant is not a person who qualifies for a right of residence pursuant to the jurisprudence of the ECJ in *Zambrano* and case C-256/11 *Dereci* [2011] ECR 1 – 11315.

Background

2. The second named applicant is a Nigerian national.

He is the father of the first named applicant who was born 29th June, 2009 and who is an Irish citizen.

3. On 7th August, 2013, on the basis of the second named applicant's parentage of the first named applicant (and with knowledge of the second named applicant's then criminal record which included a sentence of two years imprisonment on 30th January, 2012 with one year suspended following which the second named applicant was released on 29th October, 2012), the second named applicant was granted temporary residence in the State. This was on a stamp 4 basis for six months to 7th February, 2014 and conditional upon: (a) the second named applicant obeying the laws of the State; (b) not becoming involved in criminal activity; (c) making every effort to gain employment and not be a burden on the State; (d) residing continuously in the State; (e) accepting the grant of temporary permission did not confer any legitimate expectation on any other person to enter or remain in the State; and (f) playing an active role in the life of his dependant Irish citizen child.

4. The conviction and sentence imposed on the second named applicant in the Circuit Court was appealed to the Court of Criminal Appeal. On 23rd September, 2013, the Court of Criminal Appeal sentenced the applicant to five years imprisonment resulting in a further period of incarceration until April, 2015.

5. Consequent upon this, on 25th November, 2013, the first named respondent wrote to the second named applicant advising him that she was intending to revoke his permission to remain in the State. In the interest of fair procedures and natural justice, the second named applicant was afforded a period of fifteen working days to submit any observations or comments as to why the temporary permission should not be revoked.

6. On 10th December, 2013, representations were made on behalf of the second named applicant as to why he should be allowed to remain in the State. Reference was made to the second named applicant having previously advised the Minister of his criminal conviction and that when released from prison in October, 2012, he had gained employment and had made maintenance payments to his Irish citizen child. The first named respondent was further advised that the second named applicant had commenced residing with his Irish citizen girlfriend (not the mother of his child). It was submitted that the extension of his sentence by the Court of Criminal Appeal was beyond his control and unforeseen by him. The second applicant indicated his willingness to pursue gainful employment once released from prison.

7. The first named respondent was further advised that the first named applicant had built up "a very close bond with his father" and that if the second named applicant were to be deported "[the first named applicant] would probably never see his father again and this cannot be in the child's best interests". It was also contended that the mother of the first named applicant "would never permit" the first named applicant to move to Nigeria to be with his father and that it would not be in the child's best interests to do so. It was further asserted that even if the applicants could move to Nigeria, the second named applicant "would have no realistic prospect of gaining employment in Nigeria and would have no means of supporting himself or his family". It was further asserted that the educational opportunities open to the first named applicant would be significantly less than those available to him in this jurisdiction.

8. An extract from a letter from the second applicant's partner was set out in support of the second applicant's plea not to revoke his temporary permission.

9. Further representations were made on living and social conditions in Nigeria and security fears for the first named applicant upon a re-location to that State were highlighted.

10. Additionally, representations were made in relation to the applicants' rights pursuant to Art. 41 of the Constitution and Art. 8 of the European Convention on Human Rights ("ECHR"). The UN Convention on the Rights of the Child was referenced in the context of the best interests of the first named applicant. It was submitted that the second named applicant was "entitled to remain in the

State by virtue of the fact that he is father of a European and Irish Citizen protected by the Constitution/the European Convention on Rights" and that the applicant's should be allowed to reside in the State in the absence of any exceptional conditions, which did not arise.

11. It appears that no further action was taken in respect of the revoking the second named applicant's permission to remain. This permission expired on 7th February, 2014.

12. On 28th May, 2015, the second named applicant made an application to renew his permission to remain in the State on the basis of his parentage in an Irish citizen child.

13. As stated, the refusal of this application was communicated to the second named applicant by letter of 3rd February, 2016.

14. This letter states, *inter alia*:

> "I am directed by the Minister for Justice and Equality to notify you that the Minister proposes to make a Deportation Order in respect of you under the power given to the Minister by Section 3 the Immigration Act 1999 (as amended).
>
> The reason for the Minister's proposal is:
>
> I wish to advise that, having considered the representations you submitted in regard to your parentage in a Irish citizen child and all information on file, the Minister has decided not to renew your temporary permission to remain in the State. Please find enclosed a copy of the consideration of your case."

The letter went on to state that as the second applicant's permission to remain in the State was until 7th February, 2014, his residence in the State thereafter was unlawful. He was advised that he was a person "whose deportation would, in the opinion of the Minister, be conducive to the common good". Further to the provisions of s. 3(4) of the Immigration Act 1999 ("the 1999 Act"), the applicant was given the following options: (1) leaving the State before the Minister made a final decision in his case; (2) consenting to the making of a deportation order; or (3) submitting new representations to the Minister under s. 3 of the 1999 Act as to why a deportation order should not be made against him.

15. On 22nd February, 2016, pursuant to option 3, representations were furnished as to why the deportation order should not be made and the second applicant requested humanitarian leave to remain.

16. The Minister was advised that the application for leave to remain was without prejudice to any challenge by the second named applicant to the decision of 2nd February, 2016, refusing residency.

17. The rationale for the refusal of the residency application is set out in the "Consideration of application for renewal for right of residency in the State, accompanied by the right to work, based on parentage of an Irish citizen child", which accompanied the letter of refusal dated 2nd February, 2016.

18. In the document, the decision-maker sets out the second named applicant's background in the State, including his relationship with the first named applicant's mother, his criminal history and the subsequent expiration of the temporary permission which he had been granted in February, 2013. The author goes on to state:

> "[The second named applicant] asserts that … he has a very good relationship with [the first named applicant] and takes him every weekend. He states that he wishes to gain employment as soon as possible so that he may contribute to bills and support his child. In addition, the mother of his child is supportive of his application, noting that the applicant has a good relationship with his son who is currently unable to provide for him financially. This, she asserts, putting a strain on her life both financially and emotionally."

19. The application for the renewal of temporary permission was considered in the context of the impact of the decision of the ECJ in *Zambrano*. The author stated:

> "Information on file indicates that the applicant is the father of [the first named applicant], an Irish citizen child who was born in the State on 26th June 2009. Although there is little information on file in respect of this child, it is asserted that he resides with his mother and appears to be wholly dependant upon her. It is apparent that the applicant sees his child regularly that there maybe an emotional attachment between the two. It is equally apparent, however, that the applicant does not provide any financial support to [the mother] or [the first named applicant].
>
> It is worth noting, moreover, that the applicant has come to the attention of the Gardaí on numerous occasions over the last seven years and has served two prison terms in relation to a serious sexual assault that he committed. In this regard, it is clear that the applicant spent several of his son's early years in prison and would not have been in a position to play a significant role in his child's life during these years.
>
> In the European Court of Justice's judgment in *Zambrano* … the court stated that '*Article 20 TFEU … is to be interpreted meaning that it precludes a Member State from refusing a third country national on whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen*.'
>
> As previously stated, there is little current information on file in respect of the applicant's son, although it is clear that he is living in the State with his mother … who is an Irish citizen and has the right to move and reside freely in the territory of the Member States. It is considered, therefore, that this child is not going to be forced to leave this jurisdiction and is not going to be deprived of a genuine enjoyment of the substance of his rights as a European Union citizen if the Minister does not provide the applicant with permission to remain in the State."

20. After quoting from the decision of the ECJ in D*ereci*, the consideration continued:

> "If the refusal of residence and ultimate removal of the parent means the European Union citizen child will inevitably have to leave the Union and move to a third country, then the child's rights as a citizen of the European Union are denied.

> Crucially, however, it is not inevitable this would happen in this case as the mother of [the first named applicant] is an Irish citizen. Therefore, [the first named applicant] will continue to reside in the State with his mother and will not be deprived of the genuine enjoyment of the substance of his rights as a European Union citizen."

Ultimately, it was concluded that "the *Zambrano* ruling does not apply in [the second named applicant's] case as he has failed to demonstrate a dependent relationship exists between him and [the first named applicant]. This child may continue to reside in the State with his mother, join the substance of the right attaching to the status of European Union citizens."

21. The ground upon which leave is sought to seek judicial review is as follows:

> "Strictly confined to its own facts the "*Zambrano*" judgment referred to in the impugned decision could be said not to apply the first and second Applicants because the first Applicant is not under threat presently of having to leave the territory of the EU. However, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. The particular right in issue in the *Zambrano* case is the right of the infant EU citizens in that case to reside within the EU. In this case different fundamental rights arise, *inter alia*, those rights of the child citizen of the EU to have its best interest treated as a primary consideration, the right to Human dignity under Article 1 of the Charter, the right under Article 7 of the Charter to respect private and family life and the EU law rights as described in Article 24 of the Charter of Fundamental Rights of the European Union. By analogy with *Zambrano*, although different fundamental rights are in issue, the same principles arise, and the impunged decision is invalid. As in *Zambrano*, the second Applicant derives a derivative right to reside in the State, at least during the [first] applicant's minority, as, were it otherwise, the fundamental rights of the [first] applicant mentioned above could be of no, or disproportionately reduced, benefit to the infant Applicant herein."

22. Essentially, the applicant contends that the *Zambrano* judgment has wider implications than those contended for by the first named respondent. It is argued that the *Zambrano* principle should apply to situations where other fundamental rights are vulnerable to inference consequent on a decision such as the impugned decision. Counsel argues that the rights affected by the refusal of residence to the second applicant should not be confined exclusively to the right of his EU citizen child to reside in the territory of the European Union.

23. Those other fundamental rights of EU citizen children, other than the right to reside in the territory of the Union, are said by the applicants to be, for example, the Treaty right as reflected in Article 24.3 of the Charter to maintain on a regular basis a personal relationship and direct contact with both parents. It is submitted that should be recognised to the same degree and be analogous to the *Zambrano* case in conferring a derivative right on the second applicant to reside in the State. It is argued that the consequence of a refusal of residency to a non-EU citizen parent means that the infant EU citizen would be deprived of rights protected by the Charter.

24. It is accepted by the applicants' counsel that there is existing jurisprudence which would appear to undermine his arguments. In *E.B. (A Minor) & Ors v. Minister for Justice* (Unreported, High Court, 29th January, 2016), this court stated at para.62:-

> *"I am satisfied that the salient principle which emerges from the jurisprudence in Zambrano, Dereci, O.S. and Alokpa as to when Article 20 TFEU rights are engaged is aptly summarised by the words of MacEochaidh J. in Nicolas & Ors v. Minister for Justice [2014] IEHC 526 where he states:-*
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> > *"39. My view is that the jurisprudence of the ECJ on third country national rights is founded upon a simple principle. A third country national seeking to reside in the Union for the purposes of accompanying a Union citizen (in circumstances not governed by Council Directive 2004/38/EC), must establish that if he or she is refused the right to be present in the host state, the Union citizen will be forced to leave the territory of the Union.'"*

25. In his decision in *M.Y. v. Minister for Justice* [2015] IEHC 7, Mac Eochaidh J., at para.42, put the matter in the following terms:-

> *"No provision of EU law exempts third country nationals from complying with the laws of Member States as to residence and employment. Ireland's regime requiring non EU persons to have permission to be in the State is not affected by EU law save that such permission cannot be withheld if applicants for permission are parents /carers of dependent EU citizens who, if the applications are refused, would be obliged to the leave the territory of the Union."*

26. Having considered the arguments advanced on behalf of the applicant, I find that they do not persuade the court to adopt a different approach to that adopted in E.B. I am fortified in this conclusion by the recent decision of the Court of Appeal in *Bakare v. Minister for Justice* [2016] IECA 292 as to the scope of *Zambrano* and subsequent ECJ jurisprudence.

27. In *Bakare*, Hogan J. considered the rationale for the decision in *Zambrano*. He put the matter in the following terms:-

> *"13. There is no doubt but that the decision of the Court of Justice in Ruiz Zambrano upon which Mr. Bakare relies was a ground-breaking one. As is well known, in that case the Court of Justice held that one essential attribute of citizenship of the European Union conferred by Article 20 TFEU was that nationals of the constituent Member State had, in principle, the right to live in the territory of the Union. The Court then reasoned that this right might be jeopardised if the non-national parents of young dependent children who were themselves citizens of a Member State of the Union were to be refused a right of residence. As the Court explained (at paras. 42-44 of the judgment):*
>
> > *'42. Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union….*
> >
> > *43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.*
> >
> > *44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the*

rights conferred on them by virtue of their status as citizens of the Union.'

14. There was, however, one feature of the facts of Zambrano which, to some degree, possibly obscured the true rationale of that decision. While the decision in Zambrano only concerned the position of the father, it is clear from the Court's factual narrative that the Belgian authorities had taken a similar position attitude towards Mr. Zambrano's spouse. It is implicit in para. 44 of that judgment that these particular parents should be treated in effect as one unit for this purpose. The Court accordingly assumed that refusal of a residence permit to the husband would effectively have compelled both parents to leave Belgium (along with the children), as without that right to reside the father would have been denied access to Belgium's social security system and jobs market. In those circumstances the entire family would have faced economic hardship – even destitution – and the Court evidently considered that upon the particular facts of that case the entire family would have been obliged to leave Belgium and, for that matter, the entire territory of the Member States of the European Union."

28. The learned judge went on to state:-

"15. It is, however, clear from the subsequent case-law that this assumption regarding the likely impact of residency or other similar immigration decisions might not always hold true where the underlying facts were somewhat different, particularly where the children were being raised in the EU state in question by a parent who was a citizen of the Member State in question or who otherwise had a lawful status in the State in question.

16. This is illustrated by the next decision of the Court of Justice dealing with this issue, Case C-256/11 Derechi [2011] E.C.R. I-11315. That case concerned the legality of administrative decisions taken by the Austrian authorities to deport third country nationals who were married to Austrian nationals with Austrian citizen children. Critically, however, in these circumstances – and in contrast to the facts of Zambrano - the Austrian courts had found that there was no risk to the subsistence of the children or that the children would be themselves forced to leave Austria.

17. The Court of Justice accordingly found that the reasoning in Zambrano simply did not apply:

'65. Indeed, in the case leading to that judgment [in Zambrano], the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see Ruiz Zambrano, paragraphs 43 and 44).

66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.' (emphasis supplied).

18. In my judgment, this last paragraph – which I have taken the liberty of highlighting – shows the true rationale of Zambrano: is it likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union?"

29. Hogan J. then quoted from the decision of the ECJ in Joined Cases C-356/11 and C-357/11, *O and S* [2012] E.C.R. 1-000. He stated:-

"19. In O and S the applicants were respectively Ghanian and Algerian nationals who had been married to Finnish citizens and the applicants had given birth to children who were themselves Finnish nationals. Both Ms. O and Ms. S were divorced from their Finnish husbands and had re-married third country nationals in Finland. Following a reference from the Finnish courts as to whether Zambrano governed the fathers' respective applications for residency in Finland, the Court of Justice seemed to indicate that this was not so:

'66. It follows that the criterion [in Zambrano] relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

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68. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do

not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.'"

30. At para. 20, Hogan J. was of the view that what the ECJ was stressing in *O and S* was:-

> *"…that the ultimate issue was whether an adverse immigration decision was likely to trigger a set of circumstances leading to the situation where the young children who were Union citizens were effectively compelled to leave the Union territory."*

31. In *Bakare*, reference was also made to the decision in Case C-156/13 *Alfredo Rendón Marin,* Hogan J. stated:-

> *"21. In Alfredo Rendón Marin the facts were different again. In this case the Spanish authorities had refused a residence permit to a Colombian national who was the father of two young children who had respectively Polish and Spanish citizenship. Although the present whereabouts of the Polish mother of the children were unknown, the Spanish authorities had refused a permit to the father because he had been convicted of an (unspecified) crime which had attracted a nine months prison sentence which had been subsequently suspended.*
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> *22. The Court of Justice held that in these circumstances the Zambrano principle was engaged, precisely because of the real risk that the children would in practice be compelled to leave the territory of the Union. As the Court explained (at para. 78):*
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> > *'…if…the refusal to grant residence to Mr. Rendón Marín, a third-country national, to whose sole care those children have been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that right, in particular the right of residence, as the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole. Any obligation on their father to leave the territory of the European Union would thus deprive them of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon them…'"*

32. Applying the principles of the *Zambrano* line of case law to the factual matrix before him, Hogan J. was "*obliged to conclude that the present case is no difference in principle from other cases with broadly similar facts such as Derechi and O and S.*"

33. He put it thus at para. 28:-

> *"Given that on these facts there is no appreciable risk that the children would be obliged to leave the territory of the State by reason of the decision of the Minister to refuse to grant residency to Mr. Bakare, I do not see that the present case properly comes within the scope of Zambrano. The net effect of this conclusion is that as the denial of such status will not in practice affect the entitlement of the second appellant child of the substance of his right to reside within the territory of the Union, his rights qua citizen of the Union remain unaffected for the purposes of Article 20 TFEU."*

34. In the present case, there is no evidence before the court which points to even a remote risk that the first named applicant will be obliged to leave the territory of the Union consequent to the refusal of temporary residency to the second named applicant, or that the child is dependent on the second applicant that such an outcome is inevitable. Indeed the applicants do not suggest otherwise. Accordingly, the first applicant's rights remain unaffected by the first named respondent's refusal to renew his father's temporary permission for the purpose of Art. 20 TFEU.

35. I turn now to the submission that the *Zambrano* principle of derivative rights for the non-EU parents of EU citizen children should not be confined to situations whereby the EU citizen child would be obliged to leave the territory of the EU if their non-EU parent is refused residency. The applicants rely on the provisions of the EU Charter of Fundamental Rights of the European Union ("the Charter"), in particular Article 24.3 thereof. It provides:

> "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with his/her parents, unless that is contrary to his/her interests."

36. It is asserted that the fundamental right in Article 24.3 is one for which protection should be available to the same degree as *Zambrano* -type protection. In *E.B.,* a somewhat similar argument to that being advanced in this case was rejected by this court. I stated (at paras. 74-78):

> *"In Dereci & Ors. and OS, the Court of Justice reprised (and effectively refined) the Zambrano test as to when Art. 20 derivative rights might be triggered. It is undoubtedly the case that reference was made to the Charter in both cases. In Dereci & Ors., the Charter was considered solely in the context that if the referring court was of the view that the situation in the main proceedings was covered by EU law it must enquire whether the refusal of the right of residence undermined the right for private and family life provided for in Article 7 of the Charter.*
>
> *More specifically in OS, the Charter was invoked by the ECJ in the context of the referring court having mentioned the Family Reunification Directive without, however, posing a question concerning the Directive. Nevertheless, the ECJ noted that in contrast to the circumstances of the cases in Dereci & Ors., Ms. S. and Ms. L. were third country nationals residing lawfully in a Member State and seeking to benefit from family reunification. Accordingly, they must be recognised as sponsors within the meaning of the Family Reunification Directive and, moreover, they had children with their spouses who were themselves third country nationals and who did not therefore have the status of citizens of the EU confirmed by Article 20 TFEU. Furthermore, the Court found the application of the Directive (which Finland had implemented) could not be excluded solely because one of the parents of a minor was also the parent of a Union citizen, born of a previous marriage. (Para. 68, 69). Noting that the preamble to the Directive respects the Fundamental Rights and observes the principles enshrined in the Charter, the Court stated:*
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> > *"Applications for residence permits on the basis of family reunification such as those at issue in the main proceedings are covered by Directive 2003/86. Article 7(1)(c) of that directive must be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light*

of Articles 7 and 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive. It is for the referring court to ascertain whether the decisions refusing residence permits at issue in the main proceedings were taken in compliance with those requirements."

Thus, in OS, the application of the Charter was firmly rooted in the applicability of the Family Reunification Directive.

I am satisfied the test that this court must apply as to whether the Charter was applicable to the consideration carried out by the respondent is set out in paras. 40- 43 of Ymeraga. As is clear from the factual matrix in Ymeraga, the ECJ clearly found that the Charter was not applicable as the situation in that case did not involve the implementation by the Luxembourg authorities of EU law within the meaning of Article 51 of the Charter so that its conformity with fundamental rights could not be examined under the Charter, although it might fall to be examined under the ECHR. It seems to me that the position of the ECJ as to when the Charter comes into play is succinctly set out in para. 42 of Ymeraga: In the particular circumstances of that case, the ECJ found neither the Citizenship nor the Family Reunification Directive applicable to Mr. Ymeraga's circumstances. Nor had the refusal to give his family members a right of residence "the effect" of denying him the genuine enjoyment of the substance of his rights as an EU citizen. The ECJ found that "in those circumstances" the refusal to grant a right of residence to his family members was "not a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter." Thus, I read the decision in Ymeraga to mean that a condition precedent for the applicability of the Charter was either for Mr. Ymeraga to establish that he was covered by the aforementioned Directives or that the substance of his Art. 20 right to reside in the EU was denied to him by the refusal to grant a residence permit to his family members, which was not established.

Applying the approach adopted by the ECJ to the present case. Had the minor applicants' circumstances been covered by the Citizenship Directive (2004/38) this would have required the decision-maker to assess the matter in accordance with the Charter. However, this Directive is not applicable to their circumstances. Thus, it is only if there is a finding that the refusal to revoke the fifth named applicant's deportation order would "in effect" deprive the minor applicants of the substance of their rights as EU citizens that the provisions of the Charter would come into play since in such a case their circumstances would be governed by EU law. However, on the basis of the test set out by the ECJ in Zambrano, Dereci, and OS (and indeed Ymeraga), if it was established that the refusal to revoke the deportation order would result in the minor applicants having to leave the state, they would not require the protection of the Charter, given the absolute protection afforded to Art. 20 rights once the threshold set by the ECJ in Zambrano and the subsequent jurisprudence has been met."

37. In *Bakare*, the learned Hogan J. had occasion to consider the applicability of the Charter in cases such as the present. He stated:-

"29. It is true that Article 7 of the Charter requires that account be taken of the right to respect for family life. As the decision in Marín makes clear, Article 7 of the Charter must be read (where applicable) in conjunction with the obligation to take into account the child's best interests, as recognised by Article 24(2).

30. All of this presupposes that the Charter applies in a case of this kind. The key provision of the Charter is, of course, Article 51(1) which provides that it applies only to Member States when they are 'implementing' Union law. Classically, of course, a Member State is 'implementing' Article 51(1) when it exercises a discretionary power pursuant to a Directive or a Regulation or when it takes a decision which is within the scope of EU law: see, e.g., Case C-617/10 Åkerberg Fransson [2013] E.C.R. I-000 .

31. In my view, however, the State was not implementing Union law within the meaning of Article 51(1) of the Charter when it refused Mr. Bakare a residency permission. That decision was, however, taken in accordance the State's sovereign authority to control and regulate the status of third country nationals. It was, accordingly, taken by the Minister in the exercise of the executive power of the State in accordance with Article 28.2 of the Constitution. Just as this Court held in NHV v. Minister for Justice [2016] IECA 86 that legislation enacted by the Oireachtas regulating the rights of asylum seekers in relation to employment and the labour market fell outside the scope of EU law (so that in that instance the State was not thereby implementing Union law for the purposes of Article 51 of the Charter), it can accordingly be said by the same token that the refusal of a residency permit to a third country national represents the exercise of an autochthonous sovereign power on the part of the State.

32. It follows, therefore, that as the State was not implementing Union law within the meaning of Article 51, the provisions of the Charter accordingly have no application to the present case."

38. By reason of the aforesaid jurisprudence, it is clear that the protections in the Charter may only be invoked where a Member State is implementing EU law. The decision which is sought to be impugned in this case does not fall with the realm of EU law and thus the provisions of the Charter cannot benefit the applicants. In all the circumstances, I am satisfied that the applicants have not reached the requisite arguable grounds threshold for leave to be granted in this case.